Published on *The National Law Review* https://natlawreview.com

No Incentive: Eleventh Circuit Court of Appeals Holds that Incentive Payments Commonly Awarded to Class Representatives are Impermissible in a Classwide Settlement

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It is not very often that a Court of Appeals reaches back to Supreme Court authority from the 1800s to nix a commonly-accepted practice. And when it does happen it is critical to understand why it occurred.

Let me help.

Incentive awards.

The Eric J. Troutman Dictionary of Legal Terms defines “incentive awards” thusly: (n) a sizable but relatively modest payment made to class representatives as part of a class settlement, ostensibly to compensate for the pain and suffering inflicted upon the representative by aggressive defense counsel. Cf. necessary evil.

In truth incentive awards are approved as part of most every class settlement. The theory is that class actions, by their very nature, are designed to address teeny tiny harms that would not otherwise permit of individual litigation. Six bucks here. Twelve cents there. Stuff like that.

And if lawyers can be incented to take these cases on a classwide basis on the hope of recovering a third of that twelve cents or six bucks paid to a very large number of class members, the Plaintiff bringing the case risks much wasted time and expense in the hope of recovering…. well, just six bucks or twelve cents or, whatever.

So incentive awards were baked up at some point in the distant past for the purpose of assuring that people were actually afforded a reason to pursue class litigation. Without the award—in theory at least—human beings would not waste their time bringing class litigation. And while that may seem like an excellent outcome, in truth it would enable a good deal of micro-injuries to be permitted in our society that could add up to a great deal of unchecked misery over time and at volume.

Now please don’t misread what has been said so far as a suggestion that I—a defense lawyer of highest caliber—favor the class action vehicle. I have relative detest for it. Especially when deployed in the context of the TCPA, a statute that serves no purpose but to punish legitimate companies it

seems. But under the American system-where successful litigants do not recover their attorney's fees—it is the only way that small crimes and petty offenses can be punished in the civil arena. (I far prefer the European method of requiring the parties to pay their opponent's attorney's fees in the event of unsuccessful lawsuits of any kind.)

So it is difficult to imagine a world in which the class action vehicle can survive without incentive payments to successful class representatives. And that, love it or hate it, appears to be precisely the point of Johnson v. NPAS Solutions, No. 18-12344, 2020 U.S. App. LEXIS 29682 (11thCir. Sept. 17, 2020)—to remove any incentive for regular human beings to file class action lawsuits, leaving the practice in the hands of zealots or, perhaps with an eye toward eradicating Rule 23 altogether.

I have wasted enough keystrokes explaining the backdrop to *Johnson*-namely that Plaintiff's lawyers in Florida got ultra-greedy and flooded the federal district courthouses with piles of TCPA class actions until the dockets were crushed and the regular and important work of the federal judiciary could no longer get done. A backlash should have been anticipated. Consumer lawyers in Florida were not just pigging out, they were hogging out, and that always tends to lead to the slaughter.

And so the slaughter came, but in increments. First the standing rules tightened, then the TCPA's ATDS definition narrowed, and the ability of consumer's to revoke consent evaporated. All well and good. But the heart of the class action beast still pulsed with a steady drumbeat of new TCPA filings.

Until *Johnson*. The case that ripped the heart clear out of the beast altogether.

In *Johnson* the Eleventh Circuit court of appeals weighed the objections of a single person—the lone objector to a settlement that included over 19,000 class members and saw over 9,600 people participate in submitting a claim and expecting a recovery of $79.00. For receiving a phone call. (This is a claims rate of over 40% BTW, a remarkably favorable response by the class.)

The objector—a woman by the last name Dickenson—was not objecting that the recovery was too high, of course, but rather that it was too low. Class members deserved more—a common refrain from objectors, whose counsel commonly sell out the class to recover "more" for themselves. This objection went no further with the Eleventh Circuit than it does elsewhere.

But Dickenson raised other objections as well. More unusual ones. And, ultimately, objections the Eleventh Circuit found meritorious.

First, she argued that Rule 23 absolutely required that the fee petition be filed before the timeframe for class member objections to be filed. I have to admit I hadn't picked up on that nuance of the rules, but it appears she is absolutely right. And the Eleventh Circuit panel agreed:

> We hold that Rule 23(h)'s plain language requires a district court to sequence filings such that class counsel file and serve their attorneys'-fee motion before any objection pertaining to fees is due.

