11th Circ. Ban On Service Awards May Inhibit Class Actions

By **William Reiss and Dave Rochelson** (May 19, 2022)

William Reiss

Dave Rochelson

It is common in class action practice, after years of litigation, for class counsel to seek, and for courts to award, an incentive or service award to the individuals or businesses who stepped forward to represent the class and make the case possible. But the availability of service awards has fallen under a dark cloud — at least in one federal circuit — thanks to the 2020 decision in Johnson v. NPAS Solutions.[1]

In Johnson, a divided panel of the U.S. Court of Appeals for the Eleventh Circuit departed from decades of established case law — and the law in every other circuit — to rule that two U.S. Supreme Court cases from the 19th century prohibit such awards.

Although the Johnson court remains an outlier, its prohibition of service awards may make class actions more difficult to bring in the Eleventh Circuit, and possibly beyond. Yet the Johnson decision remains in limbo, because an en banc petition to reverse it has been pending for a year and half, leading district courts in that circuit to reach a variety of different outcomes.

Background

In Johnson, the parties settled a class action involving conduct by medical debt collectors that allegedly violated the Telephone Consumer Protection Act.[2]

Jenna Dickenson, a serial objector, challenged class counsel's request that the court award the named plaintiff an amount not to exceed $6,000 as "acknowledgement of [the named plaintiff's] role in prosecuting this case on behalf of the class members."[3] The U.S. District Court for the Southern District of Florida entered a final order approving the settlement over Dickenson's objection.[4]

Dickenson appealed. Among other things, Dickenson argued that two Supreme Court decisions from the late 19th century — Trustees v. Greenough, from 1882, and Central Railroad & Banking Co. v. Pettus, from 1885 — required the court to reject the proposed service award.

In Greenough, the plaintiff won "a considerable amount of money" from a railroad company on behalf of himself and his fellow bondholders.[5] A special master ruled that, in addition to his pro rata share of the recovery, the plaintiff was entitled to recover his costs of suit, including attorney fees, as well as to receive compensation for his personal expenses and services, including an allowance of $2,500 a year for 10 years.[6]

The Supreme Court ultimately agreed that the plaintiff could recoup his costs of suit because, though not a trustee, he had "at least acted the part of a trustee in relation to the common interest."[7] But when it came to personal services, while the court found it permissible for trustees to recover such costs in order "to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee," such awards are not available to creditors.

The court reasoned that it "would present too great a temptation" to bring frivolous cases if a creditor "could calculate upon the allowance of a salary for their time and of having all their private expenses paid."[8]

The Johnson Decision

In Johnson, a divided Eleventh Circuit panel, including a judge from the U.S. Court of Appeals for the Tenth Circuit sitting by designation, held that Greenough and Pettus precluded not only the award at issue, but all service awards earmarked for class representatives like Johnson.[9]

Acknowledging that its decision departs from decades of case law in which class representative service awards are routinely approved, the court characterized its opinion as corrective. The Greenough and Pettus decisions, the court stated, "seem to have been largely overlooked in modern class-action practice."[10]

The Johnson court read those decisions to declare a rule: that "[a] plaintiff suing on behalf of a class can be reimbursed for attorney fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses."[11]

Indeed, the majority held that the incentive award at issue was even worse — "part salary and part bounty" — because the class representative sought to be "compensated for the time he spent litigating the case, or his 'personal services'" as well as:

> a bonus for bringing the suit, inasmuch as he has "subjected himself to scrutiny from NPAS Solutions, class members, and the public at large," "successfully brought a class action that provides meaningful cash benefits to thousands of persons," and "provided an important public service by enforcing consumer protection laws."[12]

In a footnote, the court explained that its decision also tracks its obligation to make sure class representatives do not receive preferred treatment.[13] The court rejected the plaintiff's argument that Greenough and Pettus are not applicable because "both pre-date Rule 23 by decades," since each "involved an analogous litigation actor — i.e., a 'creditor seeking his rights in a judicial proceeding' on behalf of both himself and other similarly situated bondholders."[14]

What Johnson Gets Wrong

There is no real dispute that, as Johnson put it, a named plaintiff should not earn a salary or a bounty. But that is not what a service award does.

