

Split Eleventh Circuit Panel Eliminates Incentive Awards for Class Representatives

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Last month, in a split decision, the Eleventh Circuit reversed a district court's incentive award to the named plaintiff in a class action alleging willful violations of the Telephone Consumer Protection Act. In doing so, it may have rung the death knell on class action incentive awards in that Circuit. [*Dickenson v. NPAS Solutions*, No. 18-12344 \(11th Cir. Sept. 17, 2020\)](#).

Named plaintiff Charles Johnson brought a putative class action against Defendant NPAS Solutions in the Southern District of Florida, alleging NPAS called him and other putative class members through its automated dialing systems without their consent. The suit quickly proceeded to settlement, where the class obtained a \$1.4 million recovery, including a \$6,000 incentive award for Johnson. The district court preliminarily approved the settlement, and set a deadline for class members to object. Class member Jenna Dickenson objected but the district court overruled her objections and approved the settlement.

On appeal, writing for the majority, Judge Kevin C. Newsom agreed with Dickenson that the Supreme Court's decisions in [*Trustees v. Greenough*, 105 U.S. 527 \(1882\)](#) and [*Central Railroad & Banking v. Pettus*, 113 U.S. 116 \(1885\)](#) make clear that while plaintiffs suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, they cannot be paid a salary or be reimbursed for personal expenses. The majority determined that modern day incentive awards are even more troubling than the prohibited salary and expense reimbursements because they 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)." Accordingly, the Court reversed the incentive award.

Judge Beverly B. Martin dissented on the ground that categorically prohibiting incentive awards will reduce the willingness of potential class representatives to take on litigation. Instead, citing precedent from the Eleventh Circuit and other Circuit courts, Judge Martin took the position that incentive awards should be evaluated on a case-by-case basis to determine whether they are fair and whether they create a conflict between the named plaintiff and other class members.

The Eleventh Circuit appears to be the only Circuit to date to have banned incentive awards to compensate class representatives for their time and for bringing a lawsuit. But this decision may not be the final word. On October 22, Johnson filed a [petition](#) urging the Eleventh Circuit to review this panel decision *en banc*. Johnson argued in his petition that the panel's categorical prohibition against incentive awards conflicts with the law in every other Circuit and diverges from long-standing class action practice. The Eleventh Circuit has not yet ruled on this petition. Watch this space for further developments.

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