NORTH CAROLINA LAW REVIEW

Volume 100 | Number 4 Article 7

5-1-2022

Penny Pinchers or Conflict-Free Crusaders? Why the Eleventh Circuit Eliminated Service Awards for Class-Action Representatives

Christie Shaw

Penny Pinchers or Conflict-Free Crusaders? Why the Eleventh Circuit Eliminated Service Awards for Class-Action Representatives*

At the heart of every class action is a class representative who champions the suit. The representative is tasked with managing and organizing the class members, working hand in hand with attorneys, and responding to discovery requests. This responsibility, however, is accompanied by several burdens that place the representative in social and financial limbo. While that uncertainty has been combated with "incentive awards" that are awarded to a representative by the court for the representative's role in initiating the lawsuit on behalf of the class, the Eleventh Circuit has brought an end to such payments.

In Johnson v. NPAS Solutions LLC*, the court held that incentive awards, despite their prevalence in modern legal practice, created an attorney-client conflict of interest and violated Supreme Court precedent that specifically prohibits monetary awards. But the Eleventh Circuit's rationale is improper for three reasons: the burden placed on the class representatives far outweighs the benefits to the class,* Johnson *is distinguishable from the two Supreme Court cases used as precedent, and this decision will lead to further conflicts and forum shopping. In the Eleventh Circuit, class representatives are now at a significant disadvantage—working abundantly more, for equal recovery with other plaintiffs, despite substantially more costs and burden. This will lead to a decrease in willingness to serve as class representative, and attorneys may prefer to bring claims in other, incentive-award-friendly locations rather than the Eleventh Circuit.*

INTRODUCTION

When class-action cases are settled, the lead plaintiff, generally called the "class representative," routinely receives a "service award" or "incentive payment" for their role in initiating the lawsuit on behalf of the class. These payments are commonly provided and warranted due to the increased time, money, and resources necessary for organizing, certifying, and managing class members.[1] Such awards often total a few thousand dollars and are paid from the

1. *See* Corrado Rizzi, *What Does It Mean To Be the Lead Plaintiff in a Class Action Lawsuit?*, CLASSACTION (June 5, 2019), https://www.classaction.org/blog/what-does-it-mean-to-be-the-lead-plaintiff-in-a-class-action-lawsuit [https://perma.cc/33GS-XPX5] ("After a lawsuit is filed and begins to make its way through our legal system—a process that can sometimes take years—the lead plaintiff, on top of providing evidence during the discovery phase, will closely consult with attorneys and/or expert witnesses, and must be available for hearings, strategy sessions, depositions, and any other lawsuit-related appearances or conferences.").

aggregate sum that defendants pay to resolve class actions. However, the Eleventh Circuit Court of Appeals recently issued a decision that prohibits these awards.[2]

The class representative has a duty to vigorously pursue the interests of the class throughout the lawsuit.[3] The role requires exercising control over the class members and determining the best legal strategy for the lawsuit.[4] Often, class representatives are subjected to intrusive discovery requests regarding their qualifications and the alleged claims of the class.[5] To prepare for the class action, class representatives conduct document review and help counsel gather information from depositions.[6] Due to a high settlement rate among class actions, class representatives work closely with counsel to assess the potential settlement offers.[7] Above all, class representatives must put the class members' interests before their own to ensure a fair and just outcome.[8]

Still, class representatives bear significant burdens. The legal costs of class-action litigation creates a free-rider problem where idle class members reap the benefits of a successful settlement.[9] However, if the lawsuit is unsuccessful, the class representative is liable for all legal costs so long as other arrangements have not been made regarding liability.[10] Out-of-pocket expenses to meet procedural requirements—such as providing notice to class members of the pending suit—can become increasingly expensive.[11] Adding insult to injury, class representatives routinely suffer attacks on their character from employers and opposing counsel.[12] Considering these duties and liabilities, the Eleventh Circuit's recent decision fails to respect the position of class representatives.

In *Johnson v. NPAS Solutions LLC*,[13] the Eleventh Circuit held that incentive awards created an attorney-client conflict of interest and violated Supreme Court precedent that, despite their prevalence in modern legal

2. Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1255 (11th Cir. 2020) (holding that Supreme Court precedent prohibits incentive awards like Johnson's and that the award creates a conflict of interest between Johnson and the other class members).

3. MANUAL FOR COMPLEX LITIGATION (THIRD) § 30.16 (1995).

4. Gregory J. Brod, *The Role of the Named Plaintiff in a Class Action Lawsuit*, BROD LAW FIRM: S.F. INJ. LAW. BLOG (May 4, 2012), https://www.sanfranciscoinjurylawyerblog.com/the_role_of_the_named_plaintif_1/ [https://perma.cc/7ZUK-84FR].

5. *See id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. Donald N. Dewees, J. Robert S. Prichard & Michael J. Trebilcock, *An Economic Analysis of Cost and Fee Rules for Class Actions*, 10 J. LEGAL STUD. 155, 158–59 (1981).

10. *Id.* at 159.

11. *Id.*

12. Jason Jarvis, Note, *A New Approach to Plaintiff Incentive Fees in Class Action Lawsuits*, 115 NW. L. REV. 919, 927 (2020).

13. 975 F.3d 1244 (11th Cir. 2020).

practice, specifically prohibits monetary awards.[14] *Johnson* is an extension of *Trustees v. Greenough*[15] and *Central Railroad & Banking Co. v. Pettus*[16]—two cases from the late 1800s which held that incentive awards and similar payments were barred because they created conflicts of interest between representing attorneys and class members.[17]

In order to ensure equity, proper administration, and certainty, circuit court judges must follow binding precedent set by the Supreme Court.[18] Though the Eleventh Circuit attempted to do exactly that, its reliance on *Greenough* and *Pettus* is misguided. This Recent Development argues that the Eleventh Circuit's decision to classify modern-day incentive awards as conflicts of interest was improper for three reasons: (1) the burden placed on the class representative far outweighs the benefits to the class; (2) *Johnson* is distinguishable from *Greenough* and *Pettus*; and (3) the decision will lead to further conflicts and forum shopping. Consequently, the Eleventh Circuit's holding will negatively impact the willingness of individuals to serve as class representatives and promote further inconsistency in the law.[19] Ultimately, the *Johnson* court's decision threatens the future state of class actions by stripping away well-deserved compensation from lead plaintiffs and placing trivial cents or dollars into the pockets of class members.

