11th Circ. Ruling Threatens Class Rep Incentive Awards

By **Peter Morrison and Zack Faigen** (October 8, 2020, 1:16 PM EDT)

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In a decision that may upend class action practice, the U.S. Court of Appeals for the Eleventh Circuit in Johnson v. NPAS Solutions LLC **vacated** a district court's approval of a class settlement, holding that two 19th century U.S. Supreme Court cases prohibit so-called incentive awards to class representatives.[1]

Incentive awards — payments to class representatives for serving in their representative role — have been somewhat common in modern-day class actions. A 2006 study of cases from 1993 to 2002 found that incentive awards were granted in 28% of settled class actions.[2] The study further found that the average award per class representative was $15,992, while the median award was $4,357.[3]

Plaintiffs and their counsel often argue that incentive awards can serve multiple purposes. As the name implies, the prospect of a cash payment may arguably incentivize a would-be plaintiff to serve as a class representative in a lawsuit. Incentive awards may also arguably compensate class representatives for the time and effort they contribute to the class cause.

Until recently, courts generally granted the requested payments so long as they were fair and reasonable. However, in Johnson v. NPAS Solutions, the Eleventh Circuit rejected incentive awards, and openly questioned whether courts that had previously granted such incentive awards had sufficiently examined whether the law actually permits them. The Eleventh Circuit decision, thus, calls into question whether incentive awards will be part of class actions in the future, particularly if other circuit courts adopt Johnson's holding.

Eleventh Circuit Disallows Incentive Awards

In Johnson, the plaintiff alleged — on behalf of himself and others similarly situated — that the defendant company violated the Telephone Consumer Protection Act by using an automatic telephone dialing system to call his cell phone without his consent. Eight months into the case, the parties jointly filed a notice of settlement, with the defendant company agreeing to pay more than $1.4 million.

The plaintiff thereafter moved to certify a class for settlement purposes, and for appointment as class representative. The plaintiff also petitioned the court for a $6,000 incentive award out of the common fund.

One putative class member objected, arguing that, among other things, the incentive award contravened two Supreme Court decisions from the 1880s and created a conflict of interest between the plaintiff and other class members. After holding a final fairness hearing, the trial court granted the plaintiff's requests in their entirety, certifying the class for settlement purposes, appointing the plaintiff as class representative, approving the settlement, and awarding the $6,000 incentive award to the plaintiff.

On appeal by the objector, the Eleventh Circuit reversed. Relying on the Supreme Court's rulings in Trustees v. Greenough[4] and Central Railroad & Banking Co. of Georgia v. Pettus,[5] the court concluded that while a class representative is entitled to be reimbursed for any fees and expenses actually incurred "in carrying on the litigation," he may not "be paid a salary or be reimbursed for his personal expenses."

Applying that general rule, the court stated that "the modern-day incentive award for a class representative is roughly analogous to a salary" — and therefore prohibited. Additionally, the court explained that it would not matter if one were to characterize incentive awards as a "bounty" or "bonus for bringing the suit" instead of as compensation for the time spent litigating the case. The court reasoned that a payment for merely bringing the suit or simply holding the title of class representative would "give class representatives preferred treatment," which is not permitted.

The court considered and rejected the two arguments proffered by the plaintiff. First, the court concluded that Greenough and Pettus remain binding even though they predate Federal Rule of Civil Procedure 23 because "Rule 23 does not currently make, and has never made, any reference to incentive awards, service awards, or case contribution awards." Therefore, Rule 23 could not have overruled or superseded Greenough and Pettus.

Second, the court declined to credit the fact that incentive awards are "fairly typical in class action cases," reasoning that the common use and general acceptance of incentive awards "is a product of inertia and inattention, not adherence to law."

The court closed by stating that if the Supreme Court wants to overrule Greenough and Pettus then that is the Supreme Court's prerogative, but not the prerogative of an intermediate appellate court. Similarly, if either the U.S. House of Representatives' Committee on Rules or Congress disagrees with the Eleventh Circuit's ruling, "they are free to amend Rule 23 or to provide for incentive awards by statute."

The State of Incentive Awards Post-Johnson

It remains to be seen whether the Supreme Court, the Rules Committee or Congress will take the Eleventh Circuit up on its offer to reverse its decision in Johnson and affirmatively sanction awards in class actions. Unless that happens, litigants may see additional challenges to incentive awards, with other circuit courts potentially addressing the same question as the Eleventh Circuit regarding disallowing incentive awards.

Broadly speaking, payments to class representatives fall into three categories: (1) reimbursement for litigation-related costs and expenses; (2) a reward for coming forward and filling the role of class representative; and (3) compensation for the time and effort spent in actively pursuing the case on behalf of the class.

With respect to reimbursing litigation-related costs, the Eleventh Circuit decision permits payments to class representatives for that purpose, and Johnson itself reaffirmed that such payments are proper. Thus, there is no reason to suspect that these reimbursement payments will be curtailed.

The second category is really a bonus for a plaintiff simply lending their name to the case and nominally filling the role of class representative, regardless of the time or effort the plaintiff actually devotes to the case. The Eleventh Circuit in Johnson foreclosed such awards, concluding that they improperly confer a benefit on a class representative "simply by reason of his status."

Other circuit courts to address this issue in the future also may conclude that they do not want to incentivize class actions through the provision of bonus awards to class representatives irrespective of their substantive contribution.

The third category involves compensating the class representative for the time the person actually spends litigating the case on behalf of the class. For example, a class representative may earn an hourly wage at their job and ask a court to be compensated the same amount for each hour spent working on the litigation as opposed to working at said place of employment. The Eleventh Circuit foreclosed such awards in Johnson as well.

Following the Eleventh Circuit's decision, litigants should expect courts to even more closely scrutinize requests for incentive awards to class representatives. Ultimately, only time will tell whether and how Johnson impacts class actions going forward. The first step is to see whether the plaintiff in Johnson seeks either en banc review in the Eleventh Circuit or certiorari in the Supreme Court.

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[1] See 2020 WL 5553312 (11th Cir. Sept. 17, 2020).

[2] Theodore Eisenberg & Geoffrey P. Miller, "Incentive Awards to Class Action Plaintiffs: An Empirical Study," 53 UCLA L. Rev. 1303, 1307 (2006).

[3] Id. at 1308.

[4] 105 U.S. 527 (1881).

[5] 113 U.S. 116 (1885).