AUGUST 29, 2024

Eighth Circuit enters attorneys' fee fray in declaring fee award a windfall

by Michele Floyd

Takeaway: Courts are continuing to take a hard look at class action fee awards, and in *In re T-Mobile Customer Data Security Breach Litigation,* --- F.4th ----, 2024 WL 3561874 (8th Cir. July 29, 2024), the Eighth Circuit joined the Third, Sixth, Seventh and Ninth Circuits' recent trend of vacating excessive awards. *See In re WaWa, Inc. Data Sec. Litigation*, 85 F.4th 712 (3d Cir. 2023) (vacating $3.2 million fee and remanding with instructions); *Linneman v. Vita-Mix Corp.,* 970 F.3d 621 (6th Cir. 2020) (vacating $3.9 million fee as unreasonable); *In re Broiler Chicken Antitrust Litigation*, 80 F.4th 797 (7th Cir. 2023) (vacating $57.4 million fee award and remanding with instructions); *Lowrey v. Rhapsody Int'l, Inc.,* 75 F.4th 985 (9th Cir. 2023) (reversing $1.7 million fee and remanding).

Rule 23(h) permits a district court to "award *reasonable* attorney's fees and nontaxable costs that are authorized by law or by the parties' agreement." Fed. R. Civ. Proc. 23(h) (emphasis added). Courts examine a dozen or so factors to determine whether a requested fee is reasonable, including the difficulty of the case, the time and labor spent, the settlement amount, and awards in similar cases. In short, Rule 23(h) requires the district court to examine the case-specific circumstances before determining whether a fee is "reasonable."

The *In re T-Mobile* plaintiffs secured a $350 million settlement approximately two months after they filed a consolidated complaint in the MDL court. Their requested fee was $78.75 million, or 22.5% of the fund, notwithstanding their $8.17 million lodestar calculation. The district court awarded $78.75 million in fees, and the district court's award was appealed to the Eighth Circuit. Using a "lodestar crosscheck," the Eighth Circuit determined that the district court's $78.75 million award resulted in a multiplier of 9.6 and equated to hourly rates of between $7,000 and $9,500 per hour. 2024 WL 3561874, at *6. Given that the case was settled within two months of filing – before any substantial motion practice or significant discovery – the panel reversed the award as an impermissible windfall and remanded for further proceedings.

The panel declined to adopt a bright line rule requiring a reduced percentage in "megafund" cases. *Id.* at *5 ("But we think a per se rule requiring a percentage reduction in every megafund case would introduce arbitrary and formulaic rules into an inquiry that needs to be anything but."). Instead, it confirmed that the settlement amount was a factor to be considered along with other factors relevant under Rule 23(h). Notably, the Court relied heavily on results in other cases. *See id.* at 6-7 (citing *Rawa v. Monsanto Co.*, 934 F.3d 862 (8th Cir. 2019) (describing multiplier of 5.3 as "high"); *Equifax, Inc., Customer Data Sec. Breach Litig.*, 999 F.3d 1247 (11th Cir. 2021) (involving smaller multiplier of 2.62 despite more litigation and longer time to settle); and *In re Visa Check/Mastermoney Antitrust Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y.

2003) (rejecting similar multiplier (9.68) and percentage recovery (18%) but seven years of litigation, settlement on eve of trial, four rounds of certification briefing 230,000 pages of trial exhibits, 730 trial witnesses designated, three *Daubert* motions and other significant litigation)). In comparing the facts of those cases with the circumstances before it, the panel confirmed its conclusion that the district court's $78.75 million fee award was too high and, therefore, an abuse of discretion.