This Recent Development proceeds in four parts. Part I analyzes the background and case law used by the *Johnson* majority for its findings. Part II examines the flaws in the *Johnson* majority's holding by pointing out the resulting inequity between the class representative and the class members, as well as the court's failure to consider alternative Supreme Court precedent on this subject. Part III explores the majority's decision to strictly adhere to the Supreme Court's decision in *Greenough and Pettus*, which disregards practicality and confuses the original definition of "incentive award." Last, Part IV discusses the new conflict of interest between class-action attorneys and class members, as attorneys may be self-interested in choosing a forum, ultimately leading to forum shopping.

14. *Id.* at 1248–49.

15. 105 U.S. 527 (1882).

16. 113 U.S. 116 (1885).

17. *See Greenough*, 105 U.S. at 537–38; *Pettus*, 113 U.S. at 127–28; *Johnson*, 975 F.3d at 1259.

18. *Johnson*, 975 F.3d at 1248.

19. *See* Mark Moller, *The Checks and Balances of Forum Shopping*, 1 STAN. J. COMPLEX LITIG. 171, 176 (2012) ("[W]hen it comes to the practice of forum shopping, constitutional law is in disarray. Our jurisdictional infrastructure enables forum shopping. *Erie* condemns it. And scholars have learned to live with the resulting dissonance and incoherence.").

I. BACKGROUND OF *JOHNSON*

In 2017, Charles Johnson—representing himself and a putative class—sued NPAS Solution, LLC ("NPAS") in the Southern District of Florida.[20] There, Johnson and the class alleged violations of the Telephone Consumer Protection Act ("TCPA").[21] After discovery and various motions, the parties successfully settled on November 2, 2017, less than eight months after the lawsuit was filed.[22] For settlement purposes, Johnson moved to certify the class because he believed that the $1,432,000 settlement was in the best interests of the class members.[23]

Once the district court approved the settlement and certified the class, the court appointed Johnson as the class representative.[24] The district court, in its order, also permitted Johnson to petition the court to receive a payment not to exceed $6,000 for his role in managing the class.[25] Notably, class members were able to opt out of, and object to, the settlement.[26] Some months later, the "class members were . . . informed that NPAS would establish a settlement fund, that class counsel would seek attorneys' fees amounting to 30% of the fund, and that Johnson would seek a $6,000 incentive award from the fund. In total, 9,543 class members submitted claims for recovery."[27]

On the day of the deadline to file objections, only one class member objected—the appellant.[28] First, the appellant argued that Johnson's $6,000 incentive award violated the Supreme Court's decisions in *Trustees v. Greenough* and *Central Railroad & Banking Co. v. Pettus*.[29] Second, the appellant argued that the incentive payment created a conflict of interest between Johnson and the class members.[30]

Even though courts have routinely approved these awards over the last century,[31] the Eleventh Circuit held that the *Greenough* and *Pettus* decisions prohibit any award that either compensates class representatives for time spent

20. *Johnson*, 975 F.3d at 1249.

21. *Id.* Thereafter, Johnson and the class quickly moved to the settlement phase. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 1249–50. From these figures, it appears that each class member would receive, at most, $105. This allotment is determined by first taking the settlement amount ($1,432,000), minus attorney's fees ($429,600). The remaining $1,002,400 is further reduced by the $6,000 incentive payment to arrive at $996,400. Notably, that number is taken pro rata from each class member's recovery. Lastly, $996,400 divided equally amongst 9,543 class members equals about $105 per person.

28. *Id.* at 1250.

29. *Id.*

30. *Id.*

31. The Fourth Circuit has acknowledged the prevalence of incentive awards and has allowed them in practice. Berry v. Schulman, 807 F.3d 600, 613 (4th Cir. 2015) ("[Incentive payments are] 'fairly typical in class action cases.'" (quoting Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 958–59 (9th Cir. 2009)).

or rewards them for bringing the class lawsuit.[32] The court acknowledged the prevalence of service awards, stating that "although it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them."[33]

Reviewing the *Greenough* and *Pettus* decisions, the Eleventh Circuit laid out its rationale.[34] The majority stated, "*Greenough* and *Pettus* are the seminal cases establishing the rule—applicable in so many class-action cases, including this one—that attorneys' fees can be paid from a 'common fund.'"[35] Further, the two cases determined limits on specific types of awards that litigants and attorneys can claim from the fund.[36] After the court introduced the binding precedent that arose from these seminal cases, it explored the particular facts of each case, starting with *Greenough*.

In *Greenough*, the plaintiff, who held bonds in the Florida Railroad Company, sued the trustees of another fund on behalf of himself and other bondholders.[37] The plaintiff, taking on the colossal burden of litigation and advancing most of the expenses, filed a petition to recover money from the settlement fund for his expenses and services rendered.[38] There, the plaintiff sought two monetary awards for his efforts: (1) an award for "*necessary expenditures*" including attorney's fees and (2) "an allowance of $2,500 a year for ten years of personal services" and reimbursement for his "*personal expenditures*" for "railroad fares and hotel bills."[39] On appeal, the Supreme Court approved the award for "reasonable costs . . . and expenses incurred in the fair prosecution of the suit" known as "necessary expenditures."[40] However, the Court determined that the second allowance for personal expenditures was

32. Trustees v. Greenough, 105 U.S. 527, 537–38 (1882) (holding that the trial court properly awarded the bondholder his attorney fees, costs, and expenses but not his personal fees or expenses); Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116, 128 (1885) (reversing a judgment that granted appellees their costs and fees associated with preparing a suit on behalf of appellants' creditors to obtain a lien against appellants' property because, although appellees were entitled to collect the fees of unsecured creditors other than their immediate clients, the fees awarded by the lower court were excessive).

