How To Navigate Class Incentive Awards After Justices' Denial

By **Robert Sparkes, Wesley Prichard and Mick Pence** (June 7, 2023)

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Class-wide settlement agreements often provide for modest incentive awards, often called service awards, which are payments to the class representatives in addition to the relief they are entitled to receive as class members.

Class representatives and their counsel typically insist on incentive awards as compensation for their time pursuing an action on behalf of the absent class members, and class action defendants generally have little reason to object because incentive awards are typically baked into the total settlement figure and are usually de minimis relative to the size of the proposed class settlement.

Until recently, federal courts nationwide routinely approved incentive awards, provided there was adequate evidence demonstrating that the class representatives were involved in the litigation. But in 2020, the U.S. Court of Appeals for the Eleventh Circuit held in Johnson v. NPAS Solutions LLC that incentive awards are prohibited by two U.S. Supreme Court cases from the 19th century.[1]

Since then, the U.S. Courts of Appeals for the First[2] and Ninth Circuits[3] have rejected the Eleventh Circuit's reasoning and held that incentive awards are permissible, while a March U.S. Court of Appeals for the Second Circuit[4] panel expressed its agreement with the Eleventh Circuit.

Despite this growing circuit split, the Supreme Court recently **denied** petitions for certiorari expressly raising the permissibility of incentive awards.

Without a resolution, class action defendants must consider carefully whether to agree to incentive awards as part of a class-wide settlement and how to structure the agreement so that rejected incentive awards will not undo a hard-fought settlement.

Why pay an incentive award?

Incentive awards are payments to the class representatives, which are included as part of a class action settlement agreement and that are in addition to the class representatives' recovery as class members.

Incentive awards, according to the Ninth Circuit's 2009 decision in Rodriguez v. West Publishing Corp., "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action, and, sometimes, to recognize their willingness to act as private attorney general."[5]

For several decades, federal courts regularly approved incentive awards to compensate class representatives for the services they provide and the burdens of litigation, including greater subjection to discovery and depositions on behalf of the class.[6]

And, since a named plaintiff is essential for class actions, courts have found incentive awards appropriate if necessary to induce an individual to participate.[7]

In determining whether to approve an incentive award to a particular class representative, federal courts often consider a nonexhaustive list of criteria, including:

1. The risk to the class representative in commencing the suit, both financial and otherwise;

2. The notoriety and personal difficulties encountered by the class representative;

3. The amount of time and effort spent by the class representative;

4. The duration of the litigation; and

5. The personal benefit, or lack thereof, enjoyed by the class representative as a result of the litigation.[8]

So who would object to an incentive award?

Since many proposed class settlement agreements provide for some amount of the settlement fund to be paid as an incentive award by agreement of the defendants and class counsel, it may surprise some that incentive awards are challenged in the first instance.

Objections to incentive awards often come from absent class members — who have the opportunity to object to the settlement terms at the fairness hearing before the settlement is approved — or are raised voluntarily, or sua sponte, by the district court, which serves in a fiduciary capacity to the absent class members when approving a proposed class settlement.[9]

In exercising this role, the Ninth Circuit in Rodriguez declined to approve incentive awards where their size "indicated that the class representatives were more concerned with maximizing their own incentives than with judging the adequacy of the settlement as it applies to class members at large."[10]

While courts and absent class members raising objections to a proposed class-wide settlement have long watched the size of incentive awards relative to the class representatives' efforts, most courts and practitioners likely assumed the legitimacy of incentive awards generally.[11]

At least that was the case until 2020, when the Eleventh Circuit took on the argument that incentive awards are categorically foreclosed by 19th century Supreme Court precedent.

The Circuit Split

The Eleventh Circuit holds that incentive awards are improper.

