On Behalf of All Others Similarly Situated: Class Representation & Equitable Compensation

Alexander J. Noronha
University of Michigan Law School

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Litigation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mlr/vol122/iss4/4

https://doi.org/10.36644/mlr.122.4.behalf

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
NOTE

ON BEHALF OF ALL OTHERS SIMILARLY SITUATED:
CLASS REPRESENTATION & EQUITABLE COMPENSATION

Alexander J. Noronha*

Class actions require class representation. In class actions, plaintiffs litigate not only on their own behalf but “on behalf of all others similarly situated.” For almost fifty years, federal courts have routinely exercised their inherent equitable authority to award modest compensation to deserving class representatives who help recover common funds benefiting the plaintiff class. These discretionary “incentive awards” are generally intended to compensate class representatives for shouldering certain costs and risks—which are not borne by absent class members—during the pendency of class litigation.

The ubiquity of permitting class action incentive awards ended in 2020. In an extraordinary ruling, the Eleventh Circuit held that incentive awards are per se unlawful under late nineteenth-century Supreme Court precedent. This holding has ignited a new controversy in the federal courts with far-reaching implications for the future of class actions.

Much of the existing legal scholarship on incentive awards analyzes policy rationales, quantitative trends, and legal standards involving the questions of “When?” and “How much?” to compensate class representatives. Only recently have scholars turned their attention to the more foundational question of whether federal courts have a sound basis to allocate incentive awards to class representatives under any circumstances. This Note weighs in on that debate by revisiting the Eleventh Circuit’s recent decision to categorically ban incentive awards.

* J.D., May 2023, University of Michigan Law School. I owe a deep debt of gratitude to Professor Maureen Carroll for sharing her invaluable insights and providing encouragement throughout my journey of researching and writing this Note. Thank you to my fellow Volume 121 Notes Editors—Annie Schuver, Will Hanna, Noah Harrison, Hank Minor, and Lara Ryan—for teaching me to be a better writer and making our year working together such a fulfilling experience; to the Volume 122 Notes Office—Hannah Cohen Smith, Kassie Fotiadis, Ashley Munger, Katie M. Osborn, Eddie Plaut, and Jordan Schuler—for their thoughtful and thorough edits; to Bailey Tulloch for her mentorship and helpful feedback on my earliest drafts; and to Carter Brace, Robert Brewer, Rita Elfarissi, Sunita Ganesh, Margaret Larin, Tallulah Wick, and every Michigan Law Review editor. Finally, I could not have undertaken this endeavor without my family and Tori—thank you for your love and support during my three years in Ann Arbor.
More importantly, this Note looks to the future and confronts the reality that other federal circuit courts or the Supreme Court could eventually adopt the Eleventh Circuit’s position on incentive awards. Facing that unsettling prospect, this Note presents three proposals—one for policymakers and two for plaintiff-side class action practitioners—that could save the equitable tradition of compensating class representatives and reinforce the viability of the class action device itself.

TABLE OF CONTENTS

INTRODUCTION ...............................................................................................................735

I. INCENTIVE AWARDS: A HALF CENTURY OF UBIQUITY ...........738
   A. Abbreviated History of Class Actions and Incentive Awards ..................................................738
      1. Evolution of the Modern Class Action .........................738
      2. Introduction to Incentive Awards .............................741
   B. Policy Rationales for Incentive Awards ......................743
      1. Compensation for Actual Services Rendered.............743
      2. Compensation for Economic and Reputational Costs ..................................................................743
      3. Compensation for Private Enforcement of Laws Affecting the Public Interest ........................745
      4. Compensation to Incentivize Class Representation ....746
   C. Legal Authority for Incentive Awards ..........................747
   D. Opposition to Incentive Awards Before 2020 .................750

II. BANNING INCENTIVE AWARDS: THE LATEST ATTEMPT TO ERODE THE CLASS ACTION DEVICE .............752
   A. The Eleventh Circuit Resurrects Late Nineteenth-Century Federal Common Law .....................752
   B. Implications of Johnson for the Future of Class Actions ......................................................755
   C. Revisiting the Eleventh Circuit’s Johnson Holding ........758
      1. Reading Greenough in Historical Context .................758
      2. Supreme Court Dicta on Incentive Awards ..................762
      3. Congressional Action and Inaction on Banning Incentive Awards ........................................763

III. FACING THE FUTURE: INCENTIVE AWARDS AFTER JOHNSON ......763
   A. Legitimizing Incentive Awards Through Rulemaking or Legislation ...........................................763
INTRODUCTION

A decade ago, Lance Slaughter, an experienced financial advisor at Wells Fargo in Washington, D.C., filed a putative class action against his employer. \(^1\) On behalf of himself and all others similarly situated, Slaughter alleged that Wells Fargo was systemically and intentionally engaging in unlawful employment discrimination on the basis of race. \(^2\) Specifically, Slaughter claimed that Wells Fargo’s “company-wide teaming and account distribution policies and practices” excluded Black financial advisors and trainees from “lucrative teams and client account distributions,” denied them equal business opportunities, and “segregate[d] [Wells Fargo’s] workforce by race.” \(^3\)

After years of hard-fought litigation, the parties reached an agreement to settle the class claims. The classwide settlement established a $35.5 million fund to compensate 542 potential class members and provided injunctive relief described by Judge Harry Leinenweber as “comprehensive and innovative.” \(^4\) As part of the court-ordered programmatic relief, Wells Fargo agreed to “implement various revisions to its policies and practices and to take action designed to enhance opportunities for employment, earnings, and advancement” for Black financial advisors and trainees. \(^5\) Class counsel represented in briefing that the settlement would “bring systemic change to Wells Fargo and the securities industry.” \(^6\)

Such a favorable result for the plaintiff class was far from inevitable. Class counsel and six class representatives—including Slaughter—vigorously litigated the case for almost four years. As a named plaintiff from the lawsuit’s inception, Slaughter “spent many, many hours” conferring with class counsel

---

2. Id. ¶¶ 3, 35–40.
3. Id. ¶ 4.
5. Id. at *34.
about litigation strategy, reviewing briefing, assisting class plaintiffs’ expert labor economist and statistician, asking questions on behalf of absent class members, and participating in lengthy, stressful settlement negotiations with defense counsel and Wells Fargo executives—all while continuing to work full-time at Wells Fargo.\textsuperscript{7}

Lance Slaughter played an indispensable role in achieving monumental monetary and injunctive relief for hundreds of class members who reaped the settlement rewards but were otherwise “absent” during the pendency of the litigation. These absent class members benefited directly from the costs and risks borne by the class representatives. Lance Slaughter sacrificed earnings opportunities and business development,\textsuperscript{8} experienced emotional hardship and workplace isolation,\textsuperscript{9} and shouldered tangible risks to his future career.\textsuperscript{10} In a declaration to the court, Slaughter avowed: “It is hard to explain how it feels to stand before your employer and put your livelihood and your family’s livelihood at risk just to get treated fairly.”\textsuperscript{11}

Lance Slaughter deserved compensation for bearing these substantial costs and risks on behalf of the plaintiff class. Judge Leinenweber agreed.\textsuperscript{12} Consistent with an equitable practice “universally accepted” in every federal judicial circuit at the time,\textsuperscript{13} the district court approved incentive awards\textsuperscript{14} for

\begin{itemize}
 \item \textsuperscript{7} Declaration of Lance W. Slaughter ¶¶2, 8, 14, Slaughter v. Wells Fargo Advisors, LLC, No. 13-cv-6368 (N.D. Ill. Apr. 28, 2017), ECF No. 107-4.
 \item \textsuperscript{8} Id. ¶15 (“Every conference call, mediation session, and meeting that I attended was time away from servicing my clients and developing new business, which translates into lost compensation in our business.”).
 \item \textsuperscript{9} Id. ¶¶16–17 (“Emotionally and professionally, my involvement in this case has taken its toll on me. As a current Financial Advisor at Wells Fargo throughout my service as a Class Representative, I had to walk through the door of my branch office every day for the last three and a half years. . . . This has not been easy when faced with the pointed stares of colleagues and the unease of my management team. . . . I felt that I was under a microscope in terms of my work performance. I have been isolated within the office, which made it difficult to go in every day and undermined my career and position within the firm.”).
 \item \textsuperscript{10} Id. ¶¶19, 21 (“I know I will always be labeled within Wells Fargo, and likely the entire financial industry, as one of the active participants in this lawsuit. . . . It is easy to find my name and this lawsuit on the Internet. If a potential client conducts a Google search or searches lawsuits on PACER, the electronic litigation filing database, my name will show up as a named plaintiff in a class race discrimination lawsuit against Wells Fargo. . . . I know it will be very difficult for me to move to a new brokerage firm.”).
 \item \textsuperscript{11} Id. ¶23.
 \item \textsuperscript{13} Johnson v. NPAS Sols., LLC, 43 F.4th 1138, 1150 (11th Cir. 2022) (Pryor, J., dissenting).
 \item \textsuperscript{14} Courts utilize different terminology—e.g., incentive awards, incentive payments, service awards, service payments—to describe court-approved compensation to class representatives above their individual share of any class monetary recovery. Herein, I use “incentive awards” to refer to such compensation.
Slaughter and the other class representatives to compensate them for their service to the class. No one seemed to bat an eye.

Just three years later, however, a split Eleventh Circuit panel held in Johnson v. NPAS Solutions, LLC that federal courts are categorically barred from allocating incentive awards to class representatives, basing its holding on novel interpretations of two Supreme Court cases from the 1880s. Legal practitioners, law professors and students, and court watchers across America were stunned by the decision and its potential far-reaching implications for future class litigation, especially in light of the broader legislative and judicial erosion of the class action device in recent decades. The Eleventh Circuit, after all, had thrown a wrench into what was a common equitable practice in federal courts—causing the initial crack in a new circuit split that continues to widen. Almost two years after the filing of a petition for rehearing en banc, the Eleventh Circuit declined to rehear the case, with four judges filing a dissental. In April 2023, the Supreme Court denied a petition for certiorari in Johnson, but the issue will invariably continue to be contested in the federal courts and the Supreme Court may grant certiorari in due course after more circuits weigh in on the controversy.

Prior to Johnson, much of the existing legal literature on class action incentive awards assessed policy rationales, quantitative trends, and judicial standards relating to the questions of “When?” and “How much?” to compensate class representatives. After Johnson, however, the conversation has shifted to the more foundational question of whether federal courts have any

16. See id. (noting no class member objections to the proposed incentive awards).
17. Johnson v. NPAS Sols., LLC, 975 F.3d 1244 (11th Cir. 2020), reh’g en banc denied, 43 F.4th 1138 (11th Cir. 2022).
18. See infra Section II.B.
19. See infra Sections I.D, II.B.
20. See infra Section II.B.
authority to grant incentive awards to class representatives in class actions producing aggregated monetary relief.\textsuperscript{25}

Part I of this Note presents an abbreviated history of class actions and incentive awards, and then examines the policy rationales, legal authorities, and opposition from critics relating to incentive awards within that historical framework. Part II deconstructs the Eleventh Circuit’s \textit{Johnson} decision, discusses its practical implications for the future viability of class litigation, and explains why \textit{Johnson} was wrongly decided. Part III looks to the future: it offers three proposals—one for policymakers and two for plaintiff-side class action practitioners—that could save the equitable tradition of compensating class representatives if additional circuit courts or the Supreme Court embrace the Eleventh Circuit’s holding.

\section{Incentive Awards: A Half Century of Ubiquity}

Courts have woven incentive awards into the fabric of federal class action practice throughout the past half century. Though these awards have become ubiquitous over time, there remains significant scholarly debate over their underlying public policy and legal foundations. Section I.A presents a brief historical overview of representative litigation and class action incentive awards. Section I.B summarizes the primary policy rationales that courts and scholars have articulated to justify incentive awards. Section I.C details the prevailing legal theories behind granting incentive awards. Finally, Section I.D highlights several examples of pre-\textit{Johnson} opposition to incentive awards.