33. *Johnson*, 975 F.3d at 1260.

34. *Id.* at 1254–57.

35. *Id.* at 1255–56 (citing Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)).

36. *Id.* at 1256.

37. *Greenough*, 105 U.S. at 528.

38. *Id.* at 529.

39. *Id.* at 530 (emphasis added).

40. *Id.* at 537. Other "necessary expenditures" in this case included "fees of solicitors and counsel, costs of court, and sundry small incidental items for copying records and the like, the whole amounting to $34,192.62." *Id.* at 530. Also allowed were "sundry fees paid in maintaining other suits in New York, and on appeal to this court, attorneys' fees for resisting fraudulent coupons, and expenses paid to attorneys and agents to investigate fraudulent grants of the trust lands." *Id.*

objectionable.[41] Although the Court provided some scenarios where this allowance would be tolerated, such as payments to a trustee for personal services rendered for managing a trust,[42] it ultimately held that the allowance "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."[43]

Four years after the *Greenough* decision came *Pettus*. In that case, the Supreme Court recognized that attorneys have a permissible claim to fees from the class's common fund for their rendered services.[44] Additionally, the Court held an attorney's claim should be awarded based on a percentage of the class recovery.[45] Significantly, *Pettus* reiterated the distinction between necessary expenditures and personal expenditures as explained in *Greenough*.[46] That is, while necessary expenditures are proper, personal expenses are "unsupported by reason or authority."[47]

The *Greenough* and *Pettus* holdings convinced the Eleventh Circuit that Johnson's incentive award was not a necessary expenditure and therefore not similar to permissible attorney's fees for services rendered on behalf of the class.[48] As such, Johnson's contentions regarding the practical use of incentive awards failed to persuade the court because the court believed that an incentive award was more akin to personal expenditures, which creates a conflict of interest.[49] Even after citing to *Berry v. Schulman*[50]—a 2015 Fourth Circuit decision expressly approving incentive payments[51]—the Eleventh Circuit essentially claimed its hands were tied.[52] In *Berry*, the Fourth Circuit asked

41. *Id.* at 537.

42. *Id.* at 537–38 ("Where an allowance is made to trustees for their personal services, it is made with a view 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. These considerations have no application to the case of a creditor seeking his rights in a judicial proceeding.").

43. *Id.* at 538.

44. Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1257 (11th Cir. 2020).

45. *Id.*

46. *Id.*

47. *Id.* (quoting Cent. R.R. & Banking Co. v. Pettus, 113 U.S. 116, 122 (1885)).

48. *See id.* at 1256–58 (discussing the difference between necessary and personal expenditures in *Greenough* and *Pettus* and applying that reasoning to Johnson).

49. In response to Rule 23 of the Federal Rules of Civil Procedure, the court stated, "Johnson's argument implies that Rule 23 has something to say about incentive awards, and thus has some bearing on the continuing vitality of *Greenough* and *Pettus*. But it doesn't—and so it doesn't." *Id.* at 1259. Concerning use in everyday practice, the court eloquently said "so far as we can tell, [the prevalence of incentive payments] is a product of inertia and inattention, not adherence to law." *Id.*

50. 807 F.3d 600 (4th Cir. 2015).

51. *Id.* at 614 ("Under these circumstances, we defer to the judgment of the district court in approving the Class Representatives' awards . . . under Rule 23(a)(4)."). There was no mention of either the *Greenough* or the *Pettus* decision in this case. *See generally id.* (approving incentive awards without addressing either *Greenough* or *Pettus*).

52. *Johnson*, 975 F.3d at 1260–61 ("If the Supreme Court wants to overrule *Greenough* and *Pettus*, that's its prerogative. Likewise, if either the Rules Committee or Congress doesn't like the result we've

whether an incentive payment gave the class representative preferential treatment over the class members.[53] However, the *Berry* court never referenced either *Greenough* or *Pettus*. Instead, the *Berry* court relied on two Ninth Circuit cases.[54] The main concerns in *Berry* were whether the incentive payment was determined at the beginning of litigation[55] and whether the class members' participation in the class action was conditioned on supporting the incentive payment.[56] Because neither of these limitations applied, the incentive payment was permitted.[57]

The consequences of *Johnson* are apparent. Abandoning practicality and common use, the Eleventh Circuit treats class representatives as second-class. But does the increase of a few dollars or cents in the pockets of class members outweigh the possible seismic shift in class-action litigation to come?

II. THE FLAWS OF *JOHNSON*

Although it seems at first glance that *Johnson* correctly follows binding precedent, the logic of the opinion is suspect. There are two key flaws in the majority's argument that discredit the Eleventh Circuit's holding: (1) the majority failed to grasp the net benefits of the incentive payments to the lead plaintiff compared to the trivial benefit incurred by class members individually; and (2) the court failed to address *Holmes v. Continental Can Co.*[58] and other recent guidance on incentive awards from the Supreme Court.[59] These flaws are discussed in the following two sections.

A. *Weighing Benefits*

The class representative serves as the champion for the class-action lawsuit. Although this title comes with privileges, such as unfettered access to attorneys and class members, the burden of this role often outweighs the benefits. Because a class action cannot function effectively without a class representative, the incentives for assuming the role should adequately make up for any burden associated with it. For cases where the class recovery is low, "a class member may even experience a net loss from acting as class champion because the small recoveries normally gained from the case are not enough to

reached, they are free to amend Rule 23 or to provide for incentive awards by statute. But as matters stand now, we find ourselves constrained to reverse.").

53. *Berry*, 807 F.3d at 613–14.

54. *See id.* at 613 (first citing Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 959 (9th Cir. 2009); then citing Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1164 (9th Cir. 2013)).

