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Class Action Dominoes, the Sequel: First and Ninth Circuits Criticize Eleventh's Categorical Rejection of Incentive Awards for Class Representatives

By Konrad Cailteux, Pravin Patel, and Patrick Lyons

A previous edition of Weil's *Class Action Monitor* discussed the Eleventh Circuit's decision in *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020), which held class action settlement incentive awards for class representatives run afoul of a pair of nineteenth century U.S. Supreme Court decisions: *Trustees v. Greenough*, 105 U.S. 527 (1882) and *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885). Since the Eleventh Circuit's decision, class settlement objectors in other circuits have cited *Johnson* in their attempts to block class action settlements in a range of different cases. This edition examines two recent decisions from the First and Ninth Circuits rejecting the reasoning in *Johnson* and upholding the use of incentive awards.

In re Apple Inc. Device Performance Litig., 50 F.4th 769 (9th Cir. 2022) involved a consumer class action against Apple asserting violations of California's Data Access and Fraud Act and the federal Computer Fraud and Abuse Act arising from alleged degraded system performance on certain iPhones following software updates. The district court approved a $310 million class settlement over objections, and the objectors appealed invoking *Johnson* to argue that *Greenough* and *Pettus* foreclosed incentive payments to class representatives. The Ninth Circuit disagreed. *Id.* at 785. The court emphasized that longstanding Ninth Circuit precedent had "repeatedly held that reasonable incentive awards to class representatives are permitted." *Id.* (citing *Roes, 1–2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1057 (9th Cir.

2019)) (cleaned up). *Greenough* and *Pettus*, the court explained, established the "common fund doctrine, a traditional equitable doctrine rooted in concepts of quasi-contract and restitution," under which "a private plaintiff … whose efforts create, discover, increase or preserve a fund to which others also have a claim[,] is entitled to recover from the fund the costs of his litigation, including attorneys' fees." *Id.* (cleaned up). The doctrine's "fundamental purpose" is "to spread the burden of a party's litigation expenses among those who are benefitted." *Id.* at 786 (cleaned up).

The court, however, cautioned, "[w]hile private plaintiffs who recover a common fund are entitled to an extra reward, they are limited to that which is deemed reasonable under the circumstances." *Id.* (cleaned up). *Greenough* "prohibited recovery for the plaintiff's 'personal services and private expenses' because the private plaintiff was a creditor who needed no inducement to bring suit." *Id.* (cleaned up). If private plaintiffs "could calculate upon the allowance of a salary for their time and of having all their private expenses paid … it would present too great a temptation." *Id.* (citing *Greenough*, 105 U.S. at 538) (cleaned up). "Private parties would be inclined to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount." *Id.*

Therefore, the court reasoned, the common fund doctrine permits "reasonable incentive payments to class representatives but not 'special rewards.'" *Id.* (citing *Staton v. Boeing Co.*, 327 F.3d 938, 976 (9th Cir. 2003)). "An incentive payment cannot be so large that it amounts to a preferred position in the settlement … or a salary." *Id.* (citations omitted). To make this determination, a district court must consider (1) "the actions the plaintiff has taken to protect the interests of the class," (2) "the degree to which the class has benefitted from those actions," (3) "the amount of time and effort the plaintiff expended in pursuing the litigation," and (4) "any financial or reputational risks the plaintiff faced." *Id.* (citing *Roes*, 944 F.3d at 1057) (cleaned up). In *Greenough*, the court explained, the Supreme Court disapproved of a 10-year allowance for "personal services," which amounted to, adjusted for inflation, $76,000 per year as well as "personal expenditures" on "railroad fares and hotel bills" worth $458,000—a far cry from the $1,500 incentive payment the district court had awarded most class representatives in the instant action. Accordingly, the Ninth Circuit reaffirmed that incentive awards for class representatives are permissible, but must be analyzed on a case-by-case basis for reasonableness and cannot be categorically rejected or approved. *Id.* at 786–87.

Murray v. Grocery Delivery E-Servs. USA Inc., 55 F.4th 340 (1st Cir. 2022) involved a consumer class action brought against a meal subscription service alleging its marketing campaign violated the Telephone Consumer Protection Act. The district court certified a proposed class for settlement purposes and approved the class action settlement agreement over objections. The objectors appealed, invoking the Eleventh Circuit's *Johnson* decision to argue incentive payments for class representatives violate *Greenough* and *Pettus*. The First Circuit rejected these arguments, noting that "[c]ourts have blessed incentive payments for named plaintiffs in class actions for nearly a half century, despite *Greenough* and *Pettus*." *Id.* at 352. The court also disagreed with *Johnson*'s reasoning that class-action incentive awards were "roughly analogous" to the payments for personal services at issue in *Greenough*. *Id.* (citing *Johnson*, 975 F.3d at 1257). First, the court explained, the *Greenough* court was "concerned that such awards would induce creditors to interfere with the management of funds that had already been entrusted to trustees charged with fiduciary duties to act in the best interests of creditors." *Id.* at 352–53. This, the court reasoned, was not the same rationale as "ensuring that named plaintiffs will actually represent the interests of the class in whose name they sue." *Id.* at 353. Stated differently, the court explained, *Greenough* was concerned with a creditor's relationship vis-à-vis the trustees, not other creditors.

