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Back to the future: The 11th Circuit returns to the 1880s to undo incentive fees in class actions

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"Great Scott!"[1] Late last week, the United States Court of Appeals for the Eleventh Circuit reversed what seemed to be a fairly conventional settlement of a Telephone Consumer Protection Act ("TCPA")[2] class action claim. But the reversal itself was actually anything but conventional.

Continuing a recent trend of using century-old cases about railroads to decide 21st century legal issues,[3] the majority in *Johnson v. NPAS Solutions, LLC* undid a $1,432,000 class action settlement because it included a $6,000 "incentive award" to the named plaintiff. While the decision is binding only in the Eleventh Circuit (which spans Alabama, Georgia, and Florida), under its reasoning no federal court anywhere in the country should approve any incentive award in any class action settlement unless and until either Congress or the United States Supreme Court changes the law.

The decision below

NPAS Solutions, LLC ("NPAS") collects medical debts. In 2017, Charles Johnson ("Johnson") sued it in Federal District Court in Florida for allegedly using an "automatic telephone dialing system" to call him and others without their "prior express consent" as required by the TCPA.[4]

Because the TCPA provides for statutory damages of $500 for each violation, and allows treble damages for willful or knowing violations,[5] NPAS (like many companies facing TCPA claims)

[1] Dr. Emmett Brown (Christopher Lloyd), *Back to the Future*, dir. Robert Zemeckis, (Universal Pictures 1985).

[2] 47 U.S.C.A. § 227 *et seq.* (West 2020).

[3] *Cf., e.g., Waithaka v. Amazon.com, Inc.*, 966 F.3d 10, 20-21 (1st Cir.2020) (citing *Phila. & Reading Ry. Co. v. Hancock*, 253 U.S. 284, 285-86 (1920); *Shanks v. Del., Lackawanna, & W.R.R. Co.*, 239 U.S. 556, 558-59 (1916); *Ill. Cent. R.R. Co. v. Behrens*; 233 U.S. 473, 477-78 (1914); and *Seaboard Air Line Ry. v. Moore*, 228 U.S. 433, 434-35 (1913)).

[4] 47 U.S.C.A. § 227(b)(1)(A).

[5] *Id.* § 227(b)(3).

quickly considered settlement as one of its options. And indeed, fewer than eight months after Johnson had begun his class action, the parties had agreed to a nationwide settlement.

As part of the proposed settlement, Johnson moved, without objection from NPAS, to certify a class for settlement purposes, to have himself appointed as the class representative, and to seek preliminary approval for a monetary remedy. In particular, the parties had agreed that NPAS would create a settlement fund of $1,432,000, out of which attorneys' fees of up to 30%, and an incentive award to Johnson himself of up to $6,000 "as acknowledgment of his role in prosecuting this case on behalf of the class members," would be paid.[6]

From the perspective of the parties, everything proceeded smoothly. The district court certified the class, granted preliminary approval, scheduled a final hearing, and ordered a notice to the class, which included a right to object or opt out. The notice approved by the district court also included a provision to the effect that Johnson's counsel could file a motion for attorneys' fees some 18 days *after* the last date for class members to object to those fees.[7]

When the deadline for objections under the notice came, only one class member—Jenna Dickenson ("Dickenson")—objected. She asserted that the settlement violated Federal Rule of Civil Procedure 23 and the Due Process Clause of the United States Constitution because the amount of the settlement was too low for class members (in part because they had no timely opportunity to object to a motion seeking 30 percent of the settlement for attorneys' fees). She also claimed that the district court should have done a "lodestar calculation" rather than a percentage of fund calculation in approving those attorneys' fees. Finally, she argued that the proposed $6,000 incentive award both "contravened the Supreme Court's decisions in *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885), and created a conflict of interest between Johnson and other class members."[8]

Rejecting all these arguments, the district court entered a short (seven-page) order approving the settlement. Its findings consisted essentially of a recitation of the legal requirements for class action settlements and a conclusion that the particular settlement before it was "in all respects fundamentally fair, reasonable, adequate, and in the best interests of the class members."[9] Despite this conventional judicial endorsement and years of modern precedent against her on most of her issues, Dickenson promptly appealed the denial of her objection.

