

# Locke Lord QuickStudy: Eleventh Circuit Reaches Back 135 Years to Reject Incentive Awards for Lead Plaintiffs in Class Actions

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In *Johnson v. NPAS Solutions, LLC*, 975 F3d 1244 (11th Cir. 2020), the Eleventh Circuit Court of Appeals upended what has become common practice in class action settlement by ruling that “incentive” awards to named plaintiffs are unlawful under two Supreme Court cases from the 1880s.

In *Johnson*, the plaintiff filed a class action lawsuit under the Telephone Consumer Protection Act (TCPA) alleging that the defendant used an automatic telephone dialing system to call cell phones without the proper consent. Due to the statutory damages of \$500 per call allowed under the TCPA, the defendant faced potential damages in excess of \$89 million. The parties agreed to settle the case for \$1.432 million, resulting in class members receiving less than \$8 apiece. In contrast, the named plaintiff was to receive a \$6,000 incentive payment.

The lone objector to the settlement, Jenna Dickenson, appealed the final approval of the settlement. Dickenson argued that settlement was too low, the attorneys’ fees were too high, and the class representative was not entitled to an incentive award.

Relying on Supreme Court precedent from 1882 and 1885, a divided panel 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.” *Id.* at \*10. The majority relied on *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885). In *Greenough*, the Supreme Court held that an individual suing on behalf of himself and other bondholders could recover “his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund.” However, the plaintiff was not entitled to any payment for his “personal services and private expenses.” In *Pettus*, the Court held that attorneys could be awarded fees based upon a percentage of a common fund. However, the Court re-affirmed that the plaintiff could not be compensated out of the common fund for “his personal services and private expenses.” The Eleventh Circuit took the rule of *Greensbough* and *Pettus* as prohibiting incentive awards to class representatives. The court found that the incentive awards in modern class actions are even more problematic than the salary and expense reimbursements rejected in *Greensbough* and *Pettus*: “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).”

The court went on to reject plaintiff's argument that the incentive award should be affirmed because, well, everyone does it. The court reasoned, "[a]lthough 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." *Id.* at \*12.

In her partial dissent, Judge Beverly Martin disagreed with the majority's decision to strike the incentive award. She noted that taking away incentive awards would take away the incentive for people to bring class actions: "By prohibiting named plaintiffs from receiving incentive awards, the majority opinion will have the practical effect of requiring named plaintiffs to incur costs well beyond any benefits they receive from their role in leading the class. As a result, I expect potential plaintiffs will be less willing to take on the role of class representative in the future." *Id.* at \*15

As Judge Martin recognized, and as majority intended, the *Johnson* ruling has the potential to greatly reduce the incentive for individuals to bring class actions if there is no way to reward the effort associated with being a named plaintiff. It seems highly unlikely that Mr. Johnson would have agreed to expose himself to discovery and spend time sitting for a deposition to get \$8. In October 2020, Plaintiff petitioned for a rehearing from the entire Eleventh Circuit.

In addition to striking incentive awards, the Eleventh Circuit also found that the trial court's schedule requiring class members to file any objection to the settlement—including any objection pertaining to attorneys' fees—more than two weeks before class counsel had filed their fee petition violated the plain terms of Federal Rule of Civil Procedure 23(h). Finally, the Eleventh Circuit instructed the trial court to make additional findings of fact and conclusions of law on remand regarding its (1) award of attorneys' fees; (2) denial of objections; and (3) approval of the settlement.

We will continue to watch this case closely and will see if other courts follow suit in rejecting incentive awards. One of the judges who voted to strike down the incentive award, Judge Bobby Baldock, is a senior judge from the Tenth Circuit sitting by designation. Hopefully Judge Baldock can convince his colleagues on the Tenth Circuit to follow his lead. In the meantime, Eleventh Circuit litigants may no longer provide named plaintiffs with incentive awards in future class settlements and must also be sure to include sufficient factual and legal support in motions to approve class settlements and motions for attorneys' fees, as the Eleventh Circuit appears poised to closely scrutinize class action settlements going forward.

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