Class-Action Incentive Awards Under Siege?

Until recently, litigators on both sides of the "v." routinely included incentive awards in class-action settlements. The Eleventh Circuit's recent decision in Johnson v. NPAS Solutions, LLC, 975 F.3d 1244 (11th Cir. 2020), shook things up, holding incentive awards are prohibited under Supreme Court caselaw dating back over a century. While the Eleventh Circuit currently stands alone on this issue, its stark line in the sand suggests that counsel everywhere should take pause before including an incentive award in their next class-action settlement.

Incentive awards, and why plaintiffs get them

Incentive awards are payments to a class representative—above and beyond the recovery he or she would be entitled to as a class member—that pay the named plaintiff for serving as the representative of the class. Commentators have explained that, at their best, incentive awards compensate for non-pecuniary costs of serving as the class representative, such as time spent learning about the case, efforts made answering burdensome or intrusive discovery requests, and subjecting oneself to a deposition and cross-examination at trial.

Incentive awards are included, and approved by courts, in approximately twenty-eight percent of class-action settlements. See Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 UCLA L. Rev. 1303, 1310–11 (2006). However, in some types of cases, incentive awards are more common. For example, they are present in about fifty-nine percent of consumer-credit actions and forty-six percent of employment discrimination cases. Id. Eisenberg and Miller posit that the high incidence of incentive awards in consumer-credit actions is due to the negligible damages typically awarded in those cases. Without an incentive award, the argument goes, the class representative would suffer a net loss (assuming he or she actually expended significant effort on the case). Likewise, in employment-discrimination actions, where the risks of retaliation or stigmatization may be high, incentive awards can compensate the named plaintiff for shouldering these risks, in addition to enduring the burdens of litigation.

Until recently, the federal appellate courts uniformly and routinely permitted incentive payments to class representatives—in all kinds of cases. The circuits applied similar tests for approving such payments, all centered around the fairness of paying the plaintiff extra from the class recovery. These tests include factors such as the amount of effort and risks undergone by the named plaintiff, and the benefits conferred on other class members. The Fourth Circuit, for instance, considers

incentive awards "typical" and "appropriate," provided they are not pre-determined at the onset of the litigation and are not a condition for settlement. Berry v. Schulman, 807 F.3d 600, 613 (4th Cir. 2015).

Eleventh Circuit rocks the boat

Johnson disrupted the consensus among the circuits, holding incentive awards are prohibited outright under Supreme Court case law.

The case involved a class-action complaint by consumer Charles Johnson against medical debt collector NPAS Solutions, LLC. Mr. Johnson alleged that NPAS Solutions made automatic phone calls to him and over 150,000 others in violation of the Telephone Consumer Protection Act. About eight months later, the parties reached a settlement in the amount of $1,432,000. The settlement agreement provided that Mr. Johnson would receive a $6,000 incentive award, with the remaining amount (after subtracting attorneys' fees, costs, and an administration fee) to be distributed among class members. The district court preliminarily approved the settlement and certified the class.

Unnamed class member Jenna Dickenson objected. She took issue with the proposed $6,000 incentive award, among other things. The district court overruled her objection with little explanation and approved the incentive award and settlement. Ms. Dickenson appealed.

The Eleventh Circuit largely agreed with Ms. Dickenson. In an opinion written by Judge Kevin Newsom and joined by visiting Tenth Circuit Judge Bobby Baldock, the Court reversed the district court's approval of the incentive award and vacated the unexplained approval of the remainder of the settlement.

In striking down the incentive award, the Eleventh Circuit relied on two Supreme Court cases from the 1880s: Trustees v. Greenough, 105 U.S. 527 (1882), and Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885). The Court reasoned that, in both Greenough and Pettus, the Supreme Court upheld the class representative's award of actual litigation expenses, but rejected an award for "personal services and private expenses." In Greenough, these "personal services and private expenses" included a yearly salary for the named plaintiff.

The Eleventh Circuit held that "[a] plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses." The Court reasoned that incentive awards are "roughly analogous" to a salary, and therefore prohibited under Supreme Court precedent.

The Eleventh Circuit attributed other circuits' allowance of incentive awards to "inertia and inattention, not adherence to law."

Will Johnson survive?

Johnson's longevity is, at a minimum, questionable.

For one, Judge Beverly Martin dissented. She observed that the Eleventh Circuit expressly allowed incentive payments in Holmes v. Continental Can Company, 706 F.2d 1144 (11th Cir. 1983), which she said was binding and simply required that such payments be "fair." In addition, Judge Martin argued that the practical effects of the majority's decision—requiring named plaintiffs to incur costs well beyond any benefits they receive from their role in leading the class—would result in individuals being less willing to take on the role of class representative. Judge Martin also emphasized that the Eleventh Circuit would be alone in its holding, and noted that in Frank v. Gaos, 139 S. Ct. 1041 (2019), and China Agritech, Inc. v. Resh, 138 S. Ct. 1800 (2018), the Supreme Court acknowledged incentive awards in dicta, suggesting such awards were not strictly precluded by Supreme Court case law, as the majority claimed.