Courts routinely recognize that named plaintiffs are entitled to modest service awards. As Johnson's one dissenting judge recognized, individuals incur costs when they agree to serve as class representatives, which "may include time and money spent, along with all the slings and arrows that accompany present day litigation."[15]

Class representatives take on substantial risk to their personal reputation and privacy by serving as named plaintiffs. That includes the inconvenience and discomfort of producing documents, reviewing discovery responses and major filings, sitting for depositions, and staying up to date on case developments.

Class representative discovery is often time-consuming and burdensome, to the point that the burdens of service often outweigh any individual benefit to the class representative. Of

course, class representatives have the choice to not serve as named plaintiffs and incur none of these costs.

But public policy weighs in favor of offering individuals and businesses incentives to step forward and bring class actions — which frequently involve negative value claims for which the pro rata individual recovery alone would not be worth the candle.

There are at least two reasons why a service award is not a bounty. First, numerous safeguards are in place. For example, the court serves as a gatekeeper and even a quasi-fiduciary, to ensure that a settlement does not create any conflicts between class representatives and absent class members.[16]

To that end, diligent class counsel are careful not to promise named plaintiffs at the outset of the case that they will receive an award above and beyond their pro rata share of any recovery — only that counsel will ask for a modest service award, subject to the court's approval.

In some cases, plaintiffs will submit declarations or affidavits stating as such, and often have to answer questions on the subject at deposition. And the court's oversight has teeth: Some courts have held that a guaranteed award creates a conflict between plaintiffs and absent class members.[17]

Second, service awards are simply too small to be a salary or bounty. The plaintiff in Greenough sought recovery of his litigation costs and attorney fees, totaling more than $50,000. Above and beyond this sum, he requested $15,003.35 for "railroad fares and hotel bills," and an "allowance out of the fund for his expenses and services," in the form of a salary of $2,500 per year for 10 years of personal services.

In other words, the salary at issue in Greenough was actually a salary. Adjusted for inflation, the plaintiff in Greenough sought approximately $1.3 million from the fund for his salary and personal expenses.[18]

Such an outsized award would in most circumstances be inappropriate. But in the 21st century, service awards to class representatives tend to be no more than a few thousand dollars — a pittance in the scheme of a complex litigation that could drag on for years.

If anything, courts should approve larger incentive awards, to compensate class representatives for the risks they take — both to their reputation and business — the significant time they commit, and the substantial work they perform, without any guarantee of recovery.

Of course, the above two points are related. One of the ways that a court exercises its quasi-fiduciary obligation to ensure that a class settlement is fair and adequate is by ensuring that service awards do not create a conflict with the class because they are too high. And courts take this gatekeeping role seriously.

For instance, a court may simultaneously recognize that — as the U.S. Court of Appeals for the Seventh Circuit said in its 1998 decision in Cook v. Niedert — "an incentive award is appropriate if it is necessary to induce an individual to participate in the suit," yet nonetheless reduce the proposed award after evaluating it in light of "the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation."[19]

Indeed, Greenough itself recognizes the need for awards to induce litigation in the public interest. The decision explains that awards for "personal services" may be granted to trustees in order to "secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee."[20]

Those same considerations weigh in favor of granting service awards to class representatives. Thus, if anything, the Greenough decision does not support the Johnson majority's opinion — it supports the dissent.

How Johnson May Discourage Plaintiffs From Serving as Class Representatives

Although the Johnson decision has the potential to deter otherwise meritorious class actions from being filed, so far its impact has been limited. No other federal appellate court has addressed the Johnson decision — and, of the 10 district courts outside the Eleventh Circuit that have, each has refused to follow it.