An important point of order and one that class action litigators the nation over should appreciate being clarified. And that rule makes sense, of course. All the notice in the world doesn't do much good if class members are foreclosed from objecting to the actual fee petition when it is filed. Superb.

Now the big one. Dickenson argued that a $6,000 “incentive payment” to Johnson as the class representative violates doctrine from two U.S. Supreme Court cases from the 1800’s: Trustees v. Greenough, 105 U.S. 527 (1882), and Central Railroad & Banking Co. v. Pettus, 113 U.S. 116 (1885).

As a rule, when a party contends that a common practice violates the requirements of some dusty decisions from the 1800s, they are wrong. Usually dreadfully. But every rule has an exception, and the Johnson case affords it.

Carefully studying the old cases, the *Johnson* panel concludes that the Supreme Court did, in fact and long ago, determine that incentive awards are impermissible. The Greenough matter—in which the Supreme Court actually did approve the payment of numerous sums to the class representative to assure that other recovering class members were not unjustly enriched for his hard work—was read narrowly by the Johnson court to forbid payments of “personal” and “private expenses.” (What Greenough actually says is “it would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interests of creditors, and that, perhaps, only to a small amount, if they could calculate upon the allowance of a salary for their time and having all their private expenses paid.”,” which seems a bit different to me.) As to Pettis the Johnson court determines the Supreme Court “confirms” the rule of Greenough that “”the expenses incurred in carrying on the suit and reclaiming the property subject to the trust” is proper, his “claim to be compensated, out of the fund or property recovered, for his personal services and private expenses” is “unsupported by reason or authority.”

From these cases—decided some 50 years prior to the passage of the original iteration of Rule 23 that empowered the modern class action vehicle—the Johnson panel derives this rule:

> 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.

A fair articulation, assuming Rule 23 did not alter matters. But an incentive award has never been structured as a payment of salary—I have never seen a class representative argue that they make $x an hour and invested y hours to defending the suit and so should recover $xy as an incentive award. Yet the *Johnson* panel had little trouble drawing a correlation: “It seems to us that the modern-day incentive award for a class representative is roughly analogous to a salary—in Greenough’s terms, payment for “personal services.”

Fair enough. But the Court goes much further. And pay careful attention here because this is where the Johnson panel makes it clear what the end game is:

> If anything, we think that modern-day incentive awards present even more pronounced risks than the salary and expense reimbursements disapproved in Greenough. Incentive awards are intended not only to compensate class representatives for their time (i.e., as a salary), but also to promote litigation by providing a prize to be won (i.e., as a bounty).

There it is. The *Johnson* panel just invalidated incentive awards because they tend to "**promote litigation**." No incentive awards. Less litigation. That is the direct, necessary, and **intended** consequence of the Johnson opinion—don't let anyone tell you different.

The Johnson panel wraps its analysis–as has become somewhat common in TCPA cases narrowly reading or applying the statute of late—imploring Congress or a higher court to fix the result if they so deem but bragging of the handcuffs that force the instant result:

Although it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them. If the Supreme Court wants to overrule Greenough and Pettus, that's its prerogative. Likewise, if either the Rules Committee or Congress doesn't like the result we've reached, they are free to amend Rule 23 or to provide for incentive awards by statute. But as matters stand now, we find ourselves constrained to reverse the district court's approval of Johnson's $6,000 award.

The end. No more incentive awards. In any amount. Period.

In addition to itself stamping out incentive awards, the *Johnson* panel advised that district courts may not "rubber stamp" approval to class action settlements. Summary approvals or settlements and fee awards are forbidden. As are summary rulings on objections to such settlements. Reasoned analysis is required in all corners and at all times in evaluating such settlements.

It will be absolutely fascinating to see whether the rule of Johnson eradicating incentive awards-which is broad enough to apply to all consumer class litigation and not just TCPA cases—will be adopted in other courts. It will be, perhaps, even more interesting to see how Dickenson, and her counsel, are compensated for bringing so much improvement to the class settlement at issue. Perhaps the day is not so far away that objecting to class action settlements is more profitable work than filing class actions in the first place.

At bottom I can't say *Johnson* is wrongly decided, but it is certainly deliberately decided and in a mold-breaking sort of way. This was a clear message folks—the Eleventh Circuit does not want your consumer class action. Bring it somewhere else. You no longer have any incentive to file it here.

We'll keep an eye out for the *en banc* petition papers.

National Law Review, Volume X, Number 262