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BLOG

Circuit Split Deepens: Are Named Plaintiffs Entitled to Incentive Awards?

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Last month, the First Circuit held that incentive awards for named plaintiffs are permissible under Rule 23, increasing the odds this question will be considered by the Supreme Court. *See Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 353–54 (1st Cir. 2022). The First Circuit in reaching its holding joined with the Ninth Circuit (*In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786 (9th Cir. 2022)) in an emerging circuit split with the Eleventh Circuit. The Eleventh Circuit—relying on case law from the 1880's—holds that incentive awards for named plaintiffs are prohibited by Supreme Court precedent. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1255 (11th Cir. 2020) (citing *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885)).

If incentive awards for class action plaintiffs are prohibited, it will have dramatic effects on the class action bar. The plaintiff in *Johnson* argued in its cert petition to the Supreme Court that "[i]ncentive awards are critically important to class-action litigation," and "a key tool to maintaining vigor in class-action litigation." *Johnson v. Dickenson*, No. 22-389 (filed Oct. 21, 2022), at 4, 19, petition for cert. pending. If this tool is unlawful, the *Johnson* plaintiff argues, then it will be more difficult to find willing named plaintiffs to take on the responsibility of representing absent class members.

The class action bar must confront the Supreme Court's holdings in *Greenough* and *Pettus* in arguing for the availability of incentive awards. In *Greenough*, which predates the existence of class actions as a procedural mechanism, the plaintiff sued on behalf of himself and other similarly situated bondholders who invested in a trust the plaintiff alleged was mismanaged. *See Greenough*, 105 U.S. at 528–29. The plaintiff prevailed and petitioned the trust for a disbursement to compensate him for his efforts in prosecuting the claim on behalf of all bondholders. *Id.* at 529. The fee petition worked its way to the Supreme Court, which held that it was proper for the plaintiff to be compensated for "his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund," but held compensation for "personal services and private expenses"—in particular, a yearly salary for performing trust-related activities—was without legal basis. *Id.* at 537–38. *Pettus* affirmed the holding in *Greenough*. *See Pettus*, 113 U.S. at 126.

The Eleventh Circuit held that "modern-day incentive award[s] for . . . class representative[s] [are] roughly analogous to a salary" and therefore expressly precluded by *Greenough* and *Pettus*. *Johnson*, 975 F.3d at 1257. The First and Ninth Circuits rejected the extension of *Greenough* to class actions, noting that the rule in *Greenough* was derived from the law of trusts, while the compensation for a named plaintiff is a matter of contract law. *See Murray*, 55 F.4th

at 352–53. Additionally, they noted that the salary sought by the plaintiff in *Greenough*, adjusting for inflation, was hundreds of thousands of dollars, while incentive awards for named plaintiffs in class actions are typically below $10,000 and subject to judicial review for fairness. *See In re Apple*, 50 F.4th at 786. Even so, similar arguments were made by the plaintiff in *Johnson* and rejected by the Eleventh Circuit, which means the circuit split endures.

This is a developing case with important implications for class action practice, and one that we will continue to monitor.

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