Within the Eleventh Circuit, however, the Johnson decision has caused confusion. The plaintiff, Johnson, and the objector, Dickenson, have sought en banc review of the decision,[21] and half a dozen interest groups have filed amicus briefs.[22]

On Nov. 9, 2020, an anonymous judge withheld issuance of the mandate, permitting the appellate court to retain jurisdiction while the petition for rehearing en banc is pending. Nearly a year and a half later, the full court has yet to take up the issue, without any clear explanation for the delay.

Under Eleventh Circuit rules, this should not affect the decision's precedential value.[23] Nonetheless, a debate has emerged over whether to follow the decision or not.

One Eleventh Circuit decision — authored by U.S. Circuit Judge Beverly Martin, who authored the dissenting opinion in Johnson — found that Johnson controls. Half a dozen district courts from the Eleventh Circuit have agreed. One court suggested that the parties must explain "what this service award is compensating Plaintiffs for" in order to have a chance at approval.

On the other hand, some district courts in the Eleventh Circuit continue to approve service awards by distinguishing Johnson. Some have found awards to class representatives appropriate if they granted defendant a release broader than the class release.[24]

One court distinguished Johnson, Greenough and Pettus because the incentive awards at issue were not defined as a "bonus" or "salary," but rather compensation to the class representatives for "considerable risk of alienation and harm to their reputations for seeking to enforce their rights."

However, a substantial plurality of courts in the Eleventh Circuit have punted, approving class action settlements while setting aside the amount of the requested award and reserving jurisdiction for that narrow purpose, unless and until the full Eleventh Circuit or the Supreme Court address the issue.

One approach that parties may want to consider is including language in the settlement agreement, providing that class counsel reserves the right to petition the court for service awards if and when the Johnson decision is vacated or superceded.

One bit of poetic justice has arisen from the saga, which all began with a professional objector's challenge to a service award. In Drazen v. GoDaddy.com — in which the U.S. District Court for the Southern District of Alabama approved a class settlement in 2020 — an objector asked the court to apply Johnson and reject the proposed service awards to the named plaintiffs.[25]

After the court agreed, the objector then sought an incentive award for himself, arguing that the Johnson decision applied only to class representatives. But the district's chief judge disagreed, holding in an indicative motion — an appeal remains pending — that the logic of Johnson extends to objectors.[26] If any lesson is to emerge from Johnson and its progeny, perhaps that lesson is: Be careful what you wish for.

William Reiss is a partner and Dave Rochelson is an associate at Robins Kaplan LLP.

[1] Johnson v. NPAS Solutions LLC, 975 F.3d 1244 (11th Cir. 2020).

[2] Johnson v. NPAS Solutions LLC, No. 9:17-CV-80393, 2017 WL 6060778, at *1 (S.D. Fla. Dec. 4, 2017).

[3] Johnson, 975 F.3d at 1249.

[4] Case No. 9:17-cv-80393 (S.D. Fl.), ECF No. 53 at 5.

[5] Trustees v. Greenough, 105 U.S. at 529.

[6] Id. at 530-31.

[7] Id. at 532.

[8] Id. at 537-38.

[9] Johnson, 975 F.3d at 1255.

[10] Id. at 1256. The Johnson court acknowledged that every other circuit that has considered Greenough found that it did not prohibit service awards. Id. at 1258 n.8. (citing Melito v. Experian Mktg. Sols. Inc., 923 F.3d 85, 96 (2d Cir.), cert. denied sub nom. Bowes v. Melito, ––– U.S. ––––, 140 S. Ct. 677 (2019); Granada Invs. Inc. v. DWG Corp., 962 F.2d 1203, 1208 (6th Cir. 1992); Matter of Cont'l Ill. Sec. Litig., 962 F.2d at 571. Note that the Pettus decision did not involve any award for personal services. Although the Johnson court describes it "as a reiteration of the dichotomy drawn in Greenough" between costs of suit and compensation for personal services, 975 F.3d at 1257, Pettus merely summarizes that discussion in Greenough; it has no bearing on the holding. Because the dicta in Pettus is not separate and additional authority, the Johnson court's reliance on it as controlling law is curious.

