Class Action Attorney's Fee Awards: A Nation-Wide Survey of the Federal Circuit Courts of Appeals

By Steve Pearl

Calculating class counsel's attorney's fees[1] is a critical issue in every consumer class action. Whether a case settles or goes to judgment, counsel need to know how fees will be calculated and whether they will be based on the total value made available to the class, or limited to the amount claimed by class members. Courts in the various circuits answer these questions differently, and – particularly given a recent, drastic change in Ninth Circuit authority – you must take these differences into account, both when filing and when settling your cases.

Lodestar and Percentage-of-the-Recovery

Federal courts have endorsed two primary methods for determining attorney's fees in consumer class actions: lodestar and the percentage-of-the-recovery.

The lodestar method more commonly applies in statutory fee-shifting cases. (See *Gelis v. BMW of N. Am., LLC*, 49 F.4th 371, 379 (3d Cir. 2022).) "The 'lodestar' figure has, as its name suggests, become the guiding light of our fee-shifting jurisprudence. We have established a 'strong presumption' that the lodestar represents the 'reasonable' fee." (*City of Burlington v. Dague*, 505 U.S. 557, 562 (1992).)

The lodestar method utilizes a three-step process. First, the court calculates the number of hours reasonably expended by counsel. Second, the court multiplies that number by a reasonable hourly rate. The product of those two numbers is the lodestar. Third, the court may adjust the lodestar upward or downward, as set forth in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). In *Johnson*, the plaintiffs prevailed in a class action under Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e et seq., and the court awarded $13,500 in attorney's fees: "60 man days of work at $200 per day … [plus] three trial days for two attorneys at $250 per trial day per attorney." (Id. at 716-717.) The Fifth Circuit vacated and remanded with instructions to consider twelve factors: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. (*Id.* at 717-719.) Although the U.S. Supreme Court has limited the use of certain factors in certain situations (see, e.g., *City of Burlington*, 505 U.S. at 567 [courts may not enhance lodestar awards under certain statutes for the contingent risk involved in the litigation]), courts continue to look to the *Johnson* factors or variations of them in evaluating attorney's fee awards.

The second of the two main methods for awarding fees is the percentage-of-the-recovery method. This method is very simple: in cases where a settlement or judgment results in creation of a common fund for distribution to class members, some courts award attorney's fees as a percentage of the common fund.[2] Awards typically range between 25% and 33% of the common fund. As in lodestar cases, many courts analyze the *Johnson* factors to determine whether to increase or decrease the percentage. (See, e.g., *In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th 1126, 1193 (10th Cir. 2023) [affirming award of one third of common fund, relying in part on consideration of the *Johnson* factors].) Some courts have expressed a preference for the percentage method in common fund cases. (*Ibid.*)

Supreme Court Precedent

In *Boeing Co. v. Van Gemert*, 444 U.S. 472, 480, 100 S.Ct. 745, 62 L.Ed.2d 676 (1980), the plaintiffs prevailed in a class action for violation of federal and state securities and contract law. Boeing appealed from the portion of the judgment related

Steve Pearl is a nationally renowned consumer class action and employment mediator based in Southern California. www.stevepearl-mediation.com

In almost all circuits, the district court may choose to award fees on either a lodestar or percentage basis.

to attorney's fees. The Supreme Court held that the district court properly awarded fees as a percentage of the total common fund, rather than just the portion of the fund to be claimed by class members. "[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole." (*Id.* at 478.) This is because "[t]he members of the class, whether or not they assert their rights, are at least the equitable owners of their respective shares in the recovery. Any right that [the defendant] may establish to the return of money eventually unclaimed is contingent on the failure of absentee class members to exercise their present rights of possession." (*Id.* at 481-482.)

Lowery: A More Stringent Approach

Although the Ninth Circuit previously followed *Boeing*, see, e.g., *Williams v. MGM-Pathe Communications Co.*, 129 F.3d 1026 (9th Cir. 1997) (in securities fraud class action settlement, abuse of discretion to base fee award on amount claimed, rather than entire fund), a recent Ninth Circuit case departs sharply from this approach.

In *Lowery v. Rhapsody International, Inc.*, 69 F.4th 994 (9th Cir. 2023), the plaintiff filed a class action against Rhapsody, a music streaming service, for copyright infringement. Soon after, Rhapsody settled a similar suit with the National Music Publishers Association (NMPA). To participate in the *NMPA* settlement, putative class members had to waive their right to participate in the *Lowery* action. Ninety-eight per cent of the putative class members did so, "effectively decimating" the *Lowery* putative class.