Second, the court emphasized, Federal Rule of Civil Procedure 23(e), which came into being well after *Greenough* and *Pettus* were decided, ensures incentive payments will not result in unfair settlements by requiring settlements to be fair, reasonable, and adequate. *Id.* at 353. A court must find that class representatives have adequately

represented the class and that the settlement treats class members equitably relative to each other. *Id.* (citing Fed. R. Civ. P. 23(e)(2)). And federal courts routinely enforce this requirement with regard to incentive payments in particular. *Id.* (citing *Matter of Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) (upholding denial of $10,000 award to named plaintiff); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 602–03 (N.D. Cal. 2020) (denying request for incentive awards under facts of case); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 469 (D.P.R. 2011) (reducing incentive award from amount requested to reflect class representative's actual participation)).

Third, the court explained Rule 23's purpose, to encourage claimants with small claims to vindicate the rights of a class, requires that class representatives bear the brunt of litigation through document production, depositions, trial, testimony, etc. *Murray*, 55 F.4th at 353. Class representatives may have no incentive to do so unless the costs of litigation are shifted to those whose interests they advance. *Id.* Thus, the court reasoned, incentive payments remove an impediment to bringing a meritorious class action and fit squarely into Rule 23(e)(2)(D)'s requirement that settlements treat class members equitably relative to each other. Finally, the court rejected the objectors' argument that incentive payments create class conflicts rendering class representatives inadequate because it relied on the unsupported presumption that incentive awards inherently cause class representatives to sell out the class in favor of their own self interests. *Murray*, 55 F.4th at 353–54.

These two decisions reaffirm each of their circuits' context-specific reasonableness tests in analyzing incentive payments for class representatives. As an aside, it is not clear whether the outcome of *Johnson* would have been different if the case had been brought in either of these circuits. The incentive payment at issue in *Johnson* ($6,000) was considerable in light of the fact that the 9,543 class members who submitted claims would each receive only about $150. *See Johnson*, 975 F.3d at 1249–50. And the district court approved that incentive award and overruled the objections to it without any written analysis. Any case with these two facts could be at risk of reversal in the First or Ninth Circuits because both circuits require district judges to engage in a careful context-specific analysis to determine the reasonableness of an incentive award. An incentive award forty times greater than a class member payout could well be unreasonable, and would certainly be scrutinized by a court in these Circuits.

Objectors will almost certainly continue to invoke *Johnson* in their attempts to invalidate incentive payments in future cases. It remains to be seen whether other circuits will join the Eleventh Circuit's categorical rejection of such payments, or follow the lead of the First and Ninth Circuits in continuing to approve incentive payments. For example, a Second Circuit panel recently indicated its agreement with the rationale of the *Johnson* decision and questioned the viability of such payments. *See Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, No. 20-339, 2023 WL 2506455, at *8 (2d Cir. Mar. 15, 2023). Nevertheless, it felt constrained to follow the prior Circuit precedent in approving the class action settlement and incentive payments, although it remanded the case because it found the incentive payment was too high. *Id.* at *10, 15 (reducing incentive award "to the extent that its size was increased by time spent in lobbying efforts" because "[t]he class should not pay for time spent lobbying for changes in law that do not benefit the class" and "would not increase the recovery of damages."). And, it remains to be seen whether the Supreme Court may become interested in resolving this apparent Circuit conflict.

Thus, companies should keep these decisions in mind when negotiating future class action settlement agreements. Whether in a jurisdiction that outright prohibits such payments or in one that applies a context-specific reasonableness test, clients can use these decisions to argue for either no incentive payments or for lower incentive payments. And if an incentive payment is part of the settlement agreement, then companies should make sure the motion to approve the settlement contains sufficient support for the reasonableness of the award amount. Additionally, companies should also consider including a standard severability clause to ensure the remaining agreement survives in the event the incentive award term is struck down by a court.