[11] Id. at 1258.

[12] Id. (quoting plaintiff's brief).

[13] Id. at 1259 n.9.

[14] Id. at 1259.

[15] 975 F.3d at 1264. See also Faroque v. Park W. Exec. Servs., No. 15-cv-6868, 2020 WL 9812905, at *8 (E.D.N.Y. Jan. 29, 2020) (noting "undertaking the risk of retaliation by holding their name out in the caption of a publicly filed Complaint" as one of a dozen reasons justifying service awards).

[16] Both class counsel and the court have responsibilities to ensure the fairness and adequacy of class action settlements and fee awards. See In re Dry Max Pampers Litig., 724 F.3d 713, 718 (6th Cir. 2013) ("[I]n class-action settlements ... the law relies upon the 'fiduciary obligations' of the class representatives and, especially, class counsel, to protect [the] interests [of the class]. And that means the courts must carefully scrutinize whether those fiduciary obligations have been met") (citation omitted); In re Fid./Micron Sec. Litig., 167 F.3d 735, 736 (1st Cir. 1999) ("[T]he district court, called upon to make awards of fees and/or expenses in [common fund] case[s], functions as a quasi-fiduciary to safeguard the corpus of the fund for the benefit of the plaintiff class"); O'Connor v. AR Res. Inc., No. 3:08-cv-01703, 2010 WL 1279023, at *3 (D. Conn. March 30, 2010) ("[T]he Court has a gatekeeper role in connection with the certification of a class and the approval of a proposed settlement"). Scrutiny of class action settlements includes two rounds of approvals, preliminary and final, including an extensive analysis under the eight factors of Rule 23(e)(2) and, in some jurisdictions, the related factors of City of Detroit v. Grinnell Corp., 495 F. 2d 448, 463 (2d Cir. 1974).

[17] See Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 968 (9th Cir. 2009).

[18] See Consumer Price Index, 1800-, Federal Reserve Bank of Minneapolis (last visited Feb. 24, 2022), http://www.minneapolisfed.org/about-us/monetary-policy/inflation-calculator/consumer-price-index-1800-.

[19] Camp Drug Store Inc. v. Cochran Wholesale Pharm. Inc., 897 F.3d 825, 834 (7th Cir. 2018) (affirming district court's reduction of service award from $15,000 to $1,000), quoting Cook v. Niedert, 142 F.3d 1004 (7th Cir. 1998).

[20] Id. at 537-38.

[21] The objector sought the full court's review of other parts of the panel's decision where she did not prevail.

[22] The authors are members of the Committee to Support the Antitrust Laws, which filed one such amicus brief, but did not participate in the preparation of that brief.

[23] Under the Eleventh Circuit's Circuit Rule 36: Internal Operating Procedure #2, "Effect of Mandate on Precedential Value of Opinion," "published opinions are binding precedent. The issuance or non-issuance of the mandate does not affect this result." https://www.ca11.uscourts.gov/sites/default/files/courtdocs/clk/Rules_Bookmark_DEC21.pdf.

[24] See, e.g., Dozier v. DBI Servs. LLC, No. 3:18-CV-972-BJD-MCR, 2021 WL 6061742, at *8 (M.D. Fla. Dec. 22, 2021); Tweedie v. Waste Pro of Fla. Inc., No. 8:19-CV-1827-AEP, 2021 WL 5843111, at *11 (M.D. Fla. Dec. 9, 2021); Broughton v. Payroll Made Easy Inc., No. 2:20-CV-41-NPM, 2021 WL 3169135, at *4 (M.D. Fla. July 27, 2021); Brockman v. Mankin L. Group PA, No. 8:20-CV-893-T-35JSS, 2021 WL 911265, at *3 (M.D. Fla. March 10, 2021).

[25] Drazen v. GoDaddy.com, 2020 WL 8254868, at *14 (S.D. Ala. Dec. 23, 2020).

[26] Drazen, 2021 WL 1881648, at *3 (S.D. Ala. April 22, 2021).