Second, Mr. Johnson has filed for en banc review. (Surprisingly, so has Ms. Dickenson, on the ground that the Court erroneously approved of calculating attorneys' fees as a percentage of the common fund, with a twenty-five percent benchmark). Mr. Johnson's petition has gotten significant amicus attention, focused on both the merits and policy of upending incentive awards. (Ms. Dickenson, as of this writing, has not gotten any amicus support.)

Harvard Law School Professor William Rubenstein and author of the renowned treatise Newberg on Class Actions filed a brief arguing that Greenough is distinguishable from Mr. Johnson's case because the plaintiff there sought a true salary (a fixed, regular payment) over the course of ten years, and not a one-time payment like Mr. Johnson. Nonprofit legal advocacy organization Public Justice has also weighed in, arguing that Greenough and Pettus are inapplicable because they involved judgments—not a settlement like Johnson.

Twenty-three other law professors, in a joint amicus brief, contend that the majority decision undermines Federal Rule of Civil Procedure 23, which seeks to incentivize individuals seeking small recoveries to prosecute their rights. The professors maintain that, without incentive awards, willing class representatives will be hard to find. Main Street Alliance makes the same argument in relation to small businesses.

The Eleventh Circuit's mandate in Johnson has been withheld, suggesting that these arguments have gotten some traction.

What now?

While divining a court's ultimate opinion is, of course, a fool's errand, Johnson—which is based on antiquated case law, breaks with every other circuit in the nation, and has received significant amicus criticism—seems destined for reversal either by the en banc Eleventh Circuit or the Supreme Court. Yet it still has lessons for class-action litigators in jurisdictions that continue to allow incentive awards, such as the Fourth Circuit.

In all jurisdictions, district courts have an obligation under Rule 23(e)(2) to ensure that class action settlements are "fair" and treat class members "equitably relative to each other." After Johnson, district judges are more likely to scrutinize incentive awards, even if they don't agree with the Eleventh Circuit's decision to ban them outright. And with Johnson in hand, objectors are more likely to challenge incentive awards, making district court scrutiny even more likely.

Class counsel: Think first, then make a record

Class counsel should now think hard about whether an incentive award is justified based on the facts of their case, and the contributions actually made and burdens actually undergone by the named plaintiff. In their filings in support of settlement approval, counsel should explain these justifications and provide supporting facts. Counsel for Mr. Johnson could have done a better job of that.

In the motion for settlement approval, counsel for Mr. Johnson and the class noted that each class member was likely to receive approximately $80, that Mr. Johnson was seeking an incentive award of $6,000 (seventy-five times the recovery of other class members), and that defense counsel agreed not to oppose the incentive award. Class counsel did not explain why Mr. Johnson deserved to recover so much more than his fellow class members.

In response to Ms. Dickenson's objection, counsel for Mr. Johnson provided more, but still only generalities. Counsel asserted that Mr. Johnson "expended a considerable amount of time" on the case, which included "frequently" communicating with his counsel by telephone and email, "reading documents" filed with the court, "responding to interrogatories and request[s] for production," and "searching for and producing documents relevant to his claims." Counsel failed to quantify the amount of time Mr. Johnson spent on the case, or the nature or burdensomeness of his discovery responses and document searches. (The Eleventh

Circuit majority noted that the discovery involved was only preliminary.) Counsel also failed to address the seventy-five factor difference between each unnamed class member's recovery and Mr. Johnson's.

The approach counsel took may have made sense at the time. To be fair, counsel for Ms. Dickenson, likewise, failed to engage with the specific facts of Mr. Johnson's case. Nonetheless, after Johnson, class counsel in jurisdictions that allow incentive awards should do more—whether an objection is made to the incentive award or not.

Defense counsel: Monitor, and intervene if needed

At the end of her oral argument before the Eleventh Circuit panel, counsel for defendant NPAS Solutions quipped "I'm a little bit like the neighbor at the cookout who's witnessing a family feud." NPAS argued neither for nor against the incentive payment and urged the Court to uphold the settlement—which was not conditioned on the incentive award—whether that award was affirmed or not. After Johnson, defense counsel may need to get involved.

Defendants, of course, have no reason to incentivize the filing of class actions—a main policy goal behind "incentive" awards. (Defense counsel may have different incentives.) Thus, defendants could take the approach of refusing altogether to include incentive awards in class-action settlements. However, where an incentive award appears justified on the facts of a particular case, defendants may wish, as part of good-faith settlement negotiations, to agree to one. If they do, counsel should ensure there is justification for the incentive award, and that the justification is in the record. If class counsel fails to do so, defense counsel should make that record and encourage the trial court to make related findings.

While this may seem outside the purview of defense counsel, it might have helped in Johnson. There, the Eleventh Circuit vacated the settlement order because the district court did not explain its reasons for approving the various parts. While the majority's ban on incentive awards may have been inevitable, had counsel justified the award to Mr. Johnson, Judge Martin might have been able to garner a majority for her position, and NPAS Solutions wouldn't be stuck litigating the settlement—potentially at all three levels of the federal court system.

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While Johnson's elimination of incentive payments is only binding in the Eleventh Circuit, the decision gives class-action objectors everywhere a new arrow in the quiver. With this in mind, both class and defense counsel should scrutinize

and justify incentive awards, and be wary that an unsupported award could sink the settlement.