\subsection{Abbreviated History of Class Actions and Incentive Awards}

\subsubsection{Evolution of the Modern Class Action}

Historians trace the genesis of the modern class action back almost a millennium.\textsuperscript{26} One of the earliest instances of plaintiff-initiated and judicially crafted representative actions, the \textit{Channel Islands} case,\textsuperscript{27} dates back to medieval England.\textsuperscript{28} Circa 1309, Sir Otes Grandison, the lord of the Channel Islands, ordered his tenants to pay rents in French currency instead of the

\begin{footnotesize}
\textsuperscript{25} This Note’s scope is limited to analyzing incentive awards in Rule 23(b)(3) class actions for aggregated monetary damages in which a common fund is established. See Maureen Carroll, \textit{Class Action Myopia}, 65 DUKE L.J. 843, 861–63 (2016), for a brief historical overview of Rule 23(b)(3) class actions, which are the majority subtype of Rule 23 class action today.


\textsuperscript{27} The Channel Islands Case 2 Edw. 2, Bill 161 (1309) (Eng.), reprinted in 30 SELDEN SOCIETY 137 (1914).

\textsuperscript{28} Raymond B. Marcin, \textit{Searching for the Origin of the Class Action}, 23 CATH. U. L. REV. 515, 521 (1974) (claiming that the \textit{Channel Islands} case was “the first consumers’ class action”).
\end{footnotesize}
islanders’ debased local coinage—effectively trebling their debts. In response, several aggrieved islanders filed a bill of complaints “for themselves and their parceners” seeking redress from the Crown for alleged trespasses. King Edward II commissioned a General Eyre (a medieval circuit court) to adjudicate the dispute and “do justice.” The appointed justices in eyre, in turn, held that “a single complainant should argue the case for all, and that the determination of the King’s Council in that one case would govern the judgment in all similar complaints.” Though the Channel Islands complainants lost their case against Sir Otes, they succeeded in organizing one of the first representative plaintiff actions.

In the early 1800s, Justice Joseph Story transported the longstanding English tradition of representative litigation across the Atlantic to the United States. Soon thereafter, Equity Rule 48, a procedural rule governing joinder of parties, permitted representative actions as a “matter of convenience” but included a saving clause guaranteeing that judgments would not prejudice claims or rights of absent parties. In 1912, Equity Rule 48 was reformulated as Equity Rule 38, with an express provision binding absent parties.

Before 1938, American courts of law and equity were governed by distinct procedures, and each boasted its own jurisprudence. At that time, class actions were “exclusively the province of equity.” But the 1938 adoption of the Federal Rules of Civil Procedure revolutionized civil litigation in the United


31. Id. at xxxiv–xxxv.

32. Id. at xxxvii–xxxviii (noting that “Philip of Carteret and certain other of the islanders appeared at Westminster in the name of all those who complained”).

33. Marcin, supra note 28, at 522; Eizenga & Davis, supra note 26, at 6 (observing that the Channel Islands case “contain[s] the very characteristics that define the modern class action: one representative arguing the case on behalf of similarly situated individuals with the decision binding on all, whether present or not”).

34. Scott Dodson, An Opt-In Option for Class Actions, 115 MICH. L. REV. 171, 175 (2016); West v. Randall, 29 F. Cas. 718, 721 (Story, Circuit Justice, C.C.D.R.I. 1820) (No. 17,424) (“It is a general rule in equity, that all persons materially interested, either as plaintiffs or defendants in the subject matter of the bill ought to be made parties to the suit, however numerous they may be.”). West involved a dispute over the estate of Revolutionary War General William West, who was a party in the Supreme Court’s first decision, West v. Barnes, 2 U.S. (2 Dall.) 401 (1791). Class Actions: The History and Evolution of Class Actions, CHARLESTON SCH. OF L., https://charlestonlaw.libguides.com/c.php?g=1255231&p=9277567 [perma.cc/LSY2-3XPV].


36. Eizenga & Davis, supra note 26, at 9; Lesar, supra note 35, at 36.


States and “abolished the distinction between actions at law and those in equity, creating instead a single form of civil action.” Though the 1938 version of Rule 23 ostensibly mirrored much of the purpose and procedure engrained in former Equity Rule 38, Professor John Coffee, Jr. observes that the drafters “did not simply restate the prior precedents on class actions in a faithful codification”—instead, they “needed to reconcile their new rule with the tangled judicial history on class actions.” In their attempt to do so, the original Rule 23 drafters partitioned class actions into the “fairly murky categories” of true, hybrid, and spurious actions. In practice, however, courts experienced “considerable difficulty” implementing the 1938 version of Rule 23.

The modern-day formulation of the federal class action device was established during the 1966 amendment to Rule 23. To “correct shortcomings” in the 1938 rule, the 1966 amendment jettisoned the true, hybrid, and spurious class action categorizations. More importantly, however, the 1966 amendment “was designed in large measure to fulfill the ‘historic mission of taking care of the smaller guy’” and “to provide means of vindicating the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” Amended Rule 23(b)(2), for example, expanded the availability of injunctive or declaratory relief to similarly situated groups of plaintiffs. Further, the revised Rule 23(b)(3) strengthened class litigation as a procedural alternative to adjudicating myriad individual disputes.

39. Id.
40. Id. (“All of the Rule 23(a) concepts, except adequacy of representation, had been articulated in Equity Rule 38; and adequacy of representation was a well understood, if unwritten, prerequisite to class status under Rule 38.”); Thomas E. Willging, Laural L. Hooper & Robert J. Niemic, An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. REV. 74, 78 (1996); FED. R. CIV. P. 23(a) advisory committee’s note to 1937 adoption (noting that Rule 23(a) “is a substantial restatement of [former] Equity Rule 38 (Representatives of Class) as that rule has been construed”).
42. Id. at 55–56; James Wm. Moore & Marcus Cohn, Federal Class Actions, 32 ILL. L. REV. 307 (1937) (describing the categorization in detail); Knepper v. Rite Aid Corp., 675 F.3d 249, 254 n.8 (3d Cir. 2012) (explaining that “true” class actions involved “joint, common, or secondary rights,” “hybrid” class actions involved “several rights related to specific property,” and “spurious” class actions involved “several rights affected by a common question and related to common relief” (internal quotation marks and citation omitted)).
43. FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment.
44. Carroll, supra note 25, at 852–53; Cianan M. Lesley, Note, Making Rule 23 Ideal: Using a Multifactor Test to Evaluate the Admissibility of Evidence at Class Certification, 118 MICH. L. REV. 149, 151 (2019).
45. Harkins, supra note 38, at 710; see also supra note 43 and accompanying text.
over small-value claims, which can be inefficient, inconsistent, and cost-prohibitive. The 1966 amendment, in effect, transformed Rule 23 into a formidable mechanism for plaintiffs to collectively vindicate their substantive rights. Though desegregation and civil rights were “the banner motivation for the revision” in 1966, the modernized Rule 23 induced—albeit unintentionally—a significant upsurge in the number of (b)(3) class actions demanding aggregated monetary damages.

In the Rule 23(b)(3) context, the Supreme Court has long acknowledged that class actions can “overcome the [public policy] problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting [their] rights.” Especially where “many individuals have suffered the same injury, but each concomitant claim would yield negligible relief to a single plaintiff,” Rule 23(b)(3) empowers “private actors, who would otherwise be deterred from pursuing their insubstantial claims, to assist in the enforcement of the law and deter harmful behavior by defendants.” In this regard, classwide adjudication of sufficiently comparable claims promotes (1) fair and economically viable access to the courts—even for plaintiffs with small- or negative-value monetary claims; (2) private enforcement of the law; and (3) deterrence of socially-detrimental conduct causing immense aggregate harm—even where individualized injury may be negligible. Courts have also recognized that class actions foster judicial efficiency and legal finality for adverse parties “by aggregating common claims and resolving them via a single lawsuit rather than numerous piecemeal actions.”

2. Introduction to Incentive Awards

Compared to the ancient pedigree of representative litigation, incentive awards are a distinctly modern phenomenon. One leading class action treatise
observes that “incentive award” (or any analogous term) has never been included in the plain text of Rule 23. Instead, the concept first appeared in published case law in the late 1980s. These payments are commonly understood to serve dual purposes: one utilitarian (to incentivize plaintiffs to step forward into the class representative role) and one equitable (to compensate representatives for their service to the plaintiff class). Although the case law on incentive awards is “chaotic” and different circuits employ different legal standards, most courts appraise the appropriateness and size of an incentive award by considering the representative’s efforts, risks, and costs, the overall class recovery, and public policy considerations. Since the 1980s, the practice of granting modest incentive awards to deserving class representatives had steadily attained universal acceptance in every circuit nationwide—until 2020.

In the most comprehensive published empirical study of incentive awards to date, Professors Theodore Eisenberg and Geoffrey Miller found that courts granted incentive awards in roughly 28% of their sample of 374 class settlements between 1993 and 2002. Among other findings, the study revealed that the median per-representative award was $4,357 (or $6,680 in 2021 dollars) and the median total incentive award comprised only 0.02% of aggregate class recovery. Eisenberg and Miller concluded that they observed “a degree of coherence and modesty in the pattern of incentive awards.” A more recent analysis of incentive award data from 2006 to 2011 compiled by Professor William Rubenstein found that incentive awards were approved in 71.3% of class actions—a significant increase in frequency compared to the Eisenberg and Miller study—but the median per-representative award ($6,450 in 2021 dollars) was almost identical to Eisenberg and Miller’s findings.

---

56. 5 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS § 17:2 (6th ed. 2022) [hereinafter NEWBERG & RUBENSTEIN].
57. Id. (citing In re Continental/Midlantic S’holders Litig., No. 86-cv-6872, 1987 WL 16678 (E.D. Pa. Sept. 1, 1987)).
58. Id. § 17:3; see infra Section I.B.
59. Ruan, supra note 24, at 413 (observing that cases “apply[] widely varying analyses with no discernable pattern” and that the full body of law provides “a wholly malleable range of citations for any conclusion a party or court wishes to make”).
60. See, e.g., Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998); Bussie v. Allmerica Fin. Corp., No. 97-cv-40204, 1999 WL 342042 (D. Mass. May 19, 1999); see also infra Sections I.B–C.
62. See NEWBERG & RUBENSTEIN, supra note 56, § 17:8.
63. Eisenberg & Miller, supra note 24, at 1307.
64. Id. at 1308; NEWBERG & RUBENSTEIN, supra note 56, § 17:8.
65. Eisenberg & Miller, supra note 24, at 1347–48 (also detecting “little evidence of excessive or abusive awards”).
66. NEWBERG & RUBENSTEIN, supra note 56, § 17:7.
67. Id. § 17:8.
B. Policy Rationales for Incentive Awards

Why award class representatives a payment above and beyond their portion of the class monetary recovery? In recent decades, courts and commentators have recognized four primary policy rationales justifying incentive awards: (1) “to compensate class representatives for work done on behalf of the class,” (2) “to make up for financial or reputational risk undertaken in bringing the action,” (3) “to recognize . . . willingness to act as a private attorney general,”68 and (4) “to induce an individual to participate in the suit” as a class representative.69 This Section explores these rationales.

