

GUIDELINES AND BEST PRACTICES
IMPLEMENTING 2018 AMENDMENTS TO
RULE 23 CLASS ACTION SETTLEMENT PROVISIONS

BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

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GUIDELINE 4: The parties should provide information on the proposed attorney’s fees, including timing of payments, in assessing whether relief provided for the class is adequate.

At the notice stage, the court should consider the amount of attorney’s fees in evaluating the fairness of the proposed settlement. Each jurisdiction may have different applicable standards for the court to determine the appropriate nature of the proposed attorney’s fees and costs, such as the “percentage of the fund” and “lodestar/multiplier” standards. The relation between the amount of the attorney’s fees and the expected benefits to the class members may be important in some cases in evaluating whether the proposed settlement is fair, reasonable, and adequate. Depending upon the relevant standard in the jurisdiction, the court may also consider other relevant Rule 23 factors in preliminarily determining whether the amount of the proposed attorney’s fees and costs are reasonable, such as the work performed by counsel, the risks associated with the case and any other relevant factors provided by counsel in support of preliminary approval. The court may also determine whether the proposed attorney’s fees are being provided by defendants in addition to the relief provided to the class.

GUIDELINE 5: At the final approval stage, the court should consider relief delivered to class members in determining the appropriate award of attorney’s fees in

accordance with Rule 23(h). In appropriate cases, a court may consider nonmonetary benefits as part of the total relief in relation to the proposed award of attorney's fees in evaluating whether the proposed settlement is fair, reasonable, and adequate.

A court awards attorney's fees in accordance with Rule 23(h). The Committee Note to Rule 23(h) sets out various factors that the court can consider in evaluating a request for attorney's fees, including: (1) work that produced a beneficial result for the class; (2) work that actually achieved a result for class members; (3) settlement provisions that provide for future payment; and (4) nonmonetary provisions that provide actual value for class members. These factors may also be adjusted based upon the accepted method for determining appropriate attorney's fees in that jurisdiction (*i.e.*, percentage of the fund, lodestar, etc.). The court should defer to the recommendations of appointed lead counsel when considering any division of attorney's fees among counsel, and it may give weight to agreements between class counsel and others about the fees claimed by the motion.

A court should consider and analyze settlements involving nonmonetary benefits for class members, according to the 2003 Committee Note accompanying Rule 23(h), to ensure that these benefits have actual value for the class, like injunctive and declaratory relief would in civil rights litigation.

BEST PRACTICE 5A: In an appropriate case, a court may consider awarding attorney's fees in a class action settlement based on a percentage of the total monetary awards made available to the class, as opposed to the actual claimed value of the settlement.¹

¹ See, e.g., *Poertner*, 618 F. App'x at 629 (holding that indirect benefits to the class—such as injunctive relief or a *cy pres* award—are properly included in a court's valuation of the total "settlement pie" from which the court calculates a reasonable fee).

Courts have disagreed about whether attorney’s fees can be awarded based solely on the monetary value of the relief actually paid to participating class members, typically in a settlement where the total amount is not fixed but fluctuates based on the number and amount of valid claims, as compared with fees based on the total value made available by the settlement.²

On one hand, some courts have concluded that class counsel’s compensation should be tied to the class’s actual recovery, rather than the relief made available to plaintiffs and the class. And the Committee Note to amended Rule 23(e)(2), after acknowledging that awards of attorney’s fees are made under Rule 23(h), states: “[T]he relief actually delivered to the class can be a significant factor in determining the appropriate fee award.”

On the other hand, other courts have taken into account other items in determining the “actual value” of the relief provided to class members. These courts weigh the significant work and considerable risk assumed by lawyers who undertake to represent consumers in class actions against often large corporate defendants. These courts have concluded that the opportunity to recover meaningful relief by availing themselves of a claims process that is procedurally fair, even though many fail to do so, is “actual value” to the class members. And counsel should not be held to account for class members’ failure to take advantage of an otherwise fair and procedurally sound settlement:

There may be many reasons or no reasons why class members decide to participate in a settlement, *e.g.*, a desire not to be involved in litigation, ideological disagreement with the justice system, their individual experiences with [a product], or sympathy for the defendant. . . . Whatever the underlying reason, that is a

² See *Lopez v. Youngblood*, 2011 WL 10483569, at *3 (E.D. Cal. Sept. 2, 2011) (noting that while “the Ninth Circuit affords district courts “discretion to apply either the lodestar method or the percentage-of-the-fund method in calculating a fee award[,]” “[m]any courts and commentators have recognized that the percentage of the available fund analysis is the preferred approach in class action fee requests because it more closely aligns the interests of the counsel and the class, i.e., class counsel directly benefit from increasing the size of the class fund and working in the most efficient manner.”) (internal quotations and citations omitted).

decision to be made by each class member. Those decisions, however, do not affect whether the settlement provided to the Class is fair, adequate, and reasonable.³

BEST PRACTICE 5B: The parties should provide information on any agreement made in connection with the proposed settlement in accordance with Rule 23(e)(3).

At the notice stage, the court should be advised of any side agreements in determining whether the relief is adequate. For example, the parties should advise the court of any conditions that must be met, other than the court's approval, to the settlement becoming effective.

The court will consider the same factors when it is deciding whether to approve the settlement at a later date under Rule 23(e)(2).

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³ *Hall v. Bank of Am.*, N.A., No. 1:12-cv-22700-FAM, 2014 WL 7184039, at *8 (S.D. Fla. Dec. 17, 2014).