55. *Id.* (citing *Rodriguez*, 563 F.3d at 959).

56. *Id.* (citing *Radcliffe*, 715 F.3d at 1164).

57. *Id.* at 614.

58. 706 F.2d 1144 (11th Cir. 1983).

59. *See, e.g.*, Frank v. Gaos, 139 S. Ct. 1041 (2019) (questioning whether a cy pres award of class-action proceeds providing no direct relief to class members supports class certification).

cover the increased costs."[60] In the same vein, a prospective representative may be disincentivized from serving if the class recovery is expected to be high and being grouped with the general pool of class members offers more anonymity and comfort.[61] In either circumstance, the individual gambles with the opportunity cost of being the class representative.

The potential burdens associated with the class-representative role are extensive. At a minimum, the class representative is typically deposed by the defendant's counsel, which can be time consuming and intrusive.[62] Moreover, they are expected to bear the costs of discovery requests, reputational damage, and possible sanctions if the case is deemed frivolous.[63] Considering these extra duties and requirements, should this individual receive the same monetary compensation as their idle class members? This Recent Development argues no. As expressed above, although "all of these costs are borne directly by the lead plaintiff, the fruits of their efforts are shared pro rata with the entire class."[64]

Despite the perception surrounding class representatives,[65] the actual amount they recover from class-action settlement funds is generally modest.[66] A 2006 empirical study performed by Theodore Eisenberg and Geoffrey P. Miller surveyed ninety class-action lawsuits and found that "the total incentive award to all representative plaintiffs constituted, on average, 0.16 percent of the class recovery."[67] The median was only 0.02%.[68] Further, they found that the incentive award was split among the class representatives, and the average award per representative was $15,992 while the median award was $4,357.[69] Ultimately, the study detailed that "[t]he size of total incentive awards was strongly associated with the size of the class recovery."[70] Therefore, the incentive award generally works in tandem with the winnings of the class—balancing the interests of the class members' recovery with the rendered services of the class representative.

60. Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1305–06 (2006).

61. *Id.* at 1306.

62. *Id.* at 1305.

63. Charles R. Korsmo & Minor Myers, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 VAND. L. REV. 1923, 1931 (2019).

64. *Id.* (citing Eisenberg & Miller, *supra* note 60, at 1305 (noting that while "[n]amed plaintiffs incur costs in performing their role . . . [,] the benefit from the recovery is shared with other class members.")).

65. Eisenberg & Miller, *supra* note 60, at 1312–13 ("Others have expressed concern about the fairness of the named plaintiff receiving a larger award than the rest of the class. Incentive awards have been stigmatized as a means for paying off 'professional plaintiffs.'").

66. *Id.* at 1308 ("When given, incentive awards constituted a small fraction of total class recovery.").

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

To combat the disparity of benefits between the class representative and other class members, courts have approved incentive awards "that are withdrawn from the common fund at the conclusion of the common fund case."[71] This amount is taken from the aggregate of the class members.[72] Indeed, scholars have found that incentive awards are "consistent with one legal theory loosely underlying such awards . . . that class members would be unjustly enriched if they were able to secure the services of the class representatives at no cost."[73] In cases where the individual recovery is recognized by a vast number of class members and the actual payment is small, the class representative may actually incur a significant loss.[74]

Putting this disparity of impact into perspective, it is helpful to look at *Cook v. Niedert*,[75] a Seventh Circuit decision affirming the importance and necessity of incentive payments in class actions.[76] The lead plaintiff in that case was Archie Cook, a truck driver who filed a class action on behalf of the Teamsters Local 705 Health and Welfare Fund.[77] After reaching a settlement, the district court judge instructed a special master to review and compute the incentive award for Mr. Cook—in this case, the amount totaled $25,000.[78]

Though this is a happy ending for Mr. Cook, who maintained his incentive award after the Seventh Circuit's review, it is important to consider the alternative. What would this case look like if Mr. Cook did not recoup the $25,000? For this hypothetical, it is vital to break down the logistics of the class and each participant's recovery in simple terms. At the district court level, there were over 20,000 class members.[79] The final recovery amount for class members

71. WILLIAM B. RUBENSTEIN, 5 NEWBERG ON CLASS ACTIONS § 17:5 (5th ed. 2021) (citing Radcliffe v. Experian Info. Sols. Inc., 715 F.3d 1157, 1163 (9th Cir. 2013) ("In cases where the class receives a monetary settlement, the [incentive] awards are often taken from the class's recovery.")); *id.* (citing Shane Grp. v. Blue Cross Blue Shield of Mich., No. 10-CV-14360, 2015 WL 1498888, at *18 (E.D. Mich. Mar. 31, 2015) ("Payment of incentive awards to class representatives is a reasonable use of settlement funds."), *vacated and remanded*, 825 F.3d 299 (6th Cir. 2016)).

72. *Id.*

73. *Id.* (citing *In re* Anthem, Inc. Data Breach Litig., No. 15-MD-02617-LHK, 2018 WL 3960068, at *32 (N.D. Cal. Aug. 17, 2018)) (rejecting special master recommendation that incentive awards be paid from attorney's fees in part because "class members would be unjustly enriched [in that] they [would be] able to secure the services of the class representatives at no cost").

74. *See id.* § 17:18 ("[I]n class suits, the claims will almost invariably be small in nature, yet the class representatives most worthy of an award will typically be those who worked the hardest and suffered most.").

75. 142 F.3d 1004 (7th Cir. 1998).

76. *Id.* at 1016 (citing *In re* Cont'l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992) ("Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit.")).

77. *Id.* at 1008–09.

78. *Id.* at 1009.