The Eleventh Circuit's reversal

The Eleventh Circuit panel, which heard Dickerson's appeal, did not accept all of her arguments (and the majority found some of them would be harmless error even if correct). But two of the three judges on the panel hearing the case agreed with her on what might have seemed to be her weakest position—her objection to the $6,000 incentive award.

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[6] *Johnson v. NPAS Sols., LLC*, 17-cv-80393-ROSENBERG/HOPKINS, 2017 U.S. Dist. LEXIS 205814, at *9(S.D. Fla. Dec. 4, 2017).

[7] *Id.* at *12.

[8] *Johnson v. NPAS Sols., LLC*, No. 18-12344, 2020 U.S. App. LEXIS 29682, at *6 (11th Cir. Sept. 17, 2020).

[9] *Johnson*, 2017 U.S. Dist. LEXIS 205814, at *4 (citing *Leverso v. SouthTrust Bank of Ala.*, 18 F.3d 1527, 1530 (11th Cir. 1994)).

The majority began by ruling that Dickenson was right to have complained about the timing of the attorneys' fee question in the settlement below. Under Federal Rule of Civil Procedure 23(h), and as held in a number of cases in other circuits, class members are entitled to more than what the district court had done by way of a fee setting process. As the majority observed, "[t]he plain text of the rule requires that any class member be allowed an opportunity to object to the fee 'motion' itself, not merely to the preliminary notice that such a motion will be filed."[10] But the majority also concluded that this error was harmless. Class members did have an opportunity to object in general to the idea of a 30% fee, and Dickenson herself identified no arguments based on the actual fee motion that she had not already made as to the settlement itself.[11]

Up to this point, the majority's analysis was conventional and consistent with decisions elsewhere in the country. But its analysis of the incentive award issue was strikingly different. Looking back to a pair of United States Supreme Court decisions from the 1880s, *Greenough* and *Pettus*, Judge Kevin C. Newsom concluded that, albeit old, those precedents (which are binding in all federal courts nationwide) affirmatively bar the many decades of modern practice allowing incentive payments to named class representatives in class action settlements.

Judge Newsom first reviewed *Greenough*. In that case, a holder of railroad bonds sued the trustees of a fund that was formed to support the railroad, accusing them of "wasting and destroying the fund."[12] While no true equivalent to Rule 23 existed yet, the plaintiff brought the lawsuit to benefit both himself and all other bondholders. After his lawsuit succeeded, the lower court awarded him not only reimbursement for various costs and expenses, including attorneys' fees, but also an award for his "personal expenses and services."[13]

On appeal, the United Sates Supreme Court approved the award of reimbursement for expenses, but disallowed the award for the plaintiff's "personal services and private expenses."[14] The Court reasoned that, allowing a plaintiff to recover a salary for his time and private expenses in bringing a litigation "would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors."[15] In other words, it could create conflicts between a class representative and a class.

Next Judge Newsom turned to *Pettus*.[16] In that case, the Supreme Court re-affirmed the central holding of *Greenough*, holding that while a "class representative's claim for 'the expenses incurred in carrying on the suit and reclaiming the property subject to the trust,' is proper, his 'claim to be

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[10] *See Johnson*, 2020 U.S. App. LEXIS 29682, at *11 (quoting *In re Mercury Interactive Corp. Sec. Litig.*, 618 F.3d 988, 993–94 (9th Cir. 2010), and citing Fed. R. Civ. P. 23(h)(2), Advisory Committee Note to 2003 Amendment).

[11] *Id.* at *13-15 (citing *Keil v. Lopez*, 862 F.3d 685, 705 (8th Cir. 2017)).

[12] *Id.* at *19 (quoting *Greenough*, 105 U.S. at 528-29).

[13] *Greenough*, 105 U.S. at 530.

[14] *Id.* at 531.

[15] *Id.* at 538.

