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Intellectual Property Alert

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Ninth Circuit clarifies attorneys' fees calculus in class action cases

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"[T]he touchstone for determining the reasonableness of attorneys' fees in a class action under Federal Rule of Civil Procedure 23 is the benefit to the class."



What's the Impact

- / The Ninth Circuit instructs lower courts to focus on the actual benefit to the class, not the "illusory" maximum settlement fund amount, in determining the reasonableness of an attorneys' fee award.
- / The door remains open for fee awards in excess of the benefit provided to the class in certain cases, such as when a copyright infringement litigation leads to substantial nonmonetary relief or provides a meaningful benefit to society.

On June 7, 2023, the Ninth Circuit Court of Appeals reversed a \$1.7 million attorneys' fees award in a music royalties class action waged against Rhapsody International, Inc. (now rebranded as Napster). The court held that the touchstone for determining the reasonableness of attorneys' fees awards in a class action is the actual benefit to the class—not the often-inflated hypothetical maximum class recovery.

Background

In early 2016, David Lowery and other named plaintiffs sued Rhapsody on behalf of a putative class of copyright owners whose musical compositions were played on Rhapsody's streaming service. The plaintiffs' claims were based upon allegations that Rhapsody had infringed their copyrights by reproducing and distributing their musical compositions without obtaining a license to do so.

By the time the plaintiffs sued, Rhapsody was in settlement negotiations with the National Music Publishers Association (NMPA) to resolve—and remedy—the very copyright violations at the heart of the *Lowery* action. Rhapsody eventually settled with the NMPA. To receive payment under that settlement, copyright owners had to waive their right to make claims in the *Lowery* action. In April 2018, Rhapsody informed the *Lowery* plaintiffs about the NMPA settlement and advised them that copyright owners of about 98% of the musical works available on its streaming service had opted to participate in the NMPA settlement—this “effectively decimated” the *Lowery* putative class.

The parties in *Lowery* focused primarily on reaching a settlement rather than substantively litigating the claims. In January 2019, the parties executed a settlement agreement pursuant to which Rhapsody agreed to pay a maximum of \$20 million on class members' claims. Because the NMPA settlement had gutted the potential class, few class members submitted claims, and Rhapsody ultimately paid only \$52,841.05 to satisfy class members' claims. The district court, nonetheless, awarded \$1.7 million in attorneys' fees.

On appeal, the Ninth Circuit found that the district court's \$1.7 million fee award was not reasonable under Federal Rule of Civil Procedure 23, given that the award was more than *thirty* times larger than the amount paid to class members. The Court held that “courts must consider the actual or realistically anticipated benefit to the class—not the maximum or hypothetical amount—in assessing the value of a class action settlement.” While the Ninth Circuit recognized that a fee award may exceed the monetary benefit provided to the class in certain copyright cases, “such as when a copyright infringement litigation leads to substantial nonmonetary relief or provides a meaningful benefit to society,” this was not such a case.

Takeaways

The *Lowery* decision should challenge plaintiffs' attorneys to think twice before bringing a class action—especially in situations like this one, where the total class recovery is limited by the underlying set of facts. Indeed, the Ninth Circuit was explicit that “[i]t matters little that the plaintiffs' counsel may have poured their blood, sweat, and tears into a case if they end up merely spinning wheels on behalf of the class. What matters most is the result for the class members.” If a contemplated fee award exceeds 25% of the benefit to the class, a court must take a hard and probing look at the award because the disparity may suggest that the fee amount is unreasonable.

While the Ninth Circuit's decision is not binding on sister circuits across the country, its focus on the actual benefits received by the plaintiff is likely to be persuasive and has potential for

adoption outside of the class action and copyright contexts. This should be encouraging, as it would constrain abusive litigation tactics that have become all too common in modern litigation and force plaintiff attorneys to pre-emptively consider the economic reasonableness of their actions.

In evaluating risk and exposure to class action claims, parties should work with experienced counsel to develop a winning strategic approach. For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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