79. Cook v. McCarron, Nos. 92 C 7042 & 95 C 0828, 1997 WL 47448, at *2 (N.D. Ill. Jan. 30, 1997), *aff'd sub nom.* Cook v. Niedert, 142 F.3d 1004 (7th Cir. 1998). The exact number of class members

was over $14,000,000.[80] Divided up equally and irrespective of other mandatory fees, each class member would recover $700, absent an incentive award. Since the court permitted Mr. Cook to recover $25,000 as an incentive award, each class member's recovery was reduced further by their pro rata share of Mr. Cook's incentive payment. Therefore, the net recovery of each class member totaled $700 (the amount originally won in the settlement per person), minus $1.25 (the amount of Mr. Cook's $25,000 incentive payment divided equally by 20,000 class members). So, with the incentive payment, each class member recouped $698.75. Without the incentive payment, each class member would have recouped $700. Mr. Cook, on the other hand, would have received the average class-member recovery minus the costs, expenses, and reputational damage incurred as lead plaintiff—ultimately leading to a major net loss compared to other members of his class.[81]

Understandably, most class members would not volunteer to act as lead plaintiff if they worked abundantly more but their net recovery was significantly less than other members of their class. As other courts and scholars have noted, lead plaintiffs provide unequivocal support to attorneys and class members alike.[82] Placing further burdens on these individuals can only negatively impact class-representative participation going forward.

B. *Binding Precedent*

In addition to failing to take practical considerations into account, the *Johnson* majority's decision to classify modern-day incentive awards as conflicts of interest was improper because the decision also neglected to address a binding case on point, *Holmes v. Continental Can Co.*[83] and failed to consider helpful insights from other circuits and the Supreme Court.

In *Holmes*, eight class representatives and 118 class members filed suit against the Continental Can Company and United Steelworkers of America.[84] The complaint alleged discrimination on the basis of sex in employment

was greater than 20,000; however, for the sake of clarity, the figure used by the Seventh Circuit will be used here. *Niedert*, 142 F.3d at 1007–08.

80. *Niedert*, 142 F.3d at 1008.

81. Appellants/Cross-Appellees' Brief at 28–29, *Niedert*, 142 F.3d 1004 (Nos. 97-1584, 97-1666 & 97-1667), 1997 WL 33623162, at *28–29. ("The unrebutted evidence shows that Mr. Cook spent hundreds of hours working on this case with class counsel . . . . The record also showed a long history of retaliation against union dissidents at Teamsters Local 705, including physical beatings and lawsuits . . . . During litigation, Mr. Cook was subjected to a sanctions motion that, if successful, would have had a devastating financial impact on this truck driver.").

82. *See* Berry v. Schulman, 807 F.3d 600, 614 (4th Cir. 2015); Eisenberg & Miller, *supra* note 60, at 1310.

83. Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1264 (11th Cir. 2020) (Martin, J., concurring in part and dissenting in part) ("The majority's analysis also disregards the analysis set forth in this Court's ruling in Holmes . . . which is binding in our Circuit.").

84. Holmes v. Cont'l Can Co., 706 F.2d 1144, 1146 (11th Cir. 1983).

opportunities.[85] In 1978, after two years of settlement negotiations, the final proposed settlement called for injunctive and declaratory relief and a $43,775 lump sum to the class.[86] However, issues arose when the eight class representatives adopted a distribution method that would award them one-half of the fund.[87] Although thirty-nine class members objected to the payment, the district court approved the class certification in 1980 and overruled their objections.[88] Thereafter, the class members appealed.[89]

Other circuits, including the Eleventh, have assessed the fairness of an incentive award granted to class representatives.[90] Courts will generally uphold the incentive payment so long as the payment is not for the class representative's personal gain and does not compromise the interests of the class.[91] In *Holmes*, the Eleventh Circuit applied such an analysis and recognized that courts often "'refuse[] to approve settlements on the ground that a disparity in benefits' between the named plaintiffs and the absent members of the class 'evidenced either substantive unfairness or inadequate representation.'"[92] Hence, if the settlement calls for the preferential treatment of a class representative, a substantial burden is placed on the proponents to prove that the settlement is fair.[93] Further, the "inference of unfairness" associated with

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 1146–47.

89. *Id.* at 1147.

90. *See, e.g.*, Staton v. Boeing Co., 327 F.3d 938, 977 (9th Cir. 2003) (finding that district courts are required to "individually" evaluate the award to each named plaintiff, using "relevant factors including 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" (quoting Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998))); *In re* U.S. Bancorp Litig., 291 F.3d 1035, 1038 (8th Cir. 2002) (relying on similar factors to approve as fair $2,000 payments to five named plaintiffs out of a class potentially numbering more than four million in a settlement of $3,000,000). Other circuits have also recognized the proper inquiry as being whether the incentive award is fair. *See, e.g.*, Chieftain Royalty Co. v. Enervest Energy Inst. Fund XIII-A, L.P., 888 F.3d 455, 468–69 (10th Cir. 2017) (rejecting percentage-based incentive award because, among other things, it encouraged a class representative to favor monetary remedy over injunctive relief, "creating a potential conflict between the interest of the class representative and the class"); Berry v. Schulman, 807 F.3d 600, 613–14 (4th Cir. 2015) (rejecting objector's argument that incentive award created a conflict of interest and upholding award); Cobell v. Salazar, 679 F.3d 909, 922 (D.C. Cir. 2012) (holding that incentive award was fair and did not create "an impermissible conflict" because the settlement agreement "provided no guarantee" that class representatives would receive incentive payments); Sullivan v. DB Invs., Inc., 667 F.3d 273, 333 n.65 (3d Cir. 2011) (holding that district court did not abuse its discretion in approving incentive award because it "discussed the role played by the several class representatives and the risks taken by these parties in prosecuting this matter").

91. Johnson v. NPAS Sols. LLC, 975 F.3d 1244, 1266 (11th Cir. 2020) (Martin, J., concurring in part and dissenting in part).

92. *Id.* (quoting *Holmes*, 706 F.2d at 1148).