1. Compensation for Actual Services Rendered

The first rationale is straightforward: class representatives deserve compensation for rendering actual services (including time and labor) on behalf of the plaintiff class. At minimum, Rule 23(a)(4) requires representatives to “fairly and adequately protect the interests of the class.”70 This adequacy requirement thus obliges class representatives to attain basic familiarity with the legal and factual allegations of the class complaint.71 Representatives, moreover, are often required to sit for a deposition—which may “be time consuming and stressful to someone not familiar with the legal process”—as well as “comply with burdensome or intrusive discovery requests.”72 They may also need to attend court hearings or settlement negotiations, and even testify at trial.73 For small business plaintiffs in particular, class representation often imposes substantial actual and opportunity costs associated with diverting limited labor and resources to litigation instead of “running their businesses.”74

2. Compensation for Economic and Reputational Costs

The second rationale is likewise compelling: class representatives should be compensated for assuming financial and reputational costs on behalf of the absent class.75 This rationale is particularly evident in the employment, antitrust, and privacy rights contexts.

68. Rodriguez v. W. Publ’g Corp., 563 F.3d 948, 958–59 (9th Cir. 2009).
69. Cook v. Niedert, 142 F.3d 1004, 1016 (7th Cir. 1998).
70. FED. R. CIV. P. 23(a)(4).
71. Eisenberg & Miller, supra note 24, at 1305.
72. Id.
74. Brief of Main Street All. as Amicus Curiae in Support Plaintiff-Appellee’s Petition for Rehearing En Banc at 2, Johnson v. NPAS Sols., LLC, 43 F.4th 1138 (11th Cir. 2022) (No. 18-12344) [hereinafter Main Street Alliance Amicus Brief].
75. NEUBERG & RUBENSTEIN, supra note 56, § 17:3 (noting that certain circumstances may make class representatives prone to retaliation or liable for paying litigation costs); see also Eisenberg & Miller, supra note 24, at 1305 (“Named plaintiffs also run a slight, but potentially worrisome, risk of being saddled with sanctions if the litigation turns out badly.”); Bellinghausen
Employment Class Actions. In employment-related class actions, the class representative is often “a former or current employee of the defendant.” In employment discrimination cases, employee-employer legal adversity can place representatives at tangible risk of retaliation from current—or even prospective—employers. In one case, a class representative averred that “multiple prospective employers . . . sent him correspondence indicating that his application for employment was rejected because of his pending litigation with his former employer.” As Lance Slaughter attested in Slaughter v. Wells Fargo, these instances of “threatened or actual retaliation and professional isolation . . . can take a significant toll on [class representatives] and their families,” particularly for representatives, like him, who remain with their employers.

Antitrust Class Actions. In antitrust class actions, the class representative is often a plaintiff that directly purchased goods or services supplied by the defendant(s). Accordingly, representatives “often jeopardize[] the very relationships the plaintiff businesses need to remain viable” by championing a class lawsuit. Backlash from defendant suppliers is a legitimate concern in the antitrust context. Especially in concentrated markets, supplier retaliation is an acute problem for plaintiffs because they will likely experience difficulty
finding alternative suppliers. Risk of retaliation is also a severe cost to class representatives alleging antitrust violations in labor markets, such as those in wage-fixing or “no poach” cases in which plaintiffs sue their employer for artificially depressing their wages.\(^{82}\)

**Privacy Rights Class Actions.** In privacy rights class actions, the class representative is often an individual whose personal information was unlawfully disclosed to the public. In *Taha v. Bucks County*, for example, class plaintiffs alleged that defendants’ “Inmate Lookup Tool” database was not secure and caused unlawful public dissemination of certain photographs, fingerprints, and arrest data of individuals held or incarcerated at a correctional facility.\(^{83}\) Some of the disclosed data related to individuals whose criminal records were previously expunged.\(^{84}\) The district court granted an incentive award in *Taha*, in part because the class representative’s name was plastered all over the class action’s public docket and therefore his “criminal history [would] be forever public” despite its prior expungement.\(^{85}\)

3. Compensation for Private Enforcement of Laws Affecting the Public Interest

The third rationale is public spirited: class representatives should be compensated for privately enforcing laws that advance the public interest. This so-called “private attorney general” rationale mirrors one of the broader (and historic) purposes of class actions: “[T]o incentivize private parties to enforce certain laws such that the government is not required to undertake all law enforcement alone.”\(^{86}\)

Class actions, especially in the civil rights and consumer protection contexts, often have overarching benefits for the public writ large. These benefits extend beyond classwide monetary recovery and accrue from the deterrent effects of class actions.\(^{87}\) For instance, in the federal antitrust context, indirect purchasers can still benefit from class actions brought by direct purchasers,

---

\(^{82}\) *In re High-Tech Emp. Antitrust Litig.*, No. 11-cv-2509, 2015 WL 5158730, at *17 (N.D. Cal. Sept. 2, 2015) (recognizing that class representatives “risked significant workplace retaliation” and “may be viewed as ‘troublemakers’ within the tech industry”); *Nitsch v. DreamWorks Animation SKG Inc.*, No. 14-cv-4062, 2017 WL 2423161, at *14 (N.D. Cal. June 5, 2017) (finding that class representatives had a “very real fear of workplace retaliation” in a labor market “particularly sensitive to the reputation of employees because it is a small industry and employees tend to switch projects and employers often”).


\(^{84}\) Id.

\(^{85}\) Id. at *10.

\(^{86}\) NEWBERG & RUBENSTEIN, supra note 56, § 17:3; Sawyer *v. Intermex Wire Transfer, LLC*, No. 19-cv-22212, 2020 WL 5259094, at *2 (S.D. Fla. Sept. 3, 2020) (approving incentive award and recognizing that “class action suits are a primary weapon in the enforcement of laws designed for the protection of the public”); see supra Section I.A.

\(^{87}\) NEWBERG & RUBENSTEIN, supra note 56, § 1:8.
despite the *Illinois Brick* “direct purchaser rule,” if private antitrust enforcement deters anticompetitive conduct higher in the supply chain and the price overcharge is no longer “passed along” to the end consumer. Beyond conferring benefits to individuals, the “private attorney general” rationale likewise aligns with the class action’s ability to “level the playing field and secure access to justice” for small businesses “to protect their rights against powerful corporate interests.”

4. Compensation to Incentivize Class Representation

The fourth rationale, pioneered by the Seventh Circuit, adopts a more functionalist, “law and economics” perspective: class representatives should be compensated where it is necessary to incentivize plaintiffs to step up and serve in the role. Acknowledging that class representatives are “an essential ingredient” for obtaining class certification under Rule 23(a)(4), the Seventh Circuit has granted incentive awards where compensation was “necessary to induce [a named plaintiff] to participate in the suit.” In this regard, the Seventh Circuit’s approach treats incentive awards as a solution to the collective action problem that rational economic actors will likely not incur significant personal costs to champion a class action if they only expect to recover “a few dollars in individual damages.”

88. *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (prohibiting indirect purchasers from recovering damages even where they were “actually injured by antitrust violations”).

89. *See id.* at 749 (Brennan, J., dissenting) (noting that “the brunt of antitrust injuries is borne by indirect purchasers, often ultimate consumers of a product, as increased costs are passed along the chain of distribution”).

90. *See Main Street Alliance Amicus Brief, supra note 74, at 5; see also id.* at 12 (“For small businesses, [incentive] awards encourage meaningful participation in class actions and provide some assurance that their businesses will not be left worse off because they came forward to vindicate the rights of absent parties.”).

91. In general, “law and economics” proponents view law “as a social tool that promotes economic efficiency” and aim to apply economic reasoning, such as behavioral economics or game theory, to legal frameworks. *See Brian Edgar Butler, Law and Economics, INTERNET ENCYCLOPEDIA OF PHIL.*, https://iep.utm.edu/law-and-economics[perma.cc/945L-2GQS].

92. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); *cf. In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 572 (7th Cir. 1992) (affirming denial of incentive award where “the case was a clear winner” and reasoning that “the market would have produced a named plaintiff willing to charge a price of zero”). Some courts outside of the Seventh Circuit have also adopted Cook’s rationale. *See, e.g., In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 292 F. Supp. 2d 184, 189 (D. Me. 2003).

C. Legal Authority for Incentive Awards

The doctrinal roots of class action incentive awards are somewhat enigmatic. Rule 23, as noted in Section I.A, makes no express reference to incentive awards (nor has it ever). This textual omission has complicated the endeavor of identifying a sound legal basis for allocating incentive awards to class representatives.

The most common—and likely the strongest—argument rationalizing the legality of incentive awards is that awarding equitable compensation to the class representative for their services prevents unjust enrichment of the class. This is the theory advanced by Professors Jay Tidmarsh and Tladi Marumo, and many courts have previously adopted this reasoning. Under this restitutitory theory, incentive awards are a logical extension of the common fund doctrine, which “holds that a litigant who recovers a common fund for the benefit of [other] persons . . . is entitled to recover some of [their] litigation expenses from the fund as a whole.” Though the common fund doctrine has a longstanding equitable tradition of justifying attorneys’ fee awards in class actions, courts have more recently employed the doctrine’s core reasoning to legally rationalize incentive awards as well.

The restitutitory theory of incentive awards, however, admittedly faces one major wrinkle: Restitution doctrine “generally confines the right to restitution to professionals, such as doctors and lawyers,” whereas class representatives are generally considered more akin to “public-spirited” class members

---

95. NEWBERG & RUBENSTEIN, supra note 56, §§ 17:1, 17:4.
96. Id. § 17:4 (pointing to Rule 23’s text as a primary reason why “[c]ourts have struggled with the question of the legal basis for a class representative’s entitlement to an incentive award”).
97. See id. (characterizing this theory as “one of equitable restitution based on unjust enrichment: namely, if the class representative provides a service to the class without the class paying for it, the class members will be unjustly enriched by virtue of receiving these services for free”).
98. See generally Tidmarsh & Marumo, supra note 73 (explaining that restitution theory justifies incentive awards so that class members are not unjustly enriched by the class representative’s work).
99. E.g., In re Anthem, Inc. Data Breach Litig., No. 15-md-2617, 2018 WL 3960068, at *32 (N.D. Cal. Aug. 17, 2018); Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1221 (S.D. Fla. 2006) (reasoning that “it would be inequitable for [the class representative] to alone bear the costs and risks they incurred for the benefit of the [c]lass because this would impose [upon the class representative] the full costs of paying lawyers to litigate [the] action”).
100. See Hadix v. Johnson, 322 F.3d 895, 898 (6th Cir. 2003); Tidmarsh & Marumo, supra note 73, at 2233.
102. NEWBERG & RUBENSTEIN, supra note 56, § 17:4.
than “professionals.” 103 The one curious exception to this general rule of
resti-
tution is the law of marine salvage, 104 which holds that persons voluntarily ren-
dering assistance to a ship facing “impending peril on the sea” and successfully
recovering “property from actual loss” are “entitled to share in the reward
which the law allows for such meritorious service, and in proportion to the
nature, duration, risk, and value of the service rendered.” 105 Though beyond
the scope of this Note, it is worth noting that the public policy rationales and
legal standards relating to salvage awards are remarkably similar to those re-
lating to class representative incentive awards. 106 To the extent that class rep-
resentative services—like the voluntary services of lawyers, doctors, or
salvors—are considered socially beneficial, perhaps the equitable doctrine of
restitution for benefits conferred voluntarily should be reconsidered and pos-
sibly expanded. 107

Notably, the restitutionary theory of incentive awards is consistent with
the current formulation of Rule 23(e), as amended in 2018. Under Rule
23(e)(2)(D), courts must consider whether class action settlements “treat[]
class members equitably relative to each other” before finding that the settle-
ment is “fair, reasonable, and adequate.” 108 Interpreting Rule 23(e)(2)(D), the
Newberg and Rubenstei n treatise observes:

103. In re Cont’l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992) (emphasis added) (also
noting that the law of restitution affords no entitlement to collect a fee if “you dive into a lake
and save a drowning person”).

