Legal Update Article

Incentive or Service Awards for Class Action Plaintiffs Unlawful, Eleventh Circuit Rules

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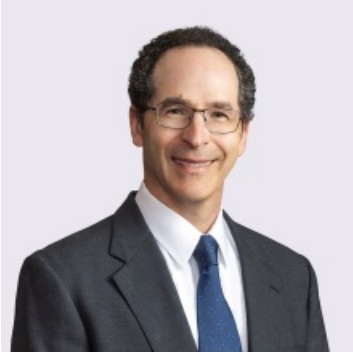

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"Incentive" or "service" awards to lead plaintiffs in Federal Rule of Civil Procedure 23 (Rule 23) class actions are unlawful, the U.S. Court of Appeals for the Eleventh Circuit has ruled in a suit brought under the Telephone Consumer Protection Act. ***Johnson v. NPAS Solutions, LLC***, No. 18-12344 (Sept. 17, 2020). It is the first circuit court of appeals to expressly invalidate such awards as a matter of law.

A divided panel of the appeals court struck down an award of $6,000 to a lead plaintiff and vacated a federal district court's order approving a proposed settlement of $1.432 million. (There were 179,642 potential class members, who would have received only $7.97 each, but only 9,543 class members submitted claims, bringing their haul to what could have been "a whopping $79.")

The Eleventh Circuit has jurisdiction over Alabama, Florida, and Georgia.

Supreme Court Precedent

The U.S. Supreme Court prohibited the award of incentive payments to plaintiffs more than a century ago. It called this particular fee for services "decidedly objectionable," the Eleventh Circuit noted, citing *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). This controlling precedent precedes Rule 23 by decades, as the plaintiffs pointed out to no avail in arguing that the decisions were nonbinding here.

These opinions appear to have gone unheeded in the 140 or so years since, the Eleventh Circuit majority acknowledged, conceding that incentive awards are routine features of class settlements today. "But, so far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law," the majority said. It added, "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."

The incentive award in *Johnson* is "part fee and part bounty," according to the majority. Such awards amount to the kind of pay for services disfavored by the Supreme Court, it noted, and such fees are meant "to promote litigation by providing a prize to be won."

Opinion is Outlier

Judge Beverly Martin dissented, noting that the majority's decision "takes our court out of the mainstream." No other circuit court has barred incentive awards, she said; in fact, "none has even directly addressed its authority to approve incentive awards," she pointed out. Yet, as the majority countered, the courts appear to have abandoned the inquiry of whether there is actually a legal basis for such awards, turning instead to the question of whether such awards are fair.

Fee Objection Before Fee Petition?

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The appeals court also was troubled that, in granting preliminary approval to the settlement (over objections), the district court effectively required class members to opt out or object to the attorney's fee award even before class counsel filed their fee petition. The appeals court found a clear violation of Federal Rule of Civil Procedure 23(h) in setting the objection date prior to the motion for fees.

However, applying the harmless-error doctrine for the first time in the context of Rule 23(h), the Court concluded that this error was harmless.

"Boilerplate" Approval

In addition, the Eleventh Circuit found the lower court violated the Federal Rule of Civil Procedure and circuit precedent more generally by failing to offer a reasoned explanation for its decision to approve the terms of a class settlement and to overrule objections. Although the appeals court recognized that the district court's approach to evaluating the settlement was fairly common, as with its approval of the incentive award, it is no answer to say, "That's just how it's done." The Court continued, "We don't necessarily fault the district court—it handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it have handled similar settlements. But familiarity breeds inattention, and it falls to us to correct the errors in the case before us."

Takeaways

Practically, removing the prospect of service awards for named plaintiffs in class actions will affect the resolution of class actions within the Eleventh Circuit, adding further nuance to the negotiation of settlements and the drafting of settlement agreements.

Johnson also will further increase judicial scrutiny of class action settlements in the Eleventh Circuit. Since its seminal decision in *Lynn's Foods, Inc. v. United States* in 1982, the Circuit has been active in scrutinizing the terms of employment class action settlements, particularly in the area of wage and hour settlements.

A critical question that remains unanswered is whether the majority's rationale will be applied to collective actions brought under Section 216(b) of the Fair Labor Standards Act or to the settlement of hybrid claims under both Rule 23 and Section 216(b).

It also remains to be seen if other federal circuits will find the Eleventh Circuit's holding persuasive, and likewise opt to prohibit the use of incentive payments, or whether the Eleventh Circuit has further distanced itself from its sister circuits in closely scrutinizing class action settlement terms.

Please contact a Jackson Lewis attorney with any questions about this case or other legal developments.