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Both Sides 'Taken by Surprise' as 11th Circuit 'Eradicated' Incentive Fees for Class-Action Representatives

Jason Kellogg said the Eleventh Circuit opinion “hit like wildfire" among class-action attorneys.

By Michael A. Mora
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Harley S. Tropin, president of Kozyak Tropin & Throckmorton in Coral Gables

South Florida attorneys are disagreeing with a majority opinion by a federal appeals court on Thursday, which disallowed incentive fees for class-action representatives.

The case involved Charles Johnson, the class representative, who sued NPAS Solutions in the U.S. District Court for the Southern District of Florida over allegations that it violated the Telephone Consumer Protection Act.

In the settlement, there was a recovery of over $1.4 million, of which the lawyers were allocated 30%, and Johnson got a $6,000 incentive award in the litigation that included more than 9,500 class members.

'Hit like wildfire'

Eleventh Circuit U.S. Court of Appeals Judge Kevin C. Newsom wrote the majority opinion.

The majority found the district court had repeated several errors when it approved the settlement. Among them, Newsom claimed the lower court ignored on-point Supreme Court precedent prohibiting incentive awards and giving the class representative preferential treatment.

"We don't necessarily fault the district court—it handled the class-action settlement here in pretty much exactly the same way that hundreds of courts before it have handled similar settlements," Newsom said. "But familiarity breeds inattention, and it falls to us to correct the errors in the case before us."

Now, Jason Kellogg, a partner at Levine Kellogg Lehman Schneider + Grossman in Miami, said the Eleventh Circuit opinion has "hit like wildfire last night among the lawyers who do class-action work."

"The opinion has taken both sides of The Florida Bar by surprise," Kellogg said. "I don't think anyone seriously thought incentive awards were in danger of being eradicated in the Eleventh Circuit. This is the first ruling of its type in the country."

Harley S. Tropin, the president of Kozyak Tropin & Throckmorton in Coral Gables, said the ruling would not change class-action lawsuits where the class representative has the main motivation of reforming a practice.

Tropin gave the example of a class-action lawsuit where a health maintenance organization cheated doctors by reimbursing them improperly. The doctors were motivated by more than just compensation. They wanted to come to an agreement with the insurer to prevent this from happening again.

On the other hand, a person buying a television from a store based on

deceptive advertising could apply to thousands of more class members. To motivate someone to serve as class representative, he said, it might be important to be able to offer that person an incentive fee.

“They’re sitting for a deposition, their records are going to have to be examined and they’re going to go through the stress and annoyance for being a plaintiff in a lawsuit that’s primarily going to benefit thousands of other people as opposed to just himself,” Tropin said.

Ronald P. Weil, a partner at Weil, Snyder & Ravindran in Miami, said the Eleventh Circuit upended almost a century of jurisprudence.

“The thin predict for its decision are two Supreme Court rulings dating back to the late 1800s,” Weil said. “Both decisions predate the adoption of Rule 23 by some four decades.”

Weil claimed that Federal Rules of Civil Procedure Rule 23 was specifically adopted to even the terrain for consumers injured by defective products or damaged by misleading or fraudulent business practices.

“Regrettably,” Weil said, “the decision takes direct aim at class-action representatives, warning that should they dare to risk their reputations and take on the burden of class representation, they may do so largely on their own dime and at their own risk.”