The parties then settled *Lowery*. Rhapsody agreed to pay a maximum of $20 million, but "because the *NMPA* settlement had gutted the potential class, very few class members submitted claims for this settlement. In the end, Rhapsody paid only $52,841.05 to satisfy class members' claims." (*Lowery*, 69 F.4th at 998-999.) Using the lodestar method, the district court awarded plaintiff's counsel over $1.7 million in attorney's fees. The Ninth Circuit reversed, holding:

> The touchstone for determining the reasonableness of attorneys' fees in a class action is the benefit to the class. It 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. Here, the benefit from this litigation was minimal: the class received a measly $52,841.05 and obtained no meaningful injunctive or nonmonetary relief.
>
> On remand, the district court should rigorously evaluate the actual benefit provided to the class and award reasonable attorneys' fees considering that benefit. In determining the value of this "claims-made" class action settlement, the court should consider its actual or anticipated value to the class members, not the maximum amount that hypothetically could have been paid to the class. The court should also consider engaging in a "cross-check" analysis to ensure that the fees are reasonably proportional to the benefit received by the class members.

(*Lowery*, 69 F.4th at 997.)

Finally, the court rejected the argument that fees may exceed the amount recovered because the case was based on a fee-shifting statute. "District courts awarding attorneys' fees in class actions under the Copyright Act must still generally consider the proportion between the award and the benefit to the class to ensure that the award is reasonable." (*Id.* at 1003.)

Time will tell whether *Lowery* indicates a departure from past precedent, or whether it is a one-off, where bad facts made bad law. If the Ninth Circuit follows *Lowery* in the future, it will make the Ninth Circuit a much less favorable jurisdiction for bringing consumer class actions. But what about the nation's other circuits? Which circuits take a more favorable approach to granting fees, and which circuits, like the Ninth after *Lowery*, may be best for plaintiffs' counsel to avoid?

Majority Rule: District Court May Choose Lodestar or Percentage Method

In almost all circuits – the First, Second, Third, Fourth, Fifth, Sixth, Eighth, and Tenth – the district court may choose to award fees on either a lodestar or percentage basis. Although most of these courts express a preference for percentage awards

in common fund cases, none of them requires it.

First Circuit: "'[I]n a common fund case the district court, in the exercise of its informed discretion, may calculate counsel fees either on a percentage of the fund basis or by fashioning a lodestar.'" (*Heien v. Archstone*, 837 F.3d 97, 100 (1st Cir. 2016).) The First Circuit has cited *Boeing* with approval in cases applying the percentage method. (See *In re Thirteen Appeals Arising out of the San Juan Dupont Plaza Hotel Fire Litigation*, 56 F.3d 295, 305 (1st Cir. 1995) ["Although the lodestar method is entrenched in the statutory fee-shifting context, a growing number of courts have looked elsewhere in 'common fund' cases — a category that encompasses cases in which 'a litigant or lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.'"])

Although the Ninth Circuit previously followed *Boeing,* a recent Ninth Circuit case departs sharply from this approach.

Second Circuit: In *Goldberger v. Integrated Resources, Inc.*, 209 F. 3d 43 (2d Cir. 2000), a securities class action, the Second Circuit confirmed that district courts in common fund cases may award fees on a lodestar or percentage basis. "Of course, no matter which method is chosen, district courts should continue to be guided by the traditional criteria in determining a reasonable common fund fee, including: '(1) the time and labor expended by counsel; (2) the magnitude and complexities of the litigation; (3) the risk of the litigation ...; (4) the quality of representation; (5) the requested fee in relation to the settlement; and (6) public policy considerations.'" (*Id.* at 50 [affirming fee award of $2.1 million, calculated on lodestar basis, following settlement of $54 million].) In *Masters v. Wilhelmina Model Agency*, 473 F.3d 423 (2d Cir. 2007), the district court awarded fees as a percentage of the claims made, rather than the settlement fund as a whole, and the Second Circuit reversed. "The entire Fund, and not some portion thereof, is created through the efforts of counsel at the instigation of the entire class. An allocation of fees by percentage should therefore be awarded on the basis of the total funds made available, whether claimed or not." (*Id.* at 437.)