93. *Holmes*, 706 F.2d at 1146 (explaining that eight named plaintiffs were not entitled to receive approximately one-half of the common fund based on their meritorious individual claims).

such unequal distributions "may be rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations."[94]

The *Holmes* court found that the defendant class representatives did "not overcome the facial unfairness of the disparate distribution of [the] . . . award."[95] Instead, the only evidence supporting the payment was offered by the class representatives' counsel.[96] Although a counsel's testimony is given great weight when approving class-action settlements, in this case, it was insufficient to prove the merits of the class representative's award.[97] In turn, the Eleventh Circuit found in favor of the class members.[98]

While the appellant in *Johnson* had some justified concerns regarding conflicts of interest,[99] a simple *Holmes* analysis would remedy those frustrations.[100] Applying this analysis, it becomes abundantly clear from Johnson's appellee brief that the class members' recovery was sizeable compared to other class-action settlements.

After robust direct mail and publication notice, as well as the creation of a dedicated settlement website and toll-free telephone number,[101] 9,543 class members submitted valid claims for their pro rata share of the settlement fund.[102] After deducting the costs of notice and claims administration, attorney's fees and expenses, and an incentive award to Mr. Johnson, each participating class member stood to receive approximately $80.[103] This per-claimant recovery compares favorably to other TCPA class action settlements.[104]

94. *Id.* at 1148.

95. *Id.* at 1160.

96. *Id.* at 1149.

97. *Id.* at 1149–50.

98. *Id.* at 1151.

99. *See* Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1252–53 (11th Cir. 2020) ("While, in theory, class counsel act as fiduciaries for the class as a whole, once a class action reaches the fee-setting stage, 'plaintiffs' counsel's understandable interest in getting paid the most for its work representing the class' comes into conflict . . . . Accordingly, 'the district court must assume the role of fiduciary for the class plaintiffs' and 'ensure that the class is afforded the opportunity to represent its own best interests.'" (quoting *In re* Mercury Interactive Corp. Secs. Litig., 618 F.3d 988, 994 (9th Cir. 2010))).

100. *Id.* at 1267 (Martin, J., concurring in part and dissenting in part) ("This fairness-to-ensure-no-conflict analysis goes to the heart of Ms. Dickenson's stated concerns, and its application would dispel her fear of collusion here."). Moreover, other class action incentive payments and overall recovery have been brought on near identical TCPA claims. *See infra* note 103 and accompanying text; *supra* Part I (discussing the TCPA claim at bar in *Johnson*).

101. *See, e.g.*, *Welcome to the Johnson v. NPAS Solutions LLC Settlement Website*, KCC, http://johnsonnpassolutionssettlement.com/ [https://perma.cc/MKZ4-QH9H]; *Frequently Asked Questions*, KCC, http://www.johnsonnpassolutionssettlement.com/frequently-asked-question.aspx [http://perma.cc/RDE7-4EQ9].

102. *Johnson*, 975 F.3d at 1250.

103. *Id.* at 1251.

104. Brief of Appellee at 3, *Johnson*, 975 F.3d 1244 (No. 18-12344).

Arguably, Johnson's $6,000 incentive award—considering his contribution and dedication to over 9,000 class members—did not compromise the class interest for his personal gain.[105] Moreover, it can hardly be maintained that this incentive award evidences substantive unfairness or inadequate representations when other courts have approved greater incentive awards in similar TCPA class actions.[106]

At least one member of the Supreme Court has also added helpful insight on incentive awards[107] and "acknowledged that a proposed settlement award included incentive payments for the named plaintiffs, and did not question the viability of those incentive awards."[108] In *Frank v. Gaos*,[109] the plaintiffs brought a class-action claim against Google and later negotiated a settlement agreement.[110] At issue were the $5,000,000 cy pres payments taken out of the total settlement agreement to be given to a nonparty, nonprofit organization.[111] The *Frank* majority did not address the merits of the settlement award.[112] However, in his dissent, Justice Thomas argued that the cy pres arrangement did not obtain any relief for the class but instead "secur[ed] significant benefits" for the class counsel and the named plaintiff.[113] Justice Thomas reaffirmed that

105. *Id.* at 46 ("Ms. Dickenson ignores the critical steps Mr. Johnson took to protect the interests of the class, and that he spent considerable time pursuing class members' claims at substantial risk to his own financial interests . . . . As a result, the $6,000 award, which represents a small fraction of the $1.432 million settlement, is well within the range of reasonableness, as the district court properly concluded.").

106. *See, e.g.*, Schwyhart v. AmSher Collection Servs., Inc., No. 15-CV-01175-JEO (N.D. Ala. Mar. 16, 2017) (approving a $10,000 incentive award to a class representative in TCPA class action containing 28,412 class members who were awarded a settlement amount of $1,700,000); Craftwood Lumber Co. v. Interline Brands, Inc., No. 11-CV-4462, 2015 WL 1399367, at *6–7 (N.D. Ill. Mar. 23, 2015) (approving a $25,000 service award to a class representative in TCPA class action where the settlement amount was $40,000,000).

107. *Johnson*, 975 F.3d at 1267 (Martin, J., concurring in part and dissenting in part) ("Our court adopted this analysis in *Holmes*. And it addresses the concerns about incentive awards raised by at least one member of the Supreme Court.").

108. *Id.* at 1267; *see also id.* at 1267 n.2 (quoting China Agritech, Inc. v. Resh, 138 S. Ct. 1800, 1810–11 n.7 (2018) ("One year earlier, the Supreme Court similarly recognized the viability of a 'financial benefit' to a class representative that goes 'above and beyond her individual claim.' The majority calls this dicta, but it cannot seriously dispute that the Supreme Court acknowledged that a class representative may be entitled to compensation in his or her role as the person bringing suit.")).

109. 139 S. Ct. 1041 (2019).

110. *Id.* at 1043.

