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A Divided Eleventh Circuit Holds that Incentive Awards are Prohibited

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In a decision that may have far-reaching consequences, a divided panel of the Eleventh Circuit ruled that incentive awards to named plaintiffs—which are routine in TCPA and other class action settlements—are improper. *See Johnson v. NPAS Solutions, LLC*, No. 18-12344, 2020 WL 5553312, at *1 (11th Cir. Sept. 17, 2020). Despite acknowledging that incentive payments are commonplace in modern class action litigation, the majority held that such awards are prohibited under "on-point Supreme Court precedent" from the late 1800s and required reversal of the district court's approval of a $1.4 million class settlement.

Named plaintiff Charles Johnson alleged that defendant had violated the TCPA by placing numerous calls to his cell phone in an attempt to collect a debt apparently owed by someone else. After preliminary discovery and motion practice, the parties quickly negotiated a class settlement which provided for, among other things, a common fund of $1.4 million, a $6,000 incentive award to Johnson for bringing the case and serving as named plaintiff, and attorneys' fees to class counsel amounting to 30% of the fund. Class member Jenna Dickenson objected to the settlement on several grounds, including that Johnson's incentive award created a conflict of interest between him and the class and contravened Supreme Court precedent. The district court overruled the objection—noting simply "[t]he objection of Jenna Dickenson is OVERRULED"—and approved the settlement.

Dickenson raised three issues on appeal: (1) the district court had improperly set the deadline to object to the settlement before the deadline for class counsel to file their attorneys' fee petition, (2) the incentive award to Johnson was improper, and (3) the court did not provide sufficient explanation of its overruling of her objection to the fairness of the settlement or the award of attorneys' fees to enable meaningful appellate review.

On the timing of the attorneys' fee petition, the Eleventh Circuit held that Rule 23(h)'s plain language requires a district court to sequence filings so that a motion seeking fees must be filed *before* class member objections to fees are due. Nevertheless, the Court found that this error was harmless because Dickenson had an opportunity to present her objections to the district court.

The Court also found that the order granting final approval was too conclusory and didn't adequately

explain the award of fees, the denial of Dickenson's objection, or the approval of the settlement. Although significant to the outcome of the case—the Court vacated the final approval and remanded so the district court could bolster its findings—the Court's ruling in this regard was based on longstanding Eleventh Circuit precedent and did not break any new ground.

Most critically, the Court reversed the district court's approval of the incentive award. In so doing, the Court conducted a detailed analysis of *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), two "seminal cases" that "seem to have been largely overlooked in modern class-action practice." The Court read these cases as establishing a clear rule 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."

According to the Court, incentive awards "present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*." In this regard, the Court described incentive awards as being "part salary and part[] bounty" because the named plaintiff "wants to be compensated for the time he spent litigating the case, or his 'personal services'" and is seeking "a bonus for bringing the suit." Whether viewed as a salary, a bonus, or both, the Court concluded it is "clear that Supreme Court precedent prohibits it."

Johnson argued that *Greenough* and *Pettus* preceded the enactment of Rule 23 by decades, and therefore the decisions were inapplicable to incentive awards. Johnson also pointed out that incentive awards are ubiquitous in modern class actions. While acknowledging that incentive awards are indeed typical, the Court observed "so far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law. The uncomfortable fact is that '[t]he judiciary has created these awards out of whole cloth,' and 'few courts have paused to consider the legal authority for incentive awards.'" The Court further noted that only the Supreme Court could overrule *Greenough* and *Pettus* or, alternatively, Congress or the Rules Committee could authorize incentive awards by enacting a statute or amending Rule 23.

Judge Martin dissented, noting that "the majority takes a step that no other court has taken to do away with the incentive for people to bring class actions." She concluded that, based on prior Eleventh Circuit precedent, the proper injury was simply whether, in the totality of the circumstances, the district court abused its discretion in finding that the $6,000 incentive award to Johnson was fair. She also criticized the majority opinion for failing to address modern judicial authority for approving incentive awards, and rather going "straight to decisions from the 1880s that do not reflect the current views of the Supreme Court or other circuits."

It remains to be seen whether Johnson will seek *en banc* or Supreme Court review. But considering the import of the issue to class action settlements generally and the ever-increasing frequency of challenges to class action settlements by "professional" objectors, it is likely this issue will come up again soon.

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