

WHAT MUST BE DETERMINED, WHAT MAY BE CONSIDERED, AND WHAT MAY BE INCLUDED

Audra Ibarra

Under the English rule, the loser in a civil case pays for the winner's attorney fees. The rule is followed in England, most Western countries other than the United States, and some states other than California. The philosophy behind the English rule is that a party is entitled to legal representation to prosecute or defend his or her claim and should not have to incur the cost of this representation if the claim was righteous. Proponents of the English rule believe that because the rule encourages righteous claims and discourages frivolous ones, it ultimately reduces litigation.

Under the English rule, the loser in a civil case pays for the winner's attorney fees.



Under the American rule, each party pays its own attorney fees irrespective of the outcome of a case, unless otherwise authorized by a statute or a contract between the parties.

Under the American rule, each party pays its own attorney fees irrespective of the outcome of a case, unless otherwise authorized by a statute or a contract between the parties. This rule is followed in the United States and most states including California. The philosophy behind the American rule is that a party should be free to prosecute or defend a claim if he or she perceives it to be righteous and should not be discouraged by fear of potential liability for the opposing party's attorney fees. Proponents of the American rule believe that parties to a contract should be able to decide whether a fee-shifting provision would be beneficial to them and that the legislature can authorize fee shifting where public policy requires it.

When attorney fees are authorized, trial courts have discretion on the amount. Recent United States Courts for the Ninth Circuit cases provide guidance to courts on how to exercise that discretion.

DETERMINATION OF REASONABLE ATTORNEY FEES

In *In re Bluetooth Headset Products Liability Litigation*, the Ninth Circuit held that before a trial court can order that a defendant pay attorney fees as the result of a class action settlement, the court has a duty to determine

that the amount is reasonable. 654 F.3d 935, 941, 943 (2011). The Ninth Circuit further held that this is true even if the parties agreed to the amount.

In *In re Bluetooth Headset Products Liability Litigation*, consumers filed twenty-six class actions against manufacturers of wireless headsets, alleging that the manufacturers failed to disclose a risk of hearing loss associated with extended use, in violation of state consumer protection and business practice laws. The parties negotiated a proposed settlement, which included \$100,000 for the class and attorney fees in an amount to be determined by the court, but not to exceed \$800,000. The District Court for the Central District of California approved the settlement and ordered an award of \$800,000 in attorney fees. The court did not explicitly calculate or explain how it got to that amount. Class objectors appealed, challenging among other things, the fairness and reasonableness of the attorney fee order.

The Ninth Circuit vacated the judgment. The court held that “a defendant’s advance agreement not to object cannot relieve the district court of its duty to assess fully the reasonableness of the [attorney] fee request.” 654 F.3d at 943. The court explained that “courts have an independent obligation to ensure that the [attorney fee] award, like the settlement itself, is reasonable, even if the parties have already agreed to the amount.” *Id.* at 941. The Ninth Circuit further held that there was insufficient analysis in the trial court’s record to determine whether the amount of the attorney fee award was reasonable. The Ninth Circuit found that the court had not made (1) an explicit calculation of a reasonable lodestar amount,¹ (2) a comparison between the amount of the attorney fee award



and the benefit to the class, or (3) a comparison between the lodestar amount and a reasonable percentage award. The Ninth Circuit concluded that the fact that the amount of attorney fees ordered was eight times the class recovery raised at least an inference of unfairness and the possibility that class counsel bargained away a benefit to the class in exchange for their own interest. However, the Ninth Circuit did not reverse, but rather remanded the case back to the trial court for further analysis of the reasonableness of the attorney fee award.

CONSIDERATION OF SETTLEMENT NEGOTIATIONS

In *Ingram v. Oroudjian*, a case of first impression in the Ninth Circuit, the court held that a court may consider settlement negotiations in determining a reasonable amount for an attorney fee award. 647 F.3d 925, 927 (2011). The court held that this is true irrespective of whether the party receiving the award prevailed at trial or accepted a settlement offer.