111. *See id.* Cy pres awards are used to distribute settlement money to the next best group of consumers whose interest may coincide with the class members; this payment is usually leftover settlement money and is given to a charity whose mission aligns with the issue at the center of the lawsuit. *What Is a Cy Pres Award?*, CLASSACTION, https://www.classaction.org/learn/cy-pres [https://perma.cc/ABB4-AQFJ]; *see, e.g.*, Lane v. Facebook, 696 F.3d 811, 819 (9th Cir. 2012) ("As we recently recognized, the '*cy pres* doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the 'next best' class of beneficiaries.'" (quoting Nachshin v. AOL, LLC, 663 F.3d 1034, 1036 (9th Cir. 2011))).

112. *Frank*, 139 S. Ct. at 1046.

113. *Id.* at 1047 (Thomas, J., dissenting).

the arrangement "strongly suggests that the interests of the class were not adequately represented."[114]

In *Johnson*, Judge Martin, concurring in part and dissenting in part, interpreted Justice Thomas's findings in the *Frank* dissent.[115] Judge Martin explained, "I read Justice Thomas's brief dissent in *Frank* to address his concern about whether the cy pres arrangement in that case was *fair*, as opposed to whether disparate awards in class actions are legally permissible as a general matter."[116] Judge Martin maintained "that the fairness analysis developed by many circuit courts, including [the Eleventh Circuit], can protect against conflicts between a class representative and absent class members."[117]

Judge Martin correctly interpreted Justice Thomas's dissent. If Justice Thomas wanted to condemn the existence of cy pres payments altogether, he could have easily done so. Instead, Justice Thomas carefully questioned "whether a class action is 'superior to other available methods for fairly and efficiently adjudicating the controversy' when it serves only as a vehicle through which to extinguish the absent class members' claims without providing them any relief."[118]

It appears that Justice Thomas's main issue was not with the allocation of settlement money to a nonprofit, plaintiff's attorney, or lead representative, but with the resulting inequity or unfairness experienced by the class members. Indeed, his dissent suggested that cy pres payments may be permitted, unless they resulted in class members being significantly worse off than the persons organizing and prosecuting the class.[119] If Justice Thomas believed this to be the case about cy pres payments—where the paid nonprofit organization had no part in aiding the class—it is hard to believe that his opinion would change for incentive payments—where the lead plaintiff actually dedicated time, money, and resources for the benefit of the class. Notably, Justice Thomas's dissent is persuasive—not binding. And, this may be why the *Johnson* court refused to distinguish *Greenough* and *Pettus* from *Johnson*, despite most evidence and sources pointing toward the contrary. However, the logic still stands, and the Eleventh Circuit should have taken this, as well as other relevant precedent, into account.

The lack of consideration for *Holmes* and *Frank* is not the only source of error in *Johnson*. The court should have distinguished *Johnson* from *Greenough* and *Pettus* because the term "incentive award" was incorrectly likened to

114. *Id.*

115. Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1267 (Martin, J., concurring in part and dissenting in part).

116. *Id.*

117. *Id.*

118. *Frank*, 139 S. Ct. at 1047 (Thomas, J., dissenting) (quoting FED. R. CIV. P. 23(b)(3)).

119. *Id.*

personal expenditures, which have created conflicts of interest in the past. This determination goes against scholars' interpretation of the term "incentive award" in modern practice.

III. *JOHNSON* IS DISTINGUISHABLE FROM *GREENOUGH* AND *PETTUS*

The *Johnson* court, somewhat alluding to the practicality of incentive awards, stated, "Although it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them. If the Supreme Court wants to overrule *Greenough* and *Pettus*, that's its prerogative."[120] Admittedly, the Supreme Court has noted that questions regarding a dated law's application to a modern case are irrelevant and only the Supreme Court has the power to reconsider its own precedent.[121]

Still, *Johnson* should not be compared to *Greenough* and *Pettus*. Perhaps most damning to the Eleventh Circuit's holding was its reliance on comparing a "personal service award" from *Greenough* to the "incentive award" in *Johnson*. As previously discussed, the "personal award" struck down by the Supreme Court in *Greenough* encompassed "an allowance of $2,500 a year for ten years of personal services" and reimbursement for the plaintiffs "personal expenditures" for "railroad fares and hotel bills."[122] These expenses are not akin to Johnson's, which were incurred by his participation in creating and managing the class.[123] Contrary to the Eleventh Circuit's reasoning, Johnson's expenses are actually more similar to the approved award in *Greenough* for "reasonable costs . . . and expenses incurred in the fair prosecution of the suit."[124]

The court harped too much on the term "incentive" insofar as it reasoned that closely tying the lead plaintiff's level of involvement to the amount of incentive payment recovered invariably leads to a conflict of interest between the lead plaintiff and other class members.[125] However, that misstates the relationship between incentive awards and plaintiff participation. The dissent in *Johnson*, highlighting this key error, stated,

> In discussing the first case to use the term "incentive award," [scholars] say[] "although labeling the payment an 'incentive award,'" the rationale that the court employs speaks more to compensation than incentive, suggesting that the class representatives are being paid for their service to the class, not

120. *Johnson*, 975 F.3d at 1260.
121. Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016).
122. Trustees v. Greenough, 105 U.S. 527, 530 (1882).
123. *Johnson*, 975 F.3d at 1249.
124. *Greenough*, 105 U.S. at 537.
125. *Johnson*, 975 F.3d at 1258.

> so as to ensure that class members will step forward in the future.[126]

Hence, an incentive award does not actually produce a conflict of interest because the lead plaintiff's interest does not become that of a creditor to the suit he is representing. The term "incentive" simply refers to the increased motivation for a lead plaintiff to step forward.

IV. FEARS OF FORUM SHOPPING

Although it has been argued that incentive awards do not create a conflict of interest between class representatives and class members,[127] there is a conflict that the *Johnson* majority failed to foresee. That is, a conflict now exists between class-action attorneys and class members because attorneys may be self-interested in choosing a forum. Attorneys now must wrestle with the choice to either pursue a case in which they must pay for the services rendered to the class representative or attempt to obtain jurisdiction in another circuit.