104. Id.

105. The Blackwall, 77 U.S. 1, 12 (1869).

106. Compare id. at 8–15 (explaining that “remuneration for salvage service is awarded to
the owners of vessels on account of the danger to which the service exposes their property, and
the risk which they run of loss in suffering their vessels to engage in such perilous undertakings,”
and courts consider factors such as the “labor expended by the salvors,” “risk incurred by the
salvors,” and the “value of the property saved” in determining the value of a salvage award), with
supra Section I.B (discussing policy rationales for incentive awards such as compensation to class
representatives for their labor and inducement of individuals to participate in class action law-
suits), and NEWBERG & RUBENSTEIN, supra note 56, §§ 17:3, 17:13 (similarly explaining that
incentive awards exist to prompt individuals to take on potentially risky roles as class
representatives, and courts determine the amount owed to representatives by weighing factors
such as the actions taken on behalf of the class, the risk to the representative, and the degree to
which the class benefited from these actions). Salvage awards are often justified by admiralty
courts not just as restitution based on the principles of quantum meruit but also as “sound public
policy” to incentivize salvors to undertake costly and dangerous—but socially beneficial—efforts
to save life or property. See Salvage, BLUESTEIN LAW FIRM, P.A., https://www.bluesteinlawof-
face.com/maritime-law-articles/salvage [perma.cc/4YJR-WNQU]; Margate Shipping Co. v. M/V
JA Orgeron, 143 F.3d 976, 986 n.12 (5th Cir. 1998) (“[I]f the costs of performing a salvage are
too high or the benefits to be derived too low, the parties might well agree to call it a day and let
the sea claim its prize.”).

107. Cf. Charles Silver, The Suspect Restitutionary Basis for Common Benefit Fee Awards in
Multi-District Litigations, 101 TEX. L. REV. 1653, 1673 (2023) (“The baseline for absent class
members, who often cannot be identified and are entirely passive, is a $0 recovery. From their
perspective, a positive payment from a common fund—even one diminished by [an incentive
award] levy—can only be an improvement.”).

108. FED. R. CIV. P. 23(e)(2) (emphasis added).
The equitable treatment requirement most obviously protects absent class members from being subjected to excessive incentive awards, but it also protects class representatives from having absent class members free ride on their efforts. In other words, if the class representatives face particular risks in serving the class and/or undertake valuable work on behalf of the class but cannot recover any of the costs of those efforts through an incentive award, they have a fair argument that the settlement is not treating them equitably relative to the absent class members.\(^\text{109}\)

The treatise goes further, positing that “incentive awards may [even] be necessary to ensure that class representatives are treated [equitably] to other class members, rewarded both for the value of their claims (like all other class members) but also for their unique service to the class.”\(^\text{110}\)

Other courts and scholars have advanced alternative legal theories to justify incentive awards. Judge Richard Posner, for example, has suggested in dicta that class representative compensation “could be thought the equivalent of [class counsel’s] nonlegal but essential case-specific expenses, such as long-distance phone calls, which are reimbursable.”\(^\text{111}\) Meanwhile, Professor William Rubenstein has postulated that representatives may derive a “simple and straightforward” legal entitlement to an incentive award because the award “is paid out of the class’s common fund and the class representative, as a member of the class, is, by definition, entitled to a portion of the common fund.”\(^\text{112}\) And Benjamin Gould, a class action practitioner,\(^\text{113}\) has also presented two alternative theories: (1) the law of settlement agreements provides courts with “independent remedial power” sufficient to authorize incentive awards in most cases,\(^\text{114}\) and (2) analogizing class representatives to trustees justifies compensating representatives for their “personal services” under “traditional equitable principles.”\(^\text{115}\)

Though the public policy rationales for incentive awards are strong,\(^\text{116}\) the legal authority buttressing such awards remains a matter of significant controversy in the federal courts and legal academy today.

\(^{109}\) NEWBERG & RUBENSTEIN, supra note 56, § 17:4 (footnote omitted).

\(^{110}\) Id. § 17:3 (emphasis added): cf. Moses v. N.Y. Times Co., 79 F.4th 235, 245 (2d Cir. 2023) (“It bears emphasis that Rule 23(e)(2)(D) requires that class members be treated equitably, not identically.”).

\(^{111}\) In re Cont’l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992). Other examples of non-legal but essential litigation expenses that are reimbursable from a common fund include postage, delivery fees, and travel costs. See, eg., In re Immune Response Sec. Litig., 497 F. Supp. 2d 1166, 1177 (S.D. Cal. 2007).

\(^{112}\) NEWBERG & RUBENSTEIN, supra note 56, § 17:4 (footnote omitted).


\(^{115}\) Id. at 16–17, 19–22.

\(^{116}\) See supra Section I.B.
D. Opposition to Incentive Awards Before 2020

Incentive awards may have been ubiquitous before Johnson, but such payments have never been immune from policy and legal opposition from critics, including legislators, courts, and class action settlement objectors.\(^{117}\)

Some of the fiercest public opposition to incentive awards has come from Capitol Hill, notably during consideration of the Class Action Fairness Act (CAFA). Section 1714(a) of the 2003 CAFA bill would have compelled courts to reject proposed class action settlements that “provide[d] for the payment of a greater share of the award to a class representative serving on behalf of a class . . . than that awarded to the other class members.”\(^{118}\) During legislative debate, Representative Bob Goodlatte characterized incentive awards as “bounties” and “rife for abuse,” and then catalogued a cherry-picked sampling of incentive award “abuses.”\(^{119}\) The House Judiciary Committee Report also articulated a concern that incentive awards create a divergence of interests between the class representative and absent class by providing disproportionately large payments to representatives vis-à-vis other class members.\(^{120}\) The 2003 CAFA bill passed the House of Representatives and was a mere one vote away from defeating a Senate filibuster.\(^{121}\) Congress eventually approved CAFA in 2005—importantly, without the draft language in Section 1714(a) of the 2003 CAFA proposal—but the 2005 CAFA did announce a congressional finding that “[c]lass members often receive little or no benefit from class actions, and are sometimes harmed, such as where . . . unjustified awards are made to certain plaintiffs at the expense of other class members.”\(^{122}\) This recent crusade against incentive awards in Congress is emblematic of a larger legislative “retrenchment” of the class action device since the 1970s.\(^{123}\)

\(^{117}\) See NEWBERG & RUBENSTEIN, supra note 56, § 17:1.

\(^{118}\) H.R. REP. NO. 108-144, at 3 (2003). Notably, the proposed bill authorized reimbursement of “reasonable time or costs that a person was required to expend in fulfilling [their] obligations as a class representative.” Id. Section 1714 appears to mirror the approach in the Private Securities Litigation Reform Act of 1995 (PSLRA), which eliminated incentive awards—but permitted reimbursement of reasonable costs and expenses—in securities class actions. See Ann K. Wooster, Propriety of Incentive Awards or Incentive Agreements in Class Actions, 60 A.L.R.6th 295 § 3 (2010).

\(^{119}\) H.R. REP. NO. 108-144, at 115–16 (statements of Rep. Goodlatte) (describing a class action against golf equipment manufacturers where a class representative was awarded $2,500 but absent class members only received three new golf balls, and a class action against a film processor where six class representatives were awarded $2,500 but absent class members only received a $1 coupon or a free film roll).

\(^{120}\) Id. at 34–35.


\(^{123}\) In a 2017 article, Professors Stephen Burbank and Sean Farhang “map[ped] legislative activity for class action retrenchment” to “[identifi]y all bills that sought to amend federal law so as to restrict opportunities and incentives for class actions.” Burbank & Farhang, supra note 49,
Federal courts, like lawmakers, have also raised concerns about incentive awards long before Johnson. As early as 1989, one district court observed that granting incentive awards could create “a potentially undesirable precedent where every named plaintiff would expect a ‘fee’ or ‘bounty,’” which could lead to “bidding war[s]” for class representative services.\textsuperscript{124} Further, in 2013, the Sixth Circuit commented in dicta that it had neither officially approved nor disapproved the practice of granting incentive awards.\textsuperscript{125} Though the Sixth Circuit did not reach the question of incentive award permissibility in \textit{Dry Max Pampers}, the panel majority did note: “[T]o the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design.”\textsuperscript{126} Nevertheless, the Sixth Circuit has affirmed district court grants of incentive awards before and after Johnson.\textsuperscript{127}

Finally, in the years preceding Johnson, some class action litigators and settlement objectors raised the very same argument against the lawfulness of incentive awards that the Eleventh Circuit found persuasive in Johnson—but to no avail at the time. For instance, in a public hearing before the Advisory Committee on Civil Rules in 2017, practitioner Eric Isaacson testified to his belief that “the Supreme Court’s seminal common-fund precedents appear to

\begin{footnotes}
\textsuperscript{124} In re Gould Sec. Litig., 727 F. Supp. 1201, 1209 (N.D. Ill. 1989); see also Wesley v. Spear, Leeds & Kellogg, 711 F. Supp. 713, 720 (E.D.N.Y. 1989) (“If class representatives expect routinely to receive special awards in addition to their share of the recovery, they may be tempted to accept suboptimal settlements at the expense of the class members whose interests they are appointed to guard.”).

\textsuperscript{125} In re Dry Max Pampers Litig., 724 F.3d 713, 722 (6th Cir. 2013); see also Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003) (noting that the Sixth Circuit “has never explicitly passed judgment on the appropriateness of incentive awards”).

\textsuperscript{126} \textit{Dry Max Pampers}, 724 F.3d at 722 (also noting that courts should be dubious of incentive awards that make class representatives whole or more than whole because a representative’s interests may be decoupled from those of absent class members). This concern is shared by other courts and commentators. NEWBERG & RUBENSTEIN, \textit{supra} note 56, §17:1 (“If a settlement is proposed and the class representative may soon receive a significant monetary award beyond [their] recovery as a class member, [they] may support the settlement even if the class members’ recoveries are suboptimal.”).

\textsuperscript{127} \textit{E.g.}, Moulton v. U.S. Steel Corp., 581 F.3d 344, 351, 355 (6th Cir. 2009); Shane Grp. Inc. v. Blue Cross Blue Shield of Mich., 833 F. App’x 430, 431 (6th Cir. 2021) (per curiam) (affirming district court judgment and rejecting objection that incentive awards were an impermissible bounty).
\end{footnotes}
flatly proscribe such payments to class representatives for personal services.” Several class action settlement objectors have launched this same legal objection in courts nationwide.

II. BANNING INCENTIVE AWARDS: THE LATEST ATTEMPT TO ERODE THE CLASS ACTION DEVICE

As discussed in the Introduction, the Eleventh Circuit in *Johnson* disrupted the status quo ubiquity of incentive awards. This Part analyzes that decision in considerable depth. Section II.A introduces *Johnson* and the late nineteenth-century Supreme Court cases on which it relies. Section II.B situates *Johnson* in the context of other recent precedents eroding the potency of the class action device and assesses the decision’s potential far-reaching implications. Finally, Section II.C revisits *Johnson* and explains why the incentive award issue was wrongly decided by the Eleventh Circuit.