Cecil Ingram and the Fair Housing Council of the San Fernando Valley sued Armine Oroudjian and Antony Abelyan for discrimination in violation of the California Fair Employment and Housing Act. The District Court for the Central District of California encouraged the parties to settle. Nevertheless, according to the district court, Ingram and the council took unreasonable settlement positions and prolonged the litigation. Ingram and the council originally demanded \$425,000, but in the end settled for \$32,000 from Oroudjian and Abelyan, an offer that had been made and rejected earlier in the case. Following settlement, Ingram and the council moved for an award of attorney fees in the amount of \$88,857. However, the

court only awarded \$30,485 in fees. Ingram and the council appealed, arguing, among other things, that the court improperly considered settlement proceedings in determining the amount of the attorney fee award.

Affirming the judgment, the Ninth Circuit held that a court may consider “settlement negotiations for the purpose of deciding a reasonable attorney fee award.” 647 F.3d at 927. The Ninth Circuit explained that other circuits have held similarly. In particular, the Ninth Circuit discussed a Third Circuit case, *Lohman v. Duryea Borough*, 547 F.3d 163 (2009). In that case, the Third Circuit affirmed a reduction of an attorney fee award because the jury verdict award was less than the offer to settle. The Third Circuit held that “it is permissible for a district court to consider settlement negotiations in measuring the litigant’s success for purposes of awarding attorney fees . . . and rejection of a settlement offer that was six times the jury award was probative of the plaintiff’s lack of success.” 647 F.3d at 927.

INCLUSION OF FEES FROM BLOCK BILLING AND CONCLUSORY NARRATIVES

In *Secalt S.A. v. Wuxi Shenxi Construction Machinery Company, Ltd.*, the Ninth Circuit held that a court may include attorney fees based on block billing and conclusory narratives. 668 F.3d 677, 690 (2012). In that case, a manufacturer sued a competitor for trade dress² infringement. The United States District Court of Nevada granted summary judgment in favor of the competitor and awarded the competitor \$836,899.99 in attorney fees. The manufacturer appealed, arguing, among other things, that the court should not have included fees from block billing and conclusory narratives.

The Ninth Circuit affirmed in relevant part. It held that a court may include fees from block billing and conclusory narratives. In this case, the block-billing entries showed numerous tasks performed over multihour spans. The conclusory narratives were incomplete descriptions and gross generalization of the work performed. The Ninth Circuit acknowledged that these entries were “not a model of clarity.” 668 F.3d at 690 n. 5. However, the court found that the number of block-billing and conclusory-narrative

entries were few in relationship to the overall number of total billing entries. Quoting the Supreme Court, the Ninth Circuit explained that counsel “is not required to record in great detail how each minute of his time was expended.” 668 F.3d at 690 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 437 n. 12 (1983)).

IMPLICATION

These cases provide guidance not only to the courts, but also to parties in attorney fee-shifting cases. Foremost, a party should only ask for compensation of reasonable attorney fees. At least in the context of a class action settlement, the opposing party cannot waive or negotiate away the reasonableness requirement. Moreover, a party should be reasonable in settlement negotiations. If a party is awarded a verdict that is less than the opposing party’s earlier offer, the court may reduce the attorney fees. Similarly, if after protracted litigation, a party accepts an offer to settle on terms less favorable than the terms in the opposing party’s earlier offer, the court may reduce the fees. Finally, an attorney should avoid creating a bill with a block-billing or conclusory-narrative entry. However, when seeking an attorney fee award, a party should include all relevant bills irrespective of format, because the court may include everything in the total award of attorney fees.

Audra Ibarra is an appellate attorney. She represents organizations and individuals in federal and state courts on civil and criminal appeals, writs, and habeas petitions. She also serves as a commissioner for the Judicial Nominees Evaluation Commission for the California State Bar and judge pro tempore for California Superior Court. She is a former supervising assistant U.S. attorney, deputy district attorney, and litigator at a large national law firm. For more information, please go to www.aiappeals.com.

Notes

1. The lodestar amount is generally “calculated by multiplying the number of hours the prevailing party reasonably expended on litigation (as supported by adequate documentation) by a reasonable hourly rate for the region and for the experience of the lawyer.” 654 F.3d at 941.

2. *Trade dress*, a legal term of art, generally refers to the visual appearance of a product, which signifies the source of the product to consumers. Trade dress is a form of intellectual property.