Class action plaintiffs want full 11th Circuit to review ban on incentive awards

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Alison Frankel's On The Case • October 26, 2020

(Reuters) - The plaintiffs in a Telephone Consumer Protection Act class action vacated last month by the 11th U.S. Circuit Court of Appeals have asked for en banc review of the court's decision in Johnson v. NPAS Solutions (975 F.3d 1244), in which a divided three-judge panel held that class action plaintiffs cannot receive incentive awards under U.S. Supreme Court precedent dating back to the 1880s.

The en banc petition argues that the full court must review the panel's ruling because it upends a widespread class action protocol that has been recognized in every federal circuit in the country – including the 11th Circuit in previous decisions. Plaintiffs' lawyers from Greenwald Davidson Radbil and Keller Lenkner noted that the most recent academic study found that 71% of class action settlements included an incentive payment to lead plaintiffs. The Supreme Court itself has "repeatedly acknowledged the practice of incentive awards," the petition said, most recently in 2018's China Agritech v. Resh (138 S.Ct. 1800). No justice on the Supreme Court has even suggested there is a problem with payments to lead plaintiffs.

The en banc petition is also signed by New York University law professor Samuel Issacharoff, who frequently represents class counsel in appellate cases. Keller Lenkner was not previously involved in the case but was brought in for the en banc petition.

Eric Isaacson, who won the 11th Circuit panel decision vacating approval of a $1.34 million TCPA settlement with the medical debt collector NPAS, did not immediately respond to my query on the en banc petition.

In the decision addressed in the petition, 11th Circuit Judge Kevin Newsom and 10th Circuit Judge Bobby Baldock, sitting by designation, agreed with Isaacson's argument that the Supreme Court's analysis way back in 1882's Trustees v. Greenough (105 U.S. 527) and 1885's Central Railroad v. Pettus (113 U.S. 116) precludes payments to named plaintiffs to compensate them for their time. Those Supreme Court cases long predate Rule 23 of the Federal Rules of Civil Procedure, which established class action protocols, so the old rulings don't involve lead plaintiffs in class actions. (Both cases were bondholder disputes in which one bondholder sued a trustee on behalf of himself and others.) Nevertheless, Judges Newsom and Baldock said decisions from

the 1800s make clear that "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."

Judge Beverly Martin dissented from that part of the decision, warning that it will discourage prospective class action plaintiffs from stepping up to lead cases.

The en banc petition picked up that theme, arguing that the ruling has important policy consequences that neither side addressed in depth in briefs or oral arguments to the three-judge panel. "To be sure, free-floating policy considerations do not establish that the panel decision is incorrect," the petition said. "But policy implications do confirm that the panel's decision is important and worth examining en banc."

The full court should also hear the case, class counsel said, because the panel was wrong. "The panel majority relied on Greenough by analogy, but the analogy does not hold," the petition argued. "Moreover, it skipped over two critical threshold questions: what source of law authorized judicial review of the settlement, and what source of law imposed a limit on that authority? Had it asked those questions, it would have seen that Greenough provides little guidance."

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

(Reporting by Alison Frankel)

References

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