A. The Eleventh Circuit Resurrects Late Nineteenth-Century Federal Common Law

In *Johnson*, plaintiff Charles Johnson, on behalf of himself and a putative class, sued NPAS Solutions, LLC, a medical debt collector. Johnson alleged that NPAS had violated the Telephone Consumer Protection Act by operating an automatic dialing system to call cell phones of nonconsenting persons. The parties eventually reached an agreement that NPAS would establish a $1,432,000 settlement fund to compensate 9,543 claims-submitting class members. The district court approved the settlement and—consistent with common practice at the time—allocated a $6,000 incentive award to Johnson

---


130. See supra Introduction.

131. Johnson v. NPAS Solns., LLC, 975 F.3d 1244 (11th Cir. 2020), reh’g en banc denied, 43 F.4th 1138 (11th Cir. 2022).

132. Id. at 1249.

133. Id. at 1250.
for serving as a class representative.\textsuperscript{134} No class members opted out of the settlement, and only one—the appellant herself—filed an objection to the incentive award (and other aspects of the settlement).\textsuperscript{135}

On appeal, the Eleventh Circuit evaluated, \textit{inter alia}, the objector’s contention that the class representative’s incentive award contravened late nineteenth-century Supreme Court precedent established in \textit{Trustees v. Greenough} (1882) and \textit{Central Railroad & Banking Co. of Georgia v. Pettus} (1885).\textsuperscript{136} In a surprising and potentially trailblazing holding, a divided Eleventh Circuit panel “did what no court of appeals had done before: \textit{it categorically barred incentive awards.}”\textsuperscript{137}

One must travel back in time to the 1880s to fully understand the Eleventh Circuit’s decision. As the \textit{Johnson} majority correctly recognized, \textit{Greenough} and \textit{Pettus} are the seminal Supreme Court cases establishing the “common fund” doctrine,\textsuperscript{138} which authorizes courts to exercise their inherent equitable powers to award attorneys’ fees in cases recovering a common fund.\textsuperscript{139} The \textit{Johnson} majority, however, agreed with the objector and interpreted \textit{Greenough} as crafting a hitherto-undiscovered federal common law rule: “A plaintiff suing on behalf of a class can be reimbursed for attorneys’ fees and expenses incurred in carrying on the litigation, but [they] cannot be paid a salary or be reimbursed for [their] personal expenses.”\textsuperscript{140}

The facts of \textit{Greenough} are instructive. In 1870, Francis Vose—a Florida Railroad Company bondholder—filed a lawsuit in equity, on behalf of himself and other bondholders, against the trustees of the Internal Improvement Fund of Florida and other defendants.\textsuperscript{141} Vose charged in his bill “[t]hat the trustees were wasting and destroying the [trust] fund by selling at nominal prices’ land

\begin{footnotes}
\footnotetext{134}{\textit{Id.} at 1249–51 (acknowledging that the district court handled the class settlement “in pretty much exactly the same way that hundreds of courts before it had handled similar settlements”).}
\footnotetext{135}{\textit{Id.} at 1250. The appellant objected to the incentive award on grounds proffered unsuccessfully by other class action objectors in the past: that the incentive award violated precedent set by two nineteenth-century Supreme Court cases. \textit{Id.; see supra note 129 and accompanying text.}}
\footnotetext{136}{\textit{Johnson,} 975 F.3d at 1250 (citing Trustees v. Greenough, 105 U.S. 527 (1882); Central Railroad & Banking Co. of Georgia v. Pettus, 113 U.S. 116 (1885)).}
\footnotetext{137}{\textit{Johnson En Banc Petition, supra note 93, at 4 (emphasis added); see also Johnson, 975 F.3d at 1264 (Martin, J., concurring in part and dissenting in part) ("[T]he majority takes a step that no other court has taken to do away with the incentive for people to bring class actions."); J. Thomas Richie & Scott Burnett Smith, 11th Circuit Forbids Incentive Payments, DECLASSIFIED (Sept. 22, 2020), https://www.classactiondeclassified.com/2020/09/11th-circuit-forbids-incentive-payments [perma.cc/X8QQ-RRY4] ("If you had ‘Court of Appeals prohibits class representative incentive payments by relying on Supreme Court cases from 1882 and 1885’ on your 2020 bingo card, come forward and collect your prize.").}}
\footnotetext{138}{\textit{Johnson,} 975 F.3d at 1255–56.}
\footnotetext{139}{\textit{See generally Silver, supra note 101, at 667–93.}}
\footnotetext{140}{\textit{Johnson,} 975 F.3d at 1257.}
\footnotetext{141}{\textit{Trustees v. Greenough,} 105 U.S. 527, 528 (1882).}
\end{footnotes}
that had been earmarked to service the bonds that he and the other bondholders held.\footnote{142} He ultimately prevailed in securing and recovering a substantial portion of the trust fund, and “dividends [were] made amongst the bondholders, most of whom came in and took the benefit of the litigation.”\footnote{143}

Because Vose shouldered almost the entire litigation burden and risk, he petitioned the court for “an allowance out of the [recovered] fund” to compensate him for his personal services and expenses.\footnote{144} In response, the lower court awarded Vose both an annual $2,500 allowance for personal services over ten years and reimbursement for “personal expenditures,” such as hotel bills and railroad fares.\footnote{145}

\textit{Greenough} eventually reached the Supreme Court. The Court held that the lower court properly reimbursed Vose for “his reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit, and in reclaiming and rescuing the trust fund.”\footnote{146} This reimbursement, in the Court’s eyes, was necessary to avert unjustly enriching bondholders who benefited from Vose’s years-long legal campaign to save and recover the trust fund.\footnote{147} The Court, however, found that this reasoning did not justify compensating Vose for his personal services and expenditures, in part because Vose was a creditor, not a trustee.\footnote{148} The \textit{Greenough} Court rationalized this holding by opining—without citation—that such allowances “would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interests of creditors.”\footnote{149} Ultimately, the Court held that compensating Vose for his “personal services and private expenses . . . ha[d] neither reason nor authority for its support” and partially reversed the lower court’s order.\footnote{150}

\textit{Pettus} arrived at the Supreme Court’s marble steps three years after \textit{Greenough}. \textit{Pettus} primarily dealt with application of the common fund doctrine to attorneys’ fee awards.\footnote{151} But, relevant to this Note, the \textit{Pettus} Court reiterated and affirmed the general principles articulated in \textit{Greenough} about “what costs, expenses and allowances could be properly charged upon a trust fund

\begin{itemize}
  \item \footnote{142}{Johnson, 975 F.3d at 1256 (quoting Greenough, 105 U.S. at 528–29).}
  \item \footnote{143}{\em Greenough}, 105 U.S. at 529.
  \item \footnote{144}{\em Id.}
  \item \footnote{145}{\em Id.} at 530.
  \item \footnote{146}{\em Id.} at 537.
  \item \footnote{147}{See \em id.} at 532.
  \item \footnote{148}{\em Id.} at 537–38 (acknowledging the policy interest in awarding trustees compensation for personal services to “secure greater activity and diligence in the performance of the trust, and . . . induce persons of reliable character and business capacity to accept the office of trustee”). The Court reviewed the “English and American authorities” on the equitable doctrine of trusts to reach this conclusion. \em Id.
  \item \footnote{149}{\em Id.}
  \item \footnote{150}{\em Id.}
  \item \footnote{151}{Tidmarsh & Marumo, \em supra} note 73, at 2232–37.
\end{itemize}
brought under the control of court” in a lawsuit filed by a creditor on behalf of themselves and other creditors having “a like interest.”

Back to 2020. Under its novel interpretation of *Greenough*\(^\text{153}\) and *Pettus*, the *Johnson* majority found that Johnson’s $6,000 incentive award was “part salary and part bounty.”\(^\text{154}\) The Eleventh Circuit therefore reversed the district court’s incentive award order and held that *Greenough* and *Pettus* categorically prohibit awards compensating class representatives for personal services or rewarding them for initiating class actions.\(^\text{155}\) *Johnson* became binding law in the Eleventh Circuit (encompassing Alabama, Florida, and Georgia) after the court declined to rehear the case en banc,\(^\text{156}\) and the Supreme Court denied a petition for certiorari.\(^\text{157}\)

B. **Implications of Johnson for the Future of Class Actions**

Soon after *Johnson* was decided, court watchers prognosticated that the decision “fundamentally change[d] the rules of obtaining approval for class action settlements”\(^\text{158}\) and “could be examined if not adopted by other jurisdictions.”\(^\text{159}\) Alas, the specter of *Johnson’s* holding spreading nationwide is real. One federal district court in California maintained that “*Johnson* raises a valid issue,”\(^\text{160}\) another in New York stated that the “issue is deserving of congressional attention,”\(^\text{161}\) and a Second Circuit panel asserted in dicta in 2023 that incentive awards “are likely impermissible under Supreme Court precedent”

---

153. The *Johnson* majority conceded that the “logic of *Greenough*” was “not directed to class representatives per se,” but nevertheless contended that *Greenough* was still applicable because it “involved an analogous litigation actor.” *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244, 1259 (11th Cir. 2020), reh’g en banc denied, 43 F.4th 1138 (11th Cir. 2022).
154. Id. at 1258 (“Incentive awards are intended not only to compensate class representatives for their time (i.e., as a salary), but also to promote litigation by providing a prize to be won (i.e., as a bounty).”).
155. Id. at 1260–61.
158. Richie & Smith, *supra* note 137.
butheld that it was bound by Second Circuit law to the contrary. Unless and until the Supreme Court or Congress weighs in, “courts and litigants across the country will have to grapple with the issues raised by the majority and dissenting opinions” in Johnson.

Since Johnson was decided in 2020, the First, Second, and Ninth Circuits have expressly or implicitly “disagreed with the Eleventh Circuit’s holding, forming an acknowledged circuit split.” Interestingly, there is also apparent intra-circuit disagreement among judges sitting on the Second and Eleventh Circuits—with different judges expressing different views on the lawfulness of incentive awards within the span of a few years. If the circuit split continues to grow wider—which seems almost inevitable—the Supreme Court will likely face intensified pressure in coming years to grant certiorari and decide the issue.

The prospect of the Supreme Court or other circuit courts adopting Johnson’s holding is profoundly troubling for two reasons. First, as Judge Jill Pryor warned in her Johnson dissental, prohibiting incentive awards “threatens the very viability of class actions,” especially in “small-dollar-value class actions, where incentive awards help to encourage potential plaintiffs to serve as class representatives despite having to take on significant additional responsibilities [and costs] while receiving the same modest recovery as other class members.” Hence, incentive awards may diminish “the collective action problem

---

162. Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704, 721 (2d Cir. 2023) (holding that “Melito and Naviens are precedents that we must follow”).


166. In re Apple Inc. Device Performance Litig., 50 F.4th 769, 785–87 (9th Cir. 2022).


168. Compare Melito v. Experian Mktg. Sols., Inc., 923 F.3d 85, 96 (2d Cir. 2019) (finding Greenough and Pettus inapposite), Hyland, 48 F.4th at 123–24 (applying Melito’s reasoning), and Moses v. N.Y. Times Co., 79 F.4th 235, 254, 256 (2d Cir. 2023) (holding that “Greenough and Pettus have been superseded, not merely by practice and usage, but by Rule 23, which creates a much broader and more muscular class action device than the common law predecessor that spawned the nineteenth-century precedents”), with Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704, 721, 723 (2d Cir. 2023) (suggesting that the basis for incentive awards “is at best dubious under Greenough”).

169. Compare Muranksy v. Godiva Chocolatier, Inc., 922 F.3d 1175, 1196 (11th Cir. 2019) (3–0 decision) (reviewing Greenough and Pettus but concluding that incentive awards are not “categorically improper”), vacated on other grounds, 979 F.3d 917 (11th Cir. 2020) (en banc), with Johnson v. NPAS Sols., LLC, 975 F.3d 1244, 1255–61 (11th Cir. 2020), reh’g en banc denied, 43 F.4th 1138 (11th Cir. 2022).

that prevails when a widely dispersed group of individuals possesses legal claims too costly to pursue individually, yet highly valuable in the aggregate.”