Third Circuit: "Common fund cases … are generally evaluated using a 'percentage-of-recovery' approach, followed by a lodestar cross-check." (*Halley v. Honeywell International, Inc.*, 861 F. 3d 481 (3rd Cir. 2017) [affirming fee award equaling approximately 28% of settlement fund, after deduction of costs].) However, in *Gelis v. BMW of North America LLC*, 300 F.3d 358 (3d Cir. 2022), the Second Circuit held that the lodestar method "may also be used in cases … 'where the nature of the recovery does not allow the determination of the settlement's value necessary for application of the percentage-of-recovery method'" (reversing award of fees on lodestar basis in defective product litigation where class counsel failed to support fee application with sufficient detail). (See also *In re Baby Products Antitrust Litigation*, 708 F.3d 163, 177 (2013) [reversed and remanded "to determine whether to decrease attorneys' fees where a portion of a fund will be distributed *cy pres*," rather than to class members].)

Fourth Circuit: In *McAdams v. Robinson*, 26 F.4th 149 (4th Cir. 2022), the plaintiffs alleged that the defendant violated federal and state consumer protection laws in servicing the class members' mortgage loans. The parties negotiated a $3,000,000 settlement, and counsel applied for $1.3 million in fees and costs, which was less than the actual lodestar and out-of-pocket expenses. The district court awarded the fees, and the Fourth Circuit affirmed, holding that the district court did not abuse its discretion in awarding fees on a lodestar basis; although the award of fees and costs represented 43% of the common fund, the court could not, without more, "find that the percentage-of-recovery calculation outweighs the strong presumption that the award is reasonable." (*Id.* at 162.) *Brundle v. Wilmington Trust, NA*, 919 F. 3d 763 (4th Cir. 2019) provides some support for calculating fees based on the settlement fund as a whole, rather than claims made. In *Brundle*, the Fourth Circuit held that the district court did not abuse its discretion in awarding $1.5 million in non-statutory common fund attorney's fees, in addition to statutory fee award in a non-class ERISA action. Rejecting the plaintiff's argument that the court should have awarded one third of the common fund, the court held: "Had [plaintiff] pursued class certification and prevailed, [counsel] could have secured attorneys' fees from the class as a whole." (*Id.* at 788.)

Fifth Circuit: In *Union Asset Management Holding AG v. Dell, Inc.*, 669 F. 3d 632 (5th Cir. 2012), an action under the Securities Exchange Act, the district court approved a $40 million settlement, including $7.2 million, or 18% of the settlement fund, in attorney's fees. The Fifth Circuit affirmed. "To be clear, we endorse the district courts' continued use of the percentage method cross-checked with the *Johnson* factors. We join the majority of circuits in allowing our district courts the flexibility to choose between the percentage and lodestar methods in common fund cases, with their analyses under either approach informed by the *Johnson* considerations." (*Id.* at 644.)

In contrast, in *Fessler v. Porcelana Corona*, 23 F.4th 408 (5th Cir. 2022), the court vacated and remanded an award of $4.3 million in fees – calculated on a lodestar basis – where the parties settled a product defect action. Although the district court did not err in applying the lodestar method, it "failed to account for counsel's time spent on unsuccessful claims and failed to compare the relief sought to that actually awarded …." (*Id.* at 413.)

Sixth Circuit: In *Gascho v. Global Fitness Holdings, LLC*, 822 F.3d 269 (6th Cir. 2016), the plaintiffs alleged that the defendant charged improper fees to gym members. The parties settled, with the defendant agreeing to pay a maximum of $15.5 million on a claims-made basis. Ultimately, approximately 50,000 claims were filed and approved (8.2% of settlement class members), resulting in $1.6 million in settlement payments. The settlement permitted class counsel to apply for $2.39 million in fees and costs. The settlement included both "kicker" and "clear sailing" clauses. Performing a lodestar analysis with a percentage cross-check, the district court approved the settlement and fees.

The Sixth Circuit affirmed. "[I]t is within the discretion of a district court both to select a lodestar computation as the appropriate method of fee calculation and, if choosing to use or include a percentage of the fund calculation, to value the benefit to the class based on the total relief class

counsel makes available to all the class members." (*Id.* at 278.) Counsel's actual lodestar exceeded the amount requested, and the court did not abuse its discretion in awarding fees on that basis. (*Id.* at 280-281.) In performing its percentage cross-check, the district court "properly relied on Supreme Court authority recognizing that class plaintiffs' 'right to share the harvest of the suit upon proof of their identity, whether or not they exercise it, is a benefit in the fund created by the efforts of class representatives and their counsel.'" (*Id.* at 282, *citing Boeing*, *supra*, 444 U.S. at 480.) The presence of the "clear sailing" and "kicker" clauses – without other evidence that the settlement was inadequate or that the fees were excessive – did not show that the court abused its discretion in approving the settlement. (*Id.* at 291.)

