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Eleventh Circuit Bans Incentive Awards for Class Actions

In *Johnson v. NPAS Solutions, LLC*, the Eleventh Circuit, which has jurisdiction over Alabama, Florida and Georgia, is the first circuit court of appeals to expressly invalidate "incentive" or "service" awards to plaintiffs in a class action.[1] This decision could have important consequences for all class action litigants.

"Incentive" or "service" awards are awards designed to induce the named plaintiff or class representative of a class action to participate in the lawsuit. These payments are typically a few thousand dollars to the named plaintiff to make up for financial or reputational risk in bringing the action. They arguably create a conflict between the named plaintiff and the class. Also, these types of "incentive" fees can create an incentive for the named plaintiff, who is leading the putative class, to reject early (and reasonable) settlement proposals to settle on an individual basis even if the named plaintiff's actual damages are minimal.

Although "incentive" payments to the named plaintiffs in a class action are often approved by courts as part of class action settlements, the issue of their legality or reasonableness has not been subject to much challenge until the Eleventh Circuit's decision.

In *Johnson*, the plaintiff filed a class action lawsuit under the Telephone Consumer Protection Act (TCPA) alleging that the defendant used an automated dialing system without proper consent. The TCPA provides for statutory damages of $500 per call, meaning the defendant faced potential damages of over $89 million. The parties decided to settle the case for $1.4 million, resulting in class members receiving a payout of less than $8 each. However, the named plaintiff was set to receive a $6,000 incentive payment. Jenna Dickinson, a class member to this suit, objected to the settlement and appealed its approval. Dickenson argued that the settlement was too low, the attorneys' fees were too high, and that the named plaintiff was not entitled to an incentive award.

In banning this type of award, the Eleventh Circuit relied on two U.S. Supreme Court cases from the late 19th century – *Trustees v. Greenough and Central Railroad & Banking Co. v. Pettus*.[2] The Eleventh Circuit explained that these decisions "establish limits on the types of awards that attorneys and litigants may recover" from a class action settlement fund.[3] The Eleventh Circuit went on to explain that these Supreme Court decisions ruled that a plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses, but cannot be paid a salary or be reimbursed for any personal expenses.[4] The Eleventh Circuit found an incentive award to be "analogous" to a salary or payment for personal services.

The Eleventh Circuit clarified that even though incentive awards may be routine, and in fact "hundreds of courts" have allowed for them, they can only be authorized if: (1) the Supreme Court overrules its precedent; (2) Federal Rule of Civil Procedure 23 (governing class actions) is amended to authorize such awards; or (3) Congress enacts a statute authorizing such awards.[5]

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1 No. 18-12344, 2020 U.S. App. LEXIS 29682 (11th Cir. Sept. 17, 2020).
2 105 U.S. 527 (1882); 113 U.S. 116 (1885).
3 2020 U.S. App. LEXIS, at *18.
4 *Id.* at *23-24.
5 *Id.* at *28.

The Second Circuit, which has jurisdiction over New York, Connecticut and Vermont, appears to be the only other circuit that has considered *Greenough* and *Pettus* respecting the issue of incentive awards.[6] However, the Second Circuit disregarded those cases since they presented a different "factual setting" and upheld the payment of an incentive award.

It remains to be seen whether other federal circuits will likewise ban incentive awards or will continue to allow such payments. Since there is now a circuit court split on this issue between the Second and Eleventh Circuits, this is the type of issue the Supreme Court could accept for review. If other courts, or the Supreme Court, adopt the Eleventh Circuit's approach, it could be easier to resolve class actions and/or create a disincentive for named plaintiffs to bring them in the first place.

If you have any questions about the information presented here, please contact Gregory Reilly, Mallory Campbell or the attorney in the firm with whom you are regularly in contact.

6 *Melito v. Experian Mktg. Solutions, Inc.*, 923 F.3d 85 (2d Cir. 2019).