[16] *Pettus* was decided in 1885—the same year to which Marty McFly (Michael J. Fox) traveled in the final *Back to the Future* film. *See Back to the Future III*, dir. Robert Zemekis (Universal Pictures 1990).

compensated, out of the fund or property recovered, for his personal services and private expenses' is 'unsupported by reason or authority.'"[17]

Judge Newsom found these 19th century decisions to be clear on a fundamental tenant of representative litigation in America: "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."[18] But the majority in *Johnson v. NPAS* did not stop there. Judge Newsom further declared that "modern-day incentive awards" are even more problematic than the 19th century variety because today's incentive awards are not merely reimbursements for cost and time expenditures, but act more like "a prize to be won (i.e., as a bounty)."[19]

In reaching this conclusion, the majority expressly rejected the argument that *Greenough* and *Pettus* had been overruled or superseded by the enactment of Rule 23. Rule 23 is actually entirely silent on the issue of incentive awards. It therefore cannot replace the holdings of *Greenough* and *Pettus*. Similarly, the majority rejected any "appeal to ubiquity."[20] Acknowledging that incentive awards are "fairly typical in class action cases," Judge Newsom nevertheless wrote that "we are not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent."[21]

The dissent

Judge Beverly B. Martin disagreed with the majority on the incentive fee issue. In particular, she chastised Judge Newsom for, in effect, using a time machine to find "decisions from the 1880s that do not reflect the current views of the Supreme Court or other circuits."[22] Judge Martin would have applied a more contemporary (and in her view binding) Eleventh Circuit precedent, *Holmes v. Continental Can Co*.[23] In her view, *Holmes* stands for the proposition that a court reviewing a class action settlement including an incentive fee should only be concerned that the proposed payment is one that would not be likely to create a conflict between the representative plaintiff and the class—an approach she considers to have been nearly universally accepted in other circuits.[24]

The outcome

The majority was not moved by the dissent. The Supreme Court's 1880s precedents may be old, and modern practice may be different, but the precedents remain. If today's Supreme Court no longer

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[17] *Johnson*, 2020 U.S. App. LEXIS 29682, at *23 (quoting *Pettus*, 113 U.S. at 122).

[18] *Id.* at *23-24.

[19] *Id.* at *24.

[20] *Id.* at *27.

[21] *Id.*

[22] *Id.* at *46 (Martin, J. dissenting).

[23] 706 F.2d 1144 (11th Cir. 1983).

[24] *Johnson*, 2020 U.S. App. LEXIS 29682, at *39-41 (citing *Chieftan Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P.*, 888 F.3d 455, 468-69 (10th Cir. 2017); *Berry v. Schulman*, 807 F.3d 600, 613-14 (4th Cir. 2015); *Cobell v. Salazar*, 679 F.3d 909, 922 (D.C. Cir. 2012); *Sullivan v. DB Invs., Inc.*, 667, F.3d 273, 333 n.65 (3d Cir. 2011); *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003); and *In re U.S. Bancorp Litig.*, 291 F.3d 1035, 1038 (8th Cir. 2002)).

agrees with *Greenough* or *Pettus*, the majority invites the Supreme Court to overrule them.[25] Alternatively, the Federal Rules Advisory Committee could suggest changes to, and Congress can amend, Rule 23 to authorize incentive awards.[26]

Conclusion

In our view, a circuit conflict now exists on the incentive fee issue. Given the nearly equal division of Democratic and Republican appointees on the active Eleventh Circuit bench, *en banc* review is certainly possible. But if the decision in *Johnson v. NPAS* stands, the case will be a compelling candidate for Supreme Court review.

With the composition of the Supreme Court changing yet again as we write, it is not easy to predict how the new Court would rule if it accepted review. But one thing is certain—the plaintiffs' federal class action bar will consider the stakes high. If the Supreme Court were to reaffirm its 140-year old precedents in the way interpreted by the majority in *Johnson v. NPAS*, that bar will argue that the result would meaningfully reduce access to class action relief by reducing the number of persons willing to act as class representatives.

We are not so sure. First, while many state court systems have adopted rules parallel to the Federal Rules of Civil Procedure, it is not clear that *Greenough* and *Pettus* are binding on their incentive fee practices (even if perhaps the analysis of those cases is right and they ought to follow the logic of that analysis). Second, some state courts use class action rules that do not parallel those of the federal courts. Third, when deposed, it is the rare class representative who will say that an expectation of any incentive award motivated their claim. So the more likely result of a widespread acceptance of *Johnson v. NPAS*, whether by the Supreme Court or other circuits, would be to increase state court filings and to reduce slightly the number of improperly motivated class plaintiffs. In a small way, that might also be another back to the future result.

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[25] *Id.*at *28.

[26] *Id.*