Prior to 2020, the Eleventh Circuit regularly approved incentive awards in class settlements, including as recently as 2019.[12] However, the court abruptly changed course the following year in Johnson v. NPAS, in which it reversed the district court's approval of a $6,000 incentive award to a single class representative as part of a nearly $1.5 million class settlement.[13]

The Eleventh Circuit not only rejected that particular award; it held that all incentive awards are prohibited by Supreme Court cases from 1881 and 1885.[14]

The Eleventh Circuit read those two cases — Trustees v. Greenough[15] and Central Railroad & Banking Co. v. Pettus[16] — to establish 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."[17]

According to the Eleventh Circuit, because an incentive award compensates a class representative for bringing a suit, such awards are categorically prohibited by Greenough and Pettus.[18]

In so ruling, the court deemed it irrelevant that Greenough and Pettus pre-dated Rule 23 by decades, because, it explained, Rule 23 is itself silent on incentive awards.[19]

The court also brushed aside the fact that incentive awards are commonplace in modern class actions, chalking their use up to "inertia and inattention, not adherence to law," describing them as created by the judiciary "out of whole cloth," and holding that ubiquity does not make incentive awards "lawful, and it does not free us to ignore Supreme Court precedent forbidding them."[20]

Other circuit courts disagree with the Eleventh Circuit and permit incentive awards.

Since the Eleventh Circuit's decision in Johnson, at least two other circuit courts have considered and rejected the same arguments premised on Greenough and Pettus.

We begin with the First Circuit. In Murray v. Grocery Delivery E-Services USA Inc., an absent class member objector raised the Greenough and Pettus arguments in an appeal of the district court's approval of a $14 million class-wide settlement that included incentive awards ranging from $2,000 to $10,000 for the named plaintiffs.[21]

The First Circuit rejected those arguments last year, holding that the incentive awards did not render the named plaintiffs inadequate representatives of the class's interests and that the awards were not categorically proscribed by Greenough and Pettus.[22]

In rejecting the Greenough and Pettus argument, the court conducted its own review of Greenough and concluded that it did not prohibit incentive awards because the payments at issue in Greenough were not sufficiently analogous to incentive awards in class settlements.[23]

The court also noted that incentive awards are valid in part because they help to implement Rule 23's "design[] to encourage claimants with small claims to vindicate their rights and hold unlawful behavior to account."[24]

The First Circuit, therefore, chose "to follow the collective wisdom of courts over the past several decades that have permitted these sorts of incentive payments, rather than create a categorical rule that refuses to consider the facts of each case."[25]

The Ninth Circuit soon followed. In In re: Apple Inc. Device Performance Litigation, it rejected arguments from absent class-member objectors "that district courts lack discretion to award any service fees or incentive payments to class representatives," citing Greenough and Pettus as the bases of their argument.[26]

The Ninth Circuit instead held in 2022 that incentive awards are permissible so long as they are reasonable.[27] The court explained that it had already examined Greenough and Pettus within the context of assessing the validity of incentive awards and explained that it read those cases to proscribe only disproportionately large incentive awards.[28]

Specifically, the court noted that, when adjusted for inflation, the payment scheme rejected in Greenough amounted to $76,000 per year for 10 years to the lead plaintiff on top of an additional $458,000 lump sum, which was a far cry from the $1,500 to $3,500 in incentive awards approved by the district court.[29]

It's complicated in the Second Circuit.

Things are more complicated in the Second Circuit. The issue appeared settled after the court's September 2022 decision in Hyland v. Navient Corp., where a three-judge panel rejected the Greenough and Pettus argument, noting that it had already decided in Melito v. Experian Marketing Solutions Inc. that Greenough and Pettus are inapposite to challenge the permissibility of incentive awards due to their disparate factual settings.[30]

But, roughly six months later, in March, a different three-judge panel in Fikes Wholesale Inc. v. HSBC Bank USA NA, stated in its opinion that service awards are likely impermissible under Supreme Court precedent in Greenough and Pettus.[31]

Importantly, however, the court recognized that it was bound to follow the prior panel decisions in Melito and Hyland, and it ultimately affirmed the inclusion of the incentive awards in the settlement at issue.[32]

In doing so, the court nevertheless found the $900,000 in incentive awards at issue — split among eight named plaintiffs as part of a roughly $5.6 billion class settlement — excessive and remanded to the district court with instructions to recalculate the awards to a lower total amount.[33]

The Supreme Court declines to resolve the split.

Given the stakes, it is unsurprising that the individuals on the losing end of the above-described cases sought relief from the Supreme Court.

For example, in Hyland, absent class member objectors filed a petition for writ of certiorari, seeking to challenge the Second Circuit's decision to permit incentive awards.