Eighth Circuit: In *In re: Life Time Fitness, Inc. TCPA Litigation*, 847 F.3d 619 (8th Cir. 2017), the district court approved a settlement requiring the defendant to pay a minimum of $10 million to resolve four separate TCPA class actions. The court awarded $2.8 million in attorney's fees – 28% of the minimum common fund. The Eighth Circuit affirmed, holding that the district court had discretion to award fees using the percentage method and did not abuse its discretion in awarding 28% of the common fund. (*Id.* at 622-623.)

In *Rawa v. Monsanto Co.*, 934 F. 3d 862 (8th Cir. 2019), the parties settled a product labeling action, with the defendant establishing a $21.5 million non-reversionary common fund for claims, costs, incentive awards, and attorney's fees. Any amount remaining after the claims process would be paid to a *cy pres* beneficiary. The district court approved the settlement and awarded approximately $6 million in attorney's fees, which equaled 28% of the full common fund (including any remainder paid to the *cy pres* beneficiary) and 5.3 times counsel's lodestar. The Eighth Circuit affirmed, holding that the district court had discretion to use either the lodestar or percentage method, and "the ultimate reasonableness of the award is evaluated" by considering the relevant *Johnson* factors. (See also *Jones v. Monsanto Co.*, 38 F.4th 693 (8th Cir. 2022) [in product mislabeling action, district court did not abuse its discretion in awarding fees equal to 25% of common fund, even though only 2-3% of eligible consumers filed claims, and more than one third of settlement fund went to *cy pres* beneficiaries: "[T]he funds that are ultimately allocated *cy pres* were available for class members to claim. If the court affirms the adequacy of the notice to the class, then the court cannot fault plaintiffs' counsel for the fact that class members, for myriad possible reasons, did not submit enough claims to exhaust the Common Fund."])

Tenth Circuit: In *In re Syngenta AG MIR 162 Corn Litigation*, 61 F.4th 1126, 1193 (10th Cir. 2023), the defendant released genetically modified corn seeds into the market without regulatory approval to import such seeds into China. When China discovered the seeds, it closed its markets to American corn, allegedly depressing corn prices and injuring producers. (*Id.* at 1138.) Plaintiffs filed thousands of class actions, mass tort actions, and individual actions. Some actions were consolidated into an MDL in the Kansas District Court; others were consolidated in Minnesota state court; and still others were litigated in the District Court for the Southern District

of Illinois. (*Id.* at 1139.) After the trial of one class action resulted in a $217 million verdict for the plaintiffs, the parties settled for $1.51 billion. (*Id.* at 1139-1140.)

The district court approved the settlement, evaluated counsel's fee request on a percentage basis, and awarded one third of the common fund, $503 million, in fees. (*Id.* at 1140.) The court examined the *Johnson* factors to determine that a "substantial award" was justified, then cross-checked the award against counsel's $357 million lodestar. (*Id.* at 1142.) The court found that the 1.4 multiplier needed to adjust the lodestar to the amount awarded was "extremely modest" given the circumstances of the case. (*Ibid.*) Finally, the court allocated the fees to three common benefit pools – one for each consolidated proceeding – and a fourth pool for individually retained private attorneys ("IRPAs").

Attorneys from each of the pools and certain IRPAs objected to the fee allocation on various grounds, and the Tenth Circuit affirmed. Rejecting the argument that the district court should have allocated fees according to each attorney's lodestar, the court held: "because the touchstone of a fee award analysis is reasonableness, we do not require rigid adherence to either the percentage-of-the-fund or lodestar methods in the common fund context," and the district court did not abuse its discretion by awarding fees on a percentage basis. (*Id.* at 1193.) Further, given the court's analysis of the relevant *Johnson* factors, the court did not err in its allocation of fees, either among the four pools or among the attorneys within each pool. (*Id.* at 1194-1197.)