Second, the “pendulum has been swinging toward the curtailment of the class action” in recent decades, and Johnson is merely the latest fracture in the slow but steady erosion of the device by the federal judiciary. Recent examples of this judicial “retrenchment” of class actions include (but are certainly not limited to): the Supreme Court’s narrow reading of Rule 23(a)(2)’s “commonality” requirement in Wal-Mart v. Dukes; the Supreme Court’s approval of class action waivers in mandatory arbitration agreements (notwithstanding state legislative attempts to prohibit them) in AT&T v. Concepcion; the Supreme Court’s adoption of a harsher evidentiary standard for satisfying Rule 23(b)(3)’s “predominance” requirement in antitrust class actions in Comcast v. Behrend; and the Third Circuit’s heightening of the implicit “ascertainability” requirement for class certification in Marcus v. BMW. Given that “the domain of the class action [is] substantially shr[inking]—much like a grape in the sun, drying slowly into a raisin,” Johnson, considered within

(“The realistic alternative to a class action is not 17 million individual suits, but zero individual suits, as only a lunatic or a fanatic sues for $30.”).

171. See NEWBERG & RUBENSTEIN, supra note 56, § 15:53.
172. COFFEE, supra note 41, at 125.
174. Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338 (2011). Before 2011, Rule 23(a)(2)’s commonality requirement was “automatically satisfied if there was even one common legal or factual issue,” but Wal-Mart heightened the requirement by scrutinizing “whether there [are] dissimilarities, not similarities, within the proposed class.” COFFEE, supra note 41, at 127–29 (concluding that “Wal-Mart implies a radical downsizing of the size and scope of class actions”).
175. AT&T Mobility LLC v. Concepcion, 563 U.S. 333 (2011). Concepcion held that mandatory arbitration agreements—even with class action waivers—are “presumptively enforceable according to [their] terms” despite state contract law. COFFEE, supra note 41, at 129. As a result, defendants can now easily evade classwide proceedings by “induc[ing] an employee, consumer, borrower, shareholder, investor, or other person to sign a boilerplate arbitration agreement” (often a contract of adhesion) with a class action waiver. Id.
176. Comcast Corp. v. Behrend, 569 U.S. 27 (2013). Comcast appears to have heightened Rule 23(b)(3)’s predominance requirement in antitrust cases, holding that predominance is not satisfied unless plaintiffs achieve the “tall order” of “present[ing] a damages model demonstrating that antitrust injury and the damages attributable to the antitrust violation can be proven on a class-wide basis . . . without resort to individualized assessments of each class member’s position.” COFFEE, supra note 41, at 130.
177. Marcus v. BMW of N. Am., LLC, 687 F.3d 583 (3d Cir. 2012). Marcus and its progeny heightened “the traditional understanding of ascertainability” to require “a reliable and administratively feasible mechanism for determining whether putative class members fall within the class definition.” Brent W. Johnson & Emmy L. Levens, Heightened Ascertaintiability Requirement Disregards Rule 23’s Plain Language, ANTITRUST, Spring 2016, at 68–69 (quoting Byrd v. Aaron’s Inc., 784 F.3d 154, 163 (3d Cir. 2015)). “This judicially crafted hurdle” has impeded the prosecution of consumer protection and antitrust class actions in the Third Circuit. See generally id.
178. COFFEE, supra note 41, at 132; see also Arthur R. Miller, The American Class Action: From Birth to Maturity, 19 THEORETICAL INQUIRIES L. 1, 21–26 (2018); Klonoff, supra note 50, at 729, 731 (arguing that “courts have cut back sharply on plaintiffs’ ability to bring class action
this broader trend, is particularly concerning precedent. And the stakes could not be higher: Professor Francis McGovern testified to the Advisory Committee on Civil Rules that “perhaps [only] 10% to 20% of legitimate claims [would] be filed” by potential plaintiffs without the class action device.\textsuperscript{179}

C. Revisiting the Eleventh Circuit’s Johnson Holding

Given the possibility that other circuit courts and the Supreme Court may weigh in on the lawfulness of incentive awards, it makes sense to scrutinize whether applying \textit{Greenough} to modern-day incentive awards is appropriate and whether \textit{Johnson} was correctly decided. This Section does so, and concludes that the Eleventh Circuit erred.

1. Reading \textit{Greenough} in Historical Context

Because \textit{Greenough} (1882) predates the advent of the modern class action (1966) by almost a century, divorcing the case from its historical context is ill-advised. Unfortunately, \textit{Johnson}’s application of \textit{Greenough} appears to be “a classic case of ‘law-office history,’”\textsuperscript{180} as the Eleventh Circuit overlooked crucial historical and legal context.\textsuperscript{181}

First, \textit{Johnson} failed to acknowledge the unique aspects of the litigation in \textit{Greenough}—a type of equity suit that was common over a century ago but has since been rendered functionally obsolete. \textit{Greenough} was an “equity receivership” case, which Benjamin Gould has described as “the nineteenth-century analogue to, and the ancestor of, Chapter 11 reorganizations.”\textsuperscript{182} Equity receiverships were a judicially crafted product of a distinct moment in American history when railroad companies were collapsing financially but neither federal nor state statutory law could provide a remedy for their insolvency.\textsuperscript{183} In

lawsuits, thereby undermining the compensation, deterrence, and efficiency functions of the class action” and observing that “many courts now require that plaintiffs put forward considerably more evidentiary proof at the class certification stage than ever before”).


\textsuperscript{180} Tidmarsh & Marumo, \textit{supra} note 73, at 2223 (arguing that the \textit{Johnson} majority “dug deep into the dustbin of Supreme Court precedent to justify their results”). Historian Saul Cornell describes “law office history” as “a results-oriented methodology in which evidence is selectively gathered and interpreted to produce a preordained conclusion.” Saul Cornell, Heller, New Originalism, and Law Office History: “Meet the New Boss, Same as the Old Boss,” 56 UCLA L. REV. 1095, 1098 (2009).

\textsuperscript{181} Id. ("Beginning in the 1870s and continuing in waves into the 1890s, many railroads began to fail. From 1878 to 1898, however, there were no federal bankruptcy statutes of any kind,
response, federal courts intervened to “restructure the railroad’s debts” through the equity receivership process.\footnote{184 Id.; \textit{Skeel}, supra note 182, at 58–60 (describing equity receivership practice in detail).}

Creditor lawsuits “to force an entity into receivership”—like Francis Vose’s equity suit in \textit{Greenough}—were later classified as “hybrid” class actions under the 1938 version of Rule 23.\footnote{185 \textit{Coffee}, supra note 41, at 55; \textit{see supra} note 42 and accompanying text.} However, Congress’s enactment of “federal bankruptcy laws trivialized this category, leaving its remaining role to be that of perplexing law students in first-year civil procedure classes for the next generation.”\footnote{186 See \textit{supra} notes 44–51 and accompanying text.}

Importantly, hybrid class action practice was also fundamentally transformed by the 1966 amendment to Rule 23.\footnote{187 See \textit{supra} notes 44–51 and accompanying text.} Hybrid class actions involved class members with “several rights [to] specific property”\footnote{188 Robert G. Bone, \textit{Walking the Class Action Maze: Toward a More Functional Rule 23}, 46 U. \textit{Mich. J.L. Reform} 1097, 1100 (2013) (emphasis added).}—in other words, class members each claimed a right to one piece of property but “the several nature of the right at stake made litigant preferences relevant and their conflict theoretically possible.”\footnote{189 David Marcus, \textit{Flawed But Noble: Desegregation Litigation and Its Implications for the Modern Class Action}, 63 \textit{ Fla. L. Rev.} 657, 679 (2011) (emphasis added).} Hybrid class actions, therefore, could be led by a \textit{self-appointed} plaintiff-representative who did not necessarily share “joint or common interests” with other class members,\footnote{190 See Moore & Cohn, \textit{supra} note 42, at 313, 317. To be sure, the understanding of “adequacy of representation” evolved after the Supreme Court’s decision in \textit{Hansberry v. Lee} in 1940. \textit{See infra} note 198.} or could involve myriad individualized questions of law or fact as long as a single piece of property was in controversy. Modern Rule 23(b)(3) class actions, however, cannot be certified unless the court finds that the class representative “fairly and adequately protect[s] the interests of the class”\footnote{191 \textit{Fed. R. Civ. P. 23(a)(4).}} and that common questions of law or fact “predominate over any questions affecting only individual members.”\footnote{192 \textit{Id.} at 23(b)(3).} Accordingly, post-1966 class actions seeking aggregated monetary damages do not remotely resemble the pre-1966 hybrid class action, the apparent successor to Vose’s bondholder suit to establish an equity receivership in \textit{Greenough}. and railroads were excluded from the 1898 Bankruptcy Act. Nor could state law solve the problem, since the railroads were interstate operations.” (footnotes omitted)).
In light of this relevant history, the *Johnson* majority’s strained analogy of Vose to the modern class representative\(^{193}\) seems inappropriate.\(^{194}\) Gould, on the other hand, has offered a more compelling analogy: “[T]he modern descendant of the creditor in *Greenough* is not the class representative, but the creditor in a Chapter 11 bankruptcy case.”\(^{195}\) This theory is persuasive, especially because equity receivership practice ultimately “became the basis for modern corporate reorganization” law.\(^{196}\) If Gould’s analogy is more appropriate than the Eleventh Circuit’s analogy, it casts serious doubt on the factual underpinnings of *Johnson*’s conclusion.

Second, the fundamental concern animating the *Greenough* Court’s refusal to reimburse Francis Vose for his personal services and private expenses is substantially less consequential in modern class actions. In *Greenough*, the Supreme Court reasoned that compensating creditors (like Vose) for their personal services and expenditures “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.”\(^{197}\) The Court’s concern was legitimate in the context of *Greenough* and similar nineteenth-century bondholder suits. After all, to the extent that *Greenough* was even litigated as a representative action pursuant to Equity Rule 48 (which is unclear from the record), Equity Rule 48 did not contain the due process protections engraigned in modern Rule 23’s class certification requirements, such as adequacy of representation.\(^{198}\)

---

193. *Johnson v. NPAS Sols.*, LLC, 975 F.3d 1244, 1259 (11th Cir. 2020), *reh’g en banc denied*, 43 F.4th 1138 (11th Cir. 2022); see supra Section IIA.

194. Although it is beyond the scope of this Note—which focuses on Rule 23(b)(3) class actions for aggregated monetary damages—if the *Greenough* rule indeed has any relevant application to Rule 23 incentive awards, perhaps the precedent only applies to Rule 23(b)(1)(B) “limited fund” class actions in which defendants have a limited pool of funds to pay out all plaintiff claims. For an overview of Rule 23(b)(1)(B) actions, see Kara McCall, *INSIGHT: Rule 23(b)(1)(B)—A Mechanism to Avoid a Famine or Means to Achieve Undeserved Feast?*, BLOOMBERG L. (July 30, 2018, 7:07 AM), https://news.bloomberglaw.com/product-liability-and-toxics-law/insight-rule-23-b-1-b-a-mechanism-to-avoid-a-famine-or-means-to-achieve-underserved-feast [perma.cc/UU8P-Q2RN]. See also Fed. R. Civ. P. 23(b)(1)(B) advisory committee’s note to 1966 amendment (noting that Rule 23(b)(1)(B)’s reasoning applies to “an action which charges a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class of security holders or other beneficiaries, and which requires an accounting or like measures to restore the subject of the trust”).

195. Gould, supra note 114, at 9–11, 17–18 (observing that “even under the present Bankruptcy Code, while individual creditors may be entitled to attorneys’ fees if they make a substantial contribution, they cannot receive payment for their personal services” (footnotes omitted)).


