9/18/20 Alison Frankel's On The Case 20:03:18

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'Dramatic' **11th** Circuit decision will disrupt business-as-usual in class actions

(Reuters) - The **11th** U.S. Circuit Court of Appeals threw down a gauntlet Thursday, warning trial judges and class action lawyers that they can no longer rely on long-accepted class action practices.

In Johnson v. NPAS Solutions (2020 WL 5553312), the **11th** Circuit faulted U.S. District Judge Robin Rosenberg of West Palm Beach for making "several errors that, while clear to us, have become commonplace in everyday class-action practice." The appellate panel – Judges Kevin Newsom, Beverly Martin and 10th Circuit Judge Bobby Baldock, sitting by designation – said that while Judge Rosenberg followed standard procedures in a garden-variety case, "that's exactly the problem."

The court's marquee holding, as I'll explain, is that 140-year-old U.S. Supreme Court precedent precludes incentive payments to class representatives. That "dramatic" finding, said class action reformer Eric Alan Isaacson, who made the winning argument at the 11th Circuit, is going to force other courts that have shrugged off similar challenges, to look seriously at the propriety of incentive payments. Isaacson previously failed, for instance, to persuade the 2nd Circuit in 2019's Melito v. Experian (923 F.3d 85) that incentive awards buck Supreme Court precedent. But he has teed up the issue in an objection to another New York federal court class action, Hyland v. Navient, and said he would consider going to the Supreme Court if he loses again at the 2nd Circuit.

Class counsel Michael Greenwald of Greenwald Davidson Radbil told me by email that he intends to seek en banc review of the decision. "Incentive awards — when reasonable — are widely accepted as a means to recognize the effort it takes for consumers to bring class actions, the scrutiny and discovery to which they are subjected, and the ultimate benefits they obtain for others," he said.

NPAS counsel Maura Monaghan of Debevoise & Plimpton did not respond to my email. NPAS, a medical debt collector, did not concede liability in the underlying case. At the **11th** Circuit, it defended the $1.4 million settlement against what it called "a frivolous objection."

The ruling at issue at the **11th** Circuit was a seven-page decision approving a $1.4 million settlement of Telephone Consumer Protection Act claims against NPAS, with a $6,000 incentive payment to named plaintiff Charles Johnson and an award of fees and costs of about $432,000 to class counsel. One class member, Jenna Dickenson, objected to the settlement and presented arguments at a fairness hearing. Judge Rosenberg's decision said simply that Dickenson's objection was overruled.

The appellate panel held that the trial judge erroneously set a deadline for objections that preceded class counsel's submission of a fee application and failed to adequately explain her rationale for rejecting Dickenson's objection. The deadline issue was harmless error, the appeals court said, because the class notice disclosed that class counsel intended to request a 30% award. But the judge's failure to explain her reasoning, both in approving the settlement and the fee award and in disregarding the objector's arguments, required a remand, the **11th** Circuit said.

And then there's the incentive award issue. As Judge Martin explained in a fascinating dissent from the **11th** Circuit majority's holding on incentive awards, the federal rules for class actions don't mention payments to class representatives for the time and expense of leading a case. In the 1980s and 1990s, however, such payments became commonplace. Courts debated whether

incentive payments created a conflict between class representatives and other class members, Judge Martin said, and federal circuits, including the 11th Circuit, developed tests to weigh the fairness of payments to class representatives.

Few courts, she said, looked back to consider the legal authority for the awards. And over time, Judge Martin wrote, federal appellate courts "began to endorse the sort of incentive awards we see today" as serving the purposes of Rule 23.

Isaacson's brief to the 11th Circuit in the NPAS case (2018 WL 3860011) argued that the Supreme Court prohibited incentive payments long before the federal rules established class action procedures. Way back in 1882's Trustees v. Greenough (105 U.S. 527), the Supreme Court looked at a case in which a bondholder litigated for years against the bond issue's trustees, eventually winning the establishment of a trust that would benefit all of his fellow bondholders. The trial court awarded the lead bondholder his attorneys' fees and a fee for his time and personal expenses. The Supreme Court allowed the payment of his attorneys' fees – a seminal decision for class action plaintiffs' lawyers who seek fees from a common fund – but disallowing the award for his personal time and expense. Such a payment, the court said, "would present too great a temptation to parties to intermeddle." The Supreme Court subsequently confirmed that holding in 1885's Central Railroad v. Pettus (113 U.S. 116).

The 11th Circuit majority in the NPAS case said Greenough and Pettus are the beginning and end of any modern debate over incentive fees. "We take the rule of Greenough, confirmed by Pettus, to be fairly clear," the court said in an opinion written by Judge Newsom. "A plaintiff suing on behalf of a class can be reimbursed for attorneys' fees and expenses incurred in carrying on the litigation, but he cannot be paid a salary or be reimbursed for his personal expenses."

That other courts routinely approve incentive payments is no excuse to ignore the Supreme Court, Judge Newsom wrote. Nor does it matter, the majority held, that the Greenough and Pettus decisions predate Rule 23 – which, after all, says nothing about incentive awards to class reps. "Incentive awards do seem to be 'fairly typical in class action cases,'" the majority said. "But, so far as we can tell, that state of affairs is a product of inertia and inattention, not adherence to law. The uncomfortable fact is that 'the judiciary has created these awards out of whole cloth.'"

Judge Martin's dissent warned that doing away with incentive awards for class representatives will discourage potential plaintiffs from leading class actions. The majority said the Supreme Court can reverse Greenough and Pettus if the justices are worried about that problem. Or Congress or the judiciary's Rules Committee can amend Rule 23 to permit payments, Judge Newsom wrote.

Objector's counsel Isaacson said the 11th Circuit's decision will immediately impact incentive awards in class actions pending in the circuit, including the $380.5 million Equifax data breach settlement, in which dozens of class representatives were awarded $2,500 apiece. (Equifax class counsel declined to comment.) Isaacson said he's not worried that a prohibition on incentive fees will dampen plaintiffs' enthusiasm for class actions.

"Name plaintiffs will show up for litigation they care about," he said. "And if no one shows up, you have to wonder if it should be a case."

The case is Johnson v. NPAS Solutions, No. 18-12344 at the 11th Circuit.

(Reporting by Alison Frankel)

---- Index References ----

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News Subject: (Business Lawsuits & Settlements (1BU19); Class Actions (1CL03); Consumer Protection (1CO43); Government (1GO80); Government Institutions (1GO90); Judicial Cases & Rulings (1JU36); Legal (1LE33); National Judiciaries (1NA65); U.S. Supreme Court (1US13))

Region: (Americas (1AM92); Florida (1FL79); North America (1NO39); U.S. Southeast Region (1SO88); USA (1US73))

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Other Indexing: (NPAS Solutions) (Eric Alan Isaacson; Bobby Baldock; Robin Rosenberg; Kevin Newsom; Greenwald Davidson; Charles Johnson; Jeh Charles Johnson; Pettus; Jenna Dickenson; Michael Greenwald; Maura Monaghan; Plimpton; Hyland; Melito; Beverly Martin)

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