See also *Voulgaris v. Array Biopharma, Inc.*, 60 F.4th 1259, 1263 (10th Cir. 2023) (in securities class action, the court had discretion to award fees on percentage or lodestar basis, the court did not abuse its discretion in awarding fees equal to one third of the common fund, the court sufficiently analyzed the *Johnson* factors, and the court's lodestar cross-check was not required, but was adequate).

Eleventh Circuit: Percentage Method Only

The Eleventh Circuit stands alone in requiring district courts to apply the percentage method in common fund cases. In *Camden I Condominium Association, Inc. v. Dunkle*, 946 F.2d 768 (11th Cir. 1991), the Eleventh Circuit held that "attorneys' fees awarded from a common fund shall be based upon a reasonable percentage of the fund established for the benefit of the class." (*Id.* at 774.) The court noted that the "majority of common fund fee awards fall between 20% to 30% of the fund" (*ibid.*) and held that "the *Johnson* factors continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases." (*Id*. at 775.)

In *Waters v. International Precious Metals Corp.*, 190 F.3d 1291 (11th Cir. 1999), an action alleging that the defendants engaged in a scheme to defraud customers, the defendant agreed to pay up to $40 million to settle the case on a claims made basis. The district court approved the settlement and awarded one third of the fund, $13.3 million, to class counsel. The Eleventh Circuit affirmed, reiterating its holdings in *Camden I* and holding further that the court did not err in awarding fees as a percentage of the total fund, rather than the portion paid out to class members, although a court in a separate matter may not abuse its discretion by awarding fees based on the amount actually paid out. (*Id.* at 1297-1298.)

In *In re Equifax Inc. Customer Data Security Breach Litigation*, 999 F.3d 1247 (11th Cir. 2021), over 300 class actions were filed across the nation and consolidated in an MDL in the Northern District of Georgia. The parties settled the case, with Equifax agreeing to pay a common fund of at least $380.5 million on a non-reversionary basis. The district court approved the settlement, including an attorney fee award of $77.5 million, or 20.36% of the common fund.

The Eleventh Circuit affirmed. First, it rejected the argument that the percentage-of-the-recovery method was no longer good law after the Supreme Court's decision in *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 130 S. Ct. 1662, 176 L.Ed.2d 494 (2010). The court distinguished *Perdue*, which involved a fee-shifting statute. "Nothing in *Perdue* considered the appropriate method for calculating attorney's fees in a common fund case. The percentage method therefore remains the proper method to apply when awarding attorney's fees in common fund settlement cases." (*Id*. at 1279.) Second, the court rejected the argument that the district court should have considered economies of scale in the case, *i.e.*, the idea that "a settlement that is ten times larger than another settlement is often not ten times harder for the lawyers to work on, such that the percentage awarded as attorney's fees should diminish as the settlement amount gets larger." (*Id.* at 1280.) Eleventh Circuit precedent required the district court to consider the *Johnson* factors, and the court declined to impose a further requirement to consider economies of scale. (*Ibid.*) Finally, the district court did not abuse its discretion in awarding 20.36% of the common fund as attorney's fees, noting that "20.36 percent is well within the percentages permitted in other common fund cases, and even in other megafund cases." (*Id.* at 1281.)

Seventh Circuit: Market Based Approach

The Seventh Circuit employs a unique "market-based approach" that seeks to award an amount that the parties would have agreed upon at the start of the litigation. *In re Stericycle Sec. Litig.*, 35 F.4th 555 (7th Cir. 2022), a securities fraud case, exemplifies this approach. The parties settled the case for $45 million, and the court approved fees equal to 25% of the common fund. The Seventh Circuit reversed, holding that "a district court must attempt to approximate the fee that the parties would have agreed to at the outset of the litigation without the benefit of hindsight." (*Id*. at 559. See also *In re Synthroid Marketing Litigation*, 264 F. 3d 712 (7th Cir. 2001) ["We have held repeatedly that, when deciding on appropriate fee levels in common-fund cases, courts must do their best to award counsel the market price for legal services, in light of the risk of nonpayment and the normal rate of compensation in the market at the time."])

Conclusion

Although most circuits allow district courts to award fees on a lodestar or percentage basis mportant differences between the circuits require attention – both at the time of filing and at the time of settlement. ■

---

[1] I use the term "attorney's fees," following Federal Rule 23(h).

[2] Courts may also consider the value of non-monetary "common benefits" to the class, such as injunctive relief.