Recent Supreme Court Rulings Continue to Chip Away at the Size and Scope of Nation-Wide Class Actions

By Edward Soto, Pravin Patel, and Daniel Guernsey

The landscape of nation-wide class actions has seen a shift since the Supreme Court's rulings in *Bristol-Myers* and *TransUnion*, with both cases bringing unnamed class members front and center. In light of these cases, practitioners may have to limit the size and scope of potential nation-wide classes to ensure every class member can establish personal jurisdiction and has standing. Only time will tell whether such concerns will lead to less class actions and save potential defendants money, or lead to more, smaller class actions and increased costs for potential defendants.

Bristol-Myers Squibb

In *Bristol-Myers Squibb Co. v. Sup. Ct. of Cal.*, 137 S. Ct. 1773, 1780 (2017), the Supreme Court held that there must be a link between the forum state and each plaintiff's claim in a mass tort action in order to establish specific personal jurisdiction. *Id.* at 1781–82. According to the Supreme Court, a common injury or claim among plaintiffs, alone, is insufficient. *Bristol-Myers* involved a *mass tort action*, and as the dissent noted, it did not address whether a court must have personal jurisdiction over all class members' (including unnamed members') claims in a *class action*.

The few circuit courts that have addressed *Bristol-Myers*' applicability to class actions have responded with an emphatic "no," finding that personal jurisdiction over named class members is sufficient. *Fischer v. Fed. Express Corp.*, 42 F.4th 366, 375 (3d Cir. 2022); *Lyngaas v. Curaden AG*, 992 F.3d 412, 417, 433–35 (6th Cir. 2021); *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 299 (D.C. Cir. 2020); *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447-48 (7th Cir. 2020); *Accord Hood v. Am. Auto Care, LLC*, 21 F.4th 1216, 1227–28 (10th Cir. 2021) (questioning whether the court's personal jurisdiction analysis would change if the putative class action became a class action proceeding) (citing *Mussat*, 953 F.3d at 447). Some lower courts, however, have held that the reasoning in *Bristol-Myers* applies with equal force in the class action context. *E.g.*, *In re Dental Supplies Antitrust Litig.*, 2017 WL 4217115, at *9 (E.D.N.Y. Sept. 20, 2017).

TransUnion

In *TransUnion L.L.C. v. Ramirez*, 141 S. Ct. 2190 (2021), the issue was whether the members of a class whose credit reports improperly identified them as a "potential match" to suspected terrorists, but whose credit reports had not been disseminated to a third party, had standing. The Supreme Court held they do not because a mere risk of future harm does not suffice; the fact that their credit report improperly identified them as a potential match to suspected terrorists, alone, was insufficient to create an injury-in-fact.

Circuit courts have continued to grapple with the scope of *TransUnion*. Some courts, like the Second Circuit, appear to have interpreted *TransUnion* to require some form of "downstream" harm beyond a statutory violation. *e.g.*, *Harty v. W. Point Realty, Inc.*, 28 F.4th 435, 443 (2d Cir. 2022) (finding that a plaintiff could not show an injury in fact when he alleged that a company's website did not comply with the ADA and "infringed his right to travel free from discrimination" because the plaintiff never alleged he was using the website for future travel). Other courts have found that *TransUnion* does not require some downstream harm beyond a statutory violation. *e.g.*, *Laufer v. Acheson Hotels, LLC*, 50 F.4th 259, 271 (1st Cir. 2022) ("[Laufer] had a right to the information that she alleges Acheson didn't give her. And the statute makes that denial of information discrimination against disabled persons and gives Laufer the right to sue in response. That Laufer had no intent to use the information for anything but a lawsuit doesn't change things – she was still injured in precisely the way the statute was designed to protect.").

Although initially these cases appear to be a useful tool for defendants to limit the scope and size of potential classes, it may ultimately lead to more harm than good. Class actions allow for the efficient resolution of numerous claims through a single streamlined case. The effect of prohibiting certain plaintiffs from joining a class based on jurisdictional or standing challenges may not necessarily be fewer claims to defend. In reality, the result for defendants may be more claims for them to defend against in multiple forums, leading to increased costs and inefficiency.

About Weil's Class Action Practice

Weil offers an integrated, cross-disciplinary class action defense group comprising lawyers with expertise across our top-rated practices and hailing from our eight offices across the U.S.

Whether our clients face a nationwide class action in one court or statewide class actions in courts across the country, we develop tailored litigation strategies based on our clients' near- and long-term business objectives, and guided by our ability to exert leverage at all phases of the case – especially at trial. Our principal focus is to navigate our clients to the earliest possible favorable resolution, saving them time and money, while minimizing risk and allowing them to focus on what truly matters—their businesses.

For more information on Weil's class action practice please visit our website.

Class Action Honors (cont.)

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