If attorneys are forced to pay for the class representative's services out of pocket, the Eleventh Circuit may see an increase in settlement proposals across the board. Consequently, strategic attorneys may attempt to recover their own costs by utilizing aggressive settlement offers at the district court level. Data support this hypothesis because the size of incentive awards is strongly linked to the amount of attorney's fees awarded.[128] Further, scholars have posited that "[i]f attorneys reward [class representatives] for serving the attorneys' interests at the expense of the class, we would expect that, holding other factors constant, incentive awards will be more frequent and higher as fees increase."[129] In an effort to compensate class representatives, class members bear the burden of decreased recovery amounts. This strategy places the pecuniary interests of the attorney at odds with the interests of the class.

Alternatively, attorneys may attempt to bring the case to a sister circuit that has not adopted the Eleventh Circuit's conclusion. The draw of an incentive award may motivate class members to serve as class representatives, thereby helping attorneys manage the lawsuit and keep legal fees low. For example, under *Holmes*, attorneys could bring an identical class action in the Ninth Circuit (assuming that jurisdiction is proper) and obtain an incentive payment so long as the payment is fair.[130]

126. *Id.* at 1264–65 (Martin, J., concurring in part and dissenting in part).

127. *See supra* Section II.B.

128. Eisenberg & Miller, *supra* note 60, at 1308.

129. *Id.* at 1317.

130. *See* Holmes v. Cont'l Can Co., 706 F.2d 1144, 1148 (11th Cir. 1983) (discussing that courts will "refuse[] to approve settlements on the ground that a disparity in benefits" between the named plaintiffs and the absent members of the class "evidenced either substantive unfairness or inadequate representation")).

While other jurisdictions experience an influx of class actions that push the field of law forward, less desirable jurisdictions, like the Eleventh Circuit, will now be left behind. It is well known that "counsel, judges, and academicians employ the term 'forum shopping' to reproach a litigant who, in their opinion, unfairly exploits jurisdictional or venue rules to affect the outcome of a lawsuit."[131] Understandably, it will be hard to sell the position of class representative if the costs outweigh the benefits. And, if it is possible to obtain jurisdiction in another circuit that is more attorney or class representative friendly, it will be advantageous to certify the class there.

Corporations seated in unfavorable jurisdictions will continue to benefit from dated laws while other jurisdictions push forward with innovative claims. Consider an employment discrimination class-action lawsuit against a business that conducts all of its activity in Florida, Georgia, or Alabama. Before the suit even begins, due to the *Johnson* decision, the Eleventh Circuit has already disincentivized possible plaintiffs from coming forward. In a study analyzing six class-action employment discrimination cases from 1993–2002, the average sum of incentive awards was $1,481,962, and the median was $545,626.[132] Further, the average recovery for each class member was $20,080, and the median was $16,229.[133] In the Eleventh Circuit, pre-*Johnson*, attorneys could sleep easy at night knowing that the class was being properly managed because the representative had a proper safety net covering their expenses. Now, attorneys may question if the health of the class action is better suited in another circuit where the representatives need not forgo hundreds of thousands of dollars.

In 2002, class members in the Eleventh Circuit had two favorable choices. They could either sit on the sideline and recoup a sizeable recovery, or they could serve as class representative and recover a sizeable incentive payment along with their share of the settlement fund. In 2022, a prospective class representative must calculate the costs associated with the role. Due to the complexity of employment discrimination cases, the costs of being a class representative are unusually high compared to twelve other categories of class-action lawsuits that were surveyed.[134] Plus, the prospective class representative can expect the costs of their expenses to significantly absorb a large amount of their recovery from the settlement fund.[135] Knowing that most of your recovery

131. Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 553 (1989).

132. Eisenberg & Miller, *supra* note 60, at 1334 tbl.5.

133. *Id.* at 1350 app. tbl.1.

134. *Id.* at 1332 ("Incentive awards were also common in employment discrimination cases, where we believe the costs to representative plaintiffs are unusually high."); *id.* at 1334 tbl.5 (displaying twelve other categories being surveyed in addition to employment discrimination).

135. *Id.* at 1340–41 ("Employment discrimination cases are positively and significantly associated with incentive awards absorbing a larger share of the recovery.").

will be decimated by the costs of serving as class representative, and understanding that there is no compensation upon completion, would you volunteer as class representative? Even if the cause is compelling, is the journey worth it? After *Johnson*, the most likely answer is no.

CONCLUSION

Despite the *Johnson* court's best efforts to respect Supreme Court precedent, its conclusions were misguided. Authorities and guidance from the Eleventh Circuit, Justice Thomas's dissent in *Frank*, treatises on class actions, and an overwhelming volume of case law from sister courts attest to the need for incentive awards to motivate class representatives. Additionally, the court should have distinguished *Johnson* from *Greenough* and *Pettus* and further considered the *Holmes* fairness inquiry. By neglecting these considerations, the court erred in its decision.

What can be expected in the aftermath of *Johnson*? In the Eleventh Circuit, lead plaintiffs are now at a significant disadvantage—working abundantly more, for equal recovery, with substantially more costs and burdens. Going forward, it will be difficult to motivate any class member to serve as lead plaintiff in a class action before the Eleventh Circuit. Instead, attorneys may look to other forums that allow incentive payments—thereby changing the fabric of law in those preferred jurisdictions. This workaround runs contrary to our economic and capitalist ideals. Class members are benefitting greatly at the expense of the representative, who, on a pro rata basis, takes very little from the class members through the incentive payment. Now, class representatives in the Eleventh Circuit must combat social and economic hardships while class members idly free ride through the class-action process.

CHRISTIE SHAW**

** I would like to thank *North Carolina Law Review* for their diligence and dedication to this piece. In addition, I would like to thank my primary editor, Jeffrey Holmes, for taking on this piece as his own and providing invaluable commentary and insight. To my parents, Melanie and John Shaw, thank you for your selflessness, support, and constant belief in my success. I am in awe of your work ethic and grit, and I would be lucky to maintain those traits throughout my legal career.