197. *Trustees v. Greenough*, 105 U.S. 527, 538 (1882); see also Gould, supra note 114, at 22 (“[N]ot all creditors in an equity receivership litigated (either formally or practically) on behalf of themselves and other creditors. Indeed, that is what prompted the *Greenough* Court’s worries about intermeddling by small creditors.” (footnote omitted)).

198. See Tidmarsh & Marumo, supra note 73, at 2240 (noting that representatives litigating under Equity Rule 48 had “no duty of loyalty toward the class, nor even the commonality or typicality of claim that fosters adequate representation”). Tidmarsh and Marumo also correctly observe that “adequacy of representation” was first required after the 1938 adoption of Rule 23
Importantly, the Greenough Court’s rule was designed to prevent opportunistic creditors from “officious[ly] intermeddling” in a trust fund. The public policy underlying this rule, however, is substantially less relevant in the modern class action context. In Greenough, the court did not have a reliable procedural mechanism to screen creditors like Vose for conflicts of interest. In stark contrast, Rule 23 now contains robust procedural safeguards to protect absent class members from improper “intermeddling” by class representatives. In particular, Rule 23(a)(4) compels courts to determine at certification whether a representative “will fairly and adequately protect the interests of the class,” and Rule 23(e)(2)(A) bars courts from approving class settlements unless they make an affirmative finding that the representative “adequately represent[s] the class.” Moreover, as Tidmarsh and Marumo observe, class representatives are generally understood to serve as “a fiduciary of the class” or owe, at minimum, “fiduciary obligations toward the class.” In essence, one of the primary purposes (if not the predominant purpose) of the Greenough rule—to preclude intermeddling in a trust fund by opportunistic creditors—is not particularly relevant to modern class action practice.

Third, even if Greenough’s rule against taxing a trust fund to reimburse a creditor’s personal services and expenditures were to apply to modern class actions, the amount and type of the compensation prohibited in Greenough are not analogous to modern-day incentive awards. For example, Francis Vose requested reimbursement totaling approximately $1.3 million in 2020 dollars, including an annual “salary” of roughly $66,000 over ten years and almost $400,000 for hotel and travel costs. Such compensation is a far cry from the comparatively modest median incentive awards (approximately $6,500 in 2021 dollars) found in Eisenberg and Miller’s and Rubenstein’s empirical studies. Notably, typical incentive awards are also awarded as a lump sum, which courts review using multifactor tests, but “are never a fixed regular payment and they hardly amount to a salary.”

and only became a constitutional requirement for a class action to have preclusive effect after Hansberry v. Lee, 311 U.S. 32 (1940). Id. at 2238–39.

199. Id. at 2235 n.82 (“The ‘officious intermeddler’ doctrine does not allow people who bestow goods or services without request to sue for the value of the goods or services.”).

200. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810 (1985) (recognizing that absent class members “may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for [their] protection”).

201. FED. R. CIV. P. 23(a)(4).

202. Id. at 23(e)(2)(A).

203. Tidmarsh & Marumo, supra note 73, at 2239–41 (collecting cases).

204. NEWBERG & RUBENSTEIN, supra note 56, § 17:4.

205. See supra notes 62–67 and accompanying text.


207. Brief of Professor William B. Rubenstein as Amicus Curiae in Support of Rehearing En Banc at 5, Johnson v. NPAS Sols., LLC, 43 F.4th 1138 (11th Cir. 2022) (No. 18-12344). The Ninth Circuit has acknowledged that “[t]here are, of course, cases where the incentive award is
Fourth, though it is beyond the scope of this Note, law professors, practitioners, and judges have raised serious doubts about whether the federal general common law rule announced in *Greenough* remains good law after *Erie Railroad Co. v. Tompkins* (1938).208 The Eleventh Circuit did not confront this issue in *Johnson*,209 but the issue deserves judicial attention.

Considering the aforementioned historical and legal context, the Eleventh Circuit’s application of *Greenough* to modern class action incentive awards is misguided.

2. Supreme Court Dicta on Incentive Awards

In more recent cases involving modern class action practice, the Supreme Court has also implicitly recognized the availability of incentive awards in dicta, calling *Johnson*’s holding into further question. For example, in *China Agritech v. Resh* (2018), the Supreme Court acknowledged that class representatives “might receive a share of class recovery above and beyond [their] individual claim.”210 And a year later, the Court noted in a per curiam opinion in *Frank v. Gaos* that portions of a class action settlement fund would be allocated to “the named plaintiffs in the form of incentive payments.”211 The Supreme Court did not squarely address the lawfulness of incentive awards in these cases—or the application of *Greenough* to class actions—but several judges on the Eleventh Circuit found the Supreme Court’s silence on the matter to be persuasive.212

more aptly analogized to a salary”—e.g., where the award is excessive or creates a conflict of interest—but drew a different conclusion than the Eleventh Circuit, holding instead that incentive awards should be reviewed for reasonableness but “cannot categorically be rejected or approved.” *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 786–87 (9th Cir. 2022).

208. *E.g.*, *Johnson* Cert. Petition, supra note 167, at 3 (“*Greenough* is entirely inapposite, since it fashioned general federal common law, a type of law that, since *Erie*, [the Supreme] Court has held *does not exist.*”); Brief of 26 Professors of L., Amici Curiae in Support of Plaintiff-Appellee’s Petition for Rehearing En Banc at 6, *Johnson* v. NPAS Sols., LLC, 43 F.4th 1138 (11th Cir. 2022) (No. 18-12344); *Johnson* v. NPAS Sols., LLC, 43 F.4th 1138, 1143 n.9 (11th Cir. 2022) (Pryor, J., dissenting); *Moses v. N.Y. Times Co.*, 79 F.3d 235, 254–55 (2d Cir. 2023).

209. *Johnson*, 43 F.4th at 1143 n.9 (Pryor, J., dissenting) (“The panel majority opinion also failed to address that *Greenough* was based on general federal common law. . . . To divine the general common law in *Greenough*, the Supreme Court relied on both old English cases and state court cases to determine what Vose could receive as compensation which was the correct approach at the time. . . . But, in 1938, the Court’s *Erie* decision renounced reliance on federal general common law, famously recognizing that ‘[t]here is no federal general common law.’” (quoting *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938))).


212. *Johnson*, 43 F.4th at 1147 (Pryor, J., dissenting); *Johnson* v. NPAS Sols., LLC, 975 F.3d 1244, 1267 (11th Cir. 2020) (Martin, J., concurring in part and dissenting in part) (noting that “a majority of the Supreme Court acknowledged [in *Frank*] that a proposed settlement award
3. Congressional Action and Inaction on Banning Incentive Awards

Legislative history relating to class action incentive awards also suggests that Johnson was wrongly decided. Notably, the Private Securities Litigation Reform Act of 1995 (PSLRA) “prohibited incentive awards . . . for class representatives in securities class action settlements.”\(^{213}\) And, as discussed earlier, the 2003 CAFA bill would have proscribed federal courts from approving class action settlements involving incentive awards.\(^{214}\) The fact that Congress banned only a narrow category of incentive awards in the PSLRA and attempted (but failed) to enact a more comprehensive ban in the 2003 CAFA bill suggests that Congress “does not view these awards as illegal” under current Supreme Court precedent.\(^{215}\)

III. FACING THE FUTURE: INCENTIVE AWARDS AFTER JOHNSON

As discussed in Section II.B, there is a real possibility that the Eleventh Circuit’s ban on incentive awards will extend to other circuits or eventually become binding Supreme Court precedent, which could have devastating consequences for the continued viability of class actions. This Part confronts this unsettling prospect and presents three proposals—one for policymakers and two for plaintiff-side class action practitioners—that could save the equitable tradition of compensating deserving class representatives if this Note’s fears come to fruition.

A. Legitimizing Incentive Awards Through Rulemaking or Legislation

Assuming the Johnson holding spreads beyond the Eleventh Circuit, the most seemingly obvious and straightforward solution would be to legitimize incentive awards via rulemaking or legislation. More specifically, the Advisory Committee on Civil Rules could recommend that the Supreme Court amend Rule 23, or Congress could expressly authorize federal courts to grant incentive awards to class representatives at their discretion. In fact, the Johnson majority contemplated these two possibilities.\(^{216}\) And, in a student note, Sofia Hubscher also advanced a similar proposal—albeit in the specific context of Rule 23(b)(2) and employment discrimination class actions.\(^{217}\) Moreover, in
other contexts, Congress has authorized courts to award incentive payments to private plaintiffs initiating public interest litigation, such as certain whistleblower suits under the False Claims Act.\footnote{See Kathryn Buggs, Note, Gotta Get Those Ill-Gotten Gains: Improving the FTC’s Authority to Seek Disgorgement in Antitrust Cases, 121 Mich. L. Rev. 1235, 1256 (2023); Clinton A. Krislov, Scrutiny of the Bounty: Incentive Awards for Plaintiffs in Class Litigation, 78 Ill. Bar J. 286, 286–87 (1990) (noting that federal statutes “explicitly grant bounties for finders, initiators, and others who inform and take action for the benefit of the sovereign . . . or for taxpayers”); COFFEE, supra note 41, at 14.}

Admittedly, the rulemaking and legislative approaches face two significant obstacles. First, the rulemaking approach may violate the Rules Enabling Act, which states that the Federal Rules “shall not abridge, enlarge or modify any substantive right.”\footnote{28 U.S.C. § 2072(b).} Though there is sufficient legal authority for granting incentive awards (e.g., under the substantive law of restitution and unjust enrichment),\footnote{See supra Section I.C.} there is also some risk that federal courts may disagree and find that the rulemaking approach “run[s] afoul of the Rules Enabling Act” by “creat[ing] a new right to payment” for some class representatives.\footnote{See Silver, supra note 107, at 1676.} Second, the legislative and rulemaking approaches rely on either affirmative authorization or acquiescence\footnote{Although the Rules Enabling Act “authorizes the Supreme Court to prescribe general rules of practice and procedure,” Congress “retain[s] the ability to review and reject any rule adopted by the Supreme Court.” Laws and Procedures Governing the Work of the Rules Committees, U.S. COURTS, https://www.uscourts.gov/rules-policies/about-rulemaking-process/laws-and-procedures-governing-work-rules-committees [perma.cc/LY8P-YN2V].} by Congress. Given past congressional hostility toward class actions and incentive awards,\footnote{See supra Section I.D.} partisan gridlock, and the Senate filibuster, codifying incentive awards may ultimately prove wishful thinking.

B. Reimagining Incentive Awards

Even if the Supreme Court or other circuit courts adopt Johnson’s holding and policymakers decline (or fail) to implement the proposal discussed in Section III.A, plaintiff-side class action practitioners should innovate by reimagining the traditional practice of equitably compensating deserving class representatives. This Section presents two novel proposals for practitioners to test drive in the Eleventh Circuit or any other circuit embracing Johnson—one for when a common fund is created after a judgment on the merits in favor of the plaintiff class (Section III.B.1) and one for when the parties negotiate a classwide settlement (Section III.B.2).
1. Reframing Incentive Awards as Reimbursement for “Costs”

Greenough and Johnson do not have to be a death knell for equitably compensating class representatives after a favorable judgment on the merits. Historical context, once again, is crucial. Though there is a meaningful difference between “costs” in equity and at common law, and between “costs” in England and the United States, this difference “has escaped attention”—perhaps because the “identity of term conceals fundamental variations in function.”

An 1890 treatise on equity practice in the United States, published a few years after Greenough, describes the key distinction: “The costs of an action at law are governed by fixed and arbitrary rules,” whereas “[i]n equity, the award or denial of costs is always in the discretion of the court.” Since the Federal Rules consolidated actions in equity and at law into one form of civil action, Rule 54(d) now governs the authority of federal courts to allow costs. Notably, the influential Federal Practice and Procedure treatise observes that inclusion of the phrase “unless a court order directs otherwise” in the plain text of Rule 54(d)(1) suggests that Rule 54(d) “adopts the practice [of allowing costs] formerly followed in equity rather than at law.” Accordingly, awarding costs is within the court’s discretion.