Similarly, the settling parties in Johnson sought Supreme Court review of the Eleventh Circuit's holding that incentive awards are per se impermissible. Despite having the issues presented to it from both sides of the circuit split, the Supreme Court denied all related petitions for certiorari on April 17.[34]

Conclusion and Takeaways

With no justice submitting an opinion respecting the denial of certiorari, it is impossible to know why the Supreme Court rejected the petitions in Hyland and Johnson.

Whatever the reason, defendants seeking to settle litigation on a class-wide basis should anticipate objections from absent class members and judicial scrutiny if the proposed settlement agreement provides for incentive payments.

While we expect parties will continue to use, and courts will continue to approve, incentive awards in proposed class-wide settlements — except in the Eleventh Circuit — emboldened objectors pose a credible threat to hard-fought class settlement agreements.

Class action defendants therefore should anticipate and account for those challenges in the proposed settlement agreement by, among other things, providing for contingent mechanisms to allow for the settlement as a whole to survive, even if a court strikes down or reduces the amounts of the incentive awards.

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[1] See Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1255–61 (11th Cir. 2020) (relying on Trustees v. Greenough, 105 U.S. 527 (1882) and Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116 (1885)).

[2] See Murray v. Grocery Delivery E-Servs. USA Inc., 55 F.4th 340, 352–54 (1st Cir. 2022).

[3] See In re Apple Inc. Device Performance Litig., 50 F.4th 769, 785–87 (9th Cir. 2022).

[4] See Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704, 720–23 (2d Cir. 2023).

[5] Rodriguez v. West Publ'g Corp., 563 F.3d 948, 958–59 (9th Cir. 2009).

[6] Humphrey v. United Way of Tex. Gulf Coast, 802 F. Supp. 2d 847, 868–69 (S.D. Tex. 2011) (collecting cases); see also Tussey v. ABB, Inc., 850 F.3d 951, 962 (8th Cir. 2017) ("Incentive awards compensate lead plaintiffs for their work and the benefit they have conveyed on the rest of the class.").

[7] Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).

[8] Van Vranken v. Atl. Richfield Co., 901 F. Supp. 294, 299 (N.D. Cal. 1995).

[9] See Fed. R. Civ. P. 23(e).

[10] Rodriguez, 563 F.3d at 960 (internal quotation marks omitted).

[11] See, e.g., Murray, 55 F.4th at 352 (Explaining that "Courts have blessed incentive payments for named plaintiffs in class actions for nearly a half century, despite Greenough and Pettus."); Vogt v. State Farm Life Ins. Co., No. 16-4170, 2021 WL 247958, at *4 (W.D. Mo. Jan. 25, 2021) (noting that "the Eighth Circuit has expressly recognized the value of incentive awards" and "has repeatedly affirmed service awards to class representatives").

[12] See Muransky v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1196–97 (11th Cir. 2019).

[13] See 975 F.3d at 1255–61.

[14] See id.

[15] 105 U.S. 527 (1881).

[16] 113 U.S. 116 (1885).

[17] Johnson, 975 F.3d at 1257.

[18] Id. at 1260.

[19] See id. at 1259.

[20] Id. (internal quotation marks omitted).

[21] 55 F.4th 340 (1st Cir. 2022).

[22] Id. at 352.

[23] Id.

[24] Id. at 353.

[25] Id.

[26] 50 F.4th 769, 785 (9th Cir. 2022).

[27] See id. at 786–87 ("The point is that incentive awards cannot categorically be rejected or approved. … So long as they are reasonable, they can be awarded." (internal citations omitted)).

[28] See id. at 785–86.

[29] Id. at 786.

[30] See Hyland v. Navient Corp., 48 F.4th 110, 123–24 (2d Cir. 2022); Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 96 (2d Cir. 2019).

[31] 62 F.4th at 721.

[32] See id. at 721, 723.

[33] See id. at 722–23 (noting specifically that "[t]he class should not pay for time spent lobbying for changes in law that do not benefit the class" and expressly directing "the district court to reduce the award to the extent its size was increased because of time spent lobbying.").

[34] See, e.g., Carson v. Hyland, No. 22-634, --- S.Ct. ----, 2023 WL 2959375 (Apr. 17, 2023); Johnson v. Dickenson, No. 22-389, --- S.Ct. ----, 2023 WL 2959369 (Apr. 17, 2023).