Because federal courts—even today—exercise equity-based discretion in awarding costs to the prevailing party, class counsel could petition the district court under Rule 54(d) to allow “costs” to the class representative by ordering the common fund (or even the defendant) “to reimburse [the class representative] for [their] expense and trouble” in leading the litigation on behalf of the plaintiff class. Such an award would be at the court’s discretion, “taking into consideration the circumstances of the case[]” and “the situation or conduct of the parties.” A class representative’s “costs” could reasonably encompass, for instance, direct economic costs, opportunity costs, reputational costs,

---

224. Arthur L. Goodhart, Costs, 38 YALE L.J. 849, 849–50 (1929); id. at 851 (arguing that “a distinction must be drawn between the costs awarded in the common-law courts and those given by equity”); see Jones v. Coxeter (1742) 26 Eng. Rep. 642, 642 (“The giving of costs in equity is [e]ntirely discretionary . . . and is not at all conformable to the rule at law.”); 10 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2665 (4th ed. 2022) (“Before the adoption of the federal rules, the federal courts tended to allow costs by treating them as within their inherent power in the absence of express statutory guidance on the subject. At law, costs were awarded [to] the prevailing party automatically; in equity, however, the courts considered themselves free to exercise discretion.”).

225. ROGER FOSTER, A TREATISE ON PLEADING AND PRACTICE IN EQUITY IN THE COURTS OF THE UNITED STATES § 326 (1890).

226. See supra Section IA.

227. FED. R. CIV. P. 54(d).

228. WRIGHT ET AL., supra note 224, § 2665 (emphasis added).

229. See Foster, supra note 225, § 326.

230. See id. In Sprague v. Ticonic National Bank, the Supreme Court explained the vast discretion of federal courts sitting in equity to award costs, including “other expenses entailed by the litigation not included in the ordinary taxable costs recognized by statute.” 307 U.S. 161, 164
and costs associated with defendant retaliation. 231 Although few courts have conceptualized incentive awards as recoverable costs in the past, 232 the theory is legally and historically sound.

Crucially, this proposal is also wholly consistent with Greenough. In Greenough, the Supreme Court recognized two “long-established” principles that guide federal courts in exercising equitable authority. 233 First, “[i]n cases of administration of funds under its control, [a federal court may] make such allowance to the parties out of the fund as justice and equity may require.” 234 Second, a federal court may exercise “control over the costs and charges of the litigation, to be exercised as equity and justice may require, including proper allowances to those who have instituted proceedings for the benefit of a general fund.” 235 Therefore, even if Greenough’s reasoning is extended to modern class actions, class representatives could still be compensated for their “reasonable costs, counsel fees, charges, and expenses incurred in the fair prosecution of the suit,” so long as the reimbursement is modest and does not rise to providing “a salary for their time and of having all their private expenses paid.” 236

2. Negotiating Settlements to Include Incentive Awards Paid by Defendants

Because Rule 54(d) regulates only the allowance of “costs” to a prevailing party after a judgment on the merits, equitably compensating class representatives in class action settlements likely requires a different approach than the one proposed in Section III.B.1. Where a class action is settled instead of litigated to final judgment, class counsel could negotiate a term in the class settlement agreement requiring the defendant to pay a modest incentive award to the class representative, in an amount determined by the district court at the Rule 23(e)(2) fairness hearing. The incentive award payment would be separate from the defendant’s payment into the common fund.

Why should class counsel request that the defendant, rather than the class, pay the class representative’s incentive award? The primary reason is that
Greenough’s holding governs only the “costs, expenses, and allowances” that may be awarded to the named plaintiff by taxing “a trust fund under the control of the court.” 237 Vose’s lawsuit in Greenough was litigated to a final judgment and did not involve a settlement,238 so Greenough therefore places no limitations on direct payments between a defendant and class representative as part of a class settlement agreement.239 The only court-imposed constraints on class settlement agreements are those articulated in Rule 23(e), including the court finding that the settlement is “fair, reasonable, and adequate,”240 that the class representative “adequately represented the class,”241 and that the settlement “treats class members equitably relative to each other.”242 As discussed in Section I.C, the Newberg and Rubenstein treatise positsthat under certain circumstances, an extra payment to class representatives in addition to their individual settlement payout as a member of the class may actually be necessary to satisfy Rule 23(e)(2)(D)’s equitable treatment requirement.243

Admittedly, asking the defendant to pay the incentive award seems inconsistent with the restitutionary theory of incentive awards because the absent class—not the defendant—is unjustly enriched by the representative’s service to the class.244 Although the restitutionary theory is a persuasive justification for incentive awards, plaintiff-side practitioners should be prepared to rationalize such awards on other grounds if Johnson’s holding continues to gain traction. Even though the proposal in this Section may be in tension with restitutionary theory, it is consistent with the “private attorney general” rationale,245 the plain text of Rule 23(e)(2)(D),246 and the law of contracts.247

There are three potential critiques of this proposal that merit some discussion. First, defendants may hesitate to agree to pay an unspecified incentive award amount that will later be determined by the court. But defendants can rest assured: courts have historically awarded modest incentive awards,248 and

237. Id. at 527.
239. See id. at 13–14 (“Generally, parties settling an action may include whatever they wish in a settlement agreement . . . . For settlement agreements are simply a contract between parties to resolve litigation, and it is the parties, not the court, that are responsible for negotiating and drafting class settlement agreements.”); id. at 14–15 (“Even if Greenough restricted courts from making awards to class representatives after a decision on the merits, that restriction would not apply to a settlement agreement that authorized such awards. For at most, Greenough restricted how a federal court may exercise its remedial powers on its own—i.e., in the absence of a settlement agreement.”).
240. FED. R. CIV. P. 23(e)(2).
241. Id. at 23(e)(2)(A).
242. Id. at 23(e)(2)(D).
243. Supra Section I.C.
244. See supra Section I.C.
245. See supra Section I.B.3.
246. See supra notes 108–110 and accompanying text.
247. Cf. supra note 239.
248. See supra Section I.A.2.
there is no reason to believe that they would suddenly start to allocate larger awards. Assuming that the class settlement agreement stipulates a “modest” incentive award, defendants could theoretically appeal the district court’s implementation of an immodest award on the basis of ordinary principles of contract interpretation. However, because incentive awards “usually pale[] in comparison to the aggregate amount awarded to the class,” and defendants are generally “most interested in the total settlement amount and achieving finally,” many defendants would likely consent to paying an incentive award (even with uncertainty as to the precise amount) to secure the benefits of global peace that a class action settlement affords. Finally, although the purpose of the court’s fiduciary duties to the absent class and Rule 23(e)(2)(D)’s equitable treatment requirement is to protect class members, these protections also have an indirect effect of advancing the defendant’s interest in paying the lowest possible incentive award under this proposal.

Second, some commentators may argue that it is inappropriate for class counsel to simultaneously negotiate the monetary relief for the settlement class and an incentive award. The concern regarding simultaneous negotiation primarily arises, however, in the context of class counsel negotiating a “lump sum that covers both class claims and attorney fees.” Even though incentive awards do present some inherent conflict between the interests of the class representative and absent class, that concern is lessened because of Rule 23’s robust due process protections, the court’s and class counsel’s fiduciary obligations to the absent class, and the fact that class counsel possesses

---

249. Kyle Miller, The Beginning of the End for the Class Representative Incentive Award? (Part II), JD SUPRA (June 11, 2021), https://www.jdsupra.com/legalnews/the-beginning-of-the-end-for-the-class-4346925 [perma.cc/W8D6-HL9R] (“If a defendant settles a class action for $5 million, the defendant likely does not care much that the class representative is getting $5,000.”).

250. Fresno Cnty. Emps. Ret. Ass’n v. Isaacson/Weaver Fam. Tr., 925 F.3d 63, 71 (2d Cir. 2019) (“[A] ‘court is to act as a fiduciary who must serve as a guardian of the rights of absent class members’ in reviewing a class-action settlement and a class fee award.” (quoting Goldberger v. Integrated Res., Inc., 209 F.3d 43, 52 (2d Cir. 2000))).

251. In particular, Rule 23(e)(2)(D)’s equitable treatment requirement precludes courts from awarding unjustifiably large incentive awards. FED. R. CIV. P. 23(e)(2)(D). Though this rule is intended to protect absent class members, if practitioners were to adopt the proposed negotiation strategy, Rule 23(e)(2)(D) would also assure defendants that any court-determined incentive award would necessarily be capped at an amount that would still allow the court to find that the overall settlement agreement “treats class members equitably relative to each other.” See supra Section I.C.

252. See DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION § 21.7 (4th ed. 2023) (emphasis added) (describing the potential conflict of interest between class counsel and the class); Gould, supra note 114, at 15 (“Ethical class counsel do not negotiate their fees when they negotiate the rest of the settlement agreement. That would make entitlement to fees a term of the settlement agreement that class counsel may have bargained for at the expense of more relief for the class, in violation of their fiduciary obligations.”).

ultimate authority to negotiate and enter into classwide settlements—even without the “assent of class representatives.” Additionally, class counsel would not negotiate the precise amount of the incentive award with the defendant—that determination would be left to the sound discretion of the district court.

Third, others may contend that this proposal is merely a disguised means to tax the common fund to pay the class representative an incentive award. The settlement procedure recommended in this proposal, however, minimizes this concern. Because the incentive award amount would necessarily be determined (by the court) after the parties finish negotiating the defendant’s payment into the common fund, the defendant cannot reliably treat the common fund and incentive award as a single pot of money and make tradeoffs between the two payments. Further, even if defendants could estimate the amount of the incentive award, these awards (unlike attorneys’ fees) are typically such a tiny fraction of the total value of the common fund that defendants are unlikely to expend finite negotiation power on shifting the cost back onto the class by decreasing the common fund payment by an equivalent amount.

CONCLUSION

In a concurring opinion in *Fikes Wholesale*, Judge Dennis Jacobs postulated: “Perhaps class actions that plaintiffs lack incentive to bring are class actions that need not be brought.” This Note fundamentally disagrees. Most rational economic actors—absent altruism or a public spirit—would see no reason to unilaterally shoulder the substantial costs and risks of serving as a class representative only to receive the same monetary payout as an absent class member. This is especially true where the class representative’s individual damages claim is small or dwarfed by the cost of litigation. But this manifestation of the collective action problem does not mean that certain class actions ought not be brought. After all, class actions enable plaintiffs to aggregate meritorious claims into a viable litigation unit to vindicate rights that might otherwise go unenforced but for the class action vehicle. Class litigation also serves the important public policy purpose of holding defendants accountable and deterring future lawbreaking.

Judge Jacobs’s commentary also suggests that the controversy over incentive awards is intertwined with the larger debate among federal judges, legal

---

255. Eisenberg & Miller, supra note 24, at 1308 (finding the median total incentive award in their study comprised only 0.02% of aggregate class recovery). Even where incentive awards are large, they are still generally akin to a rounding error for a defendant’s aggregate financial liability. See, e.g., Fikes Wholesale, Inc. v. HSBC Bank USA, N.A., 62 F.4th 704, 713, 722 (2d Cir. 2023) (combined incentive award payment of $900,000 to eight class representatives comprised just 0.017% of the $5.3 billion common fund).
practitioners and academics, policymakers, and the public writ large about the utility of the class action device. Nevertheless, as long as the class action continues to live on in Rule 23, class representatives like Lance Slaughter—who, at great personal cost, assist in establishing a common fund to benefit the plaintiff class—deserve equitable compensation. Justice so requires.