

# **INCENTIVE AWARDS TO CLASS REPRESENTATIVES IN CLASS ACTION SETTLEMENTS**

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## **INTRODUCTION**

As part of many class action settlements, the named plaintiffs receive an incentive award for having performed the services of a class representative.<sup>2</sup> While such awards are routinely made, courts continue to debate the legal rationale and evidentiary showing for such awards. The case law is inconsistent and, as a result, practitioners frequently struggle with setting a fair settlement amount for class representatives. On the one hand, it is important that class representatives receive some compensation for the additional time, effort and risk associated with bearing the fiduciary duties of a class representative. At the same time, if the compensation to class representatives is disproportionately greater than the benefits to ordinary class members, a court may find that the class representatives have interests that conflict with those of the class.

In this article, we provide a summary of the case authority on class representative bonuses and suggest strategies to ensure that these awards do not interfere with approval of a class action settlement.

## **FORMS OF INCENTIVE COMPENSATION FOR NAMED PLAINTIFFS**

Compensation for named plaintiffs can be handled in two different ways. We refer to these as the Bonus Method and the Preferential Treatment Method. While these two approaches are analytically distinct, courts rarely distinguish between them and typically rely on the same kinds of factors to evaluate and justify them.

**Bonus Method** - The first method is for named plaintiffs to receive a share of the monetary class fund like any other class member and then receive a separate cash bonus payment for serving as a named plaintiff. The Bonus Method analysis typically looks at the effort, risk and benefits to the class provided by the class representatives.

**Preferential Treatment Method** - The second approach – and the source of much confusion in the case law – is for the named plaintiffs to receive one payment under the terms of the class settlement that is greater than that available to the ordinary class member. Under the latter method, the district court will analyze whether there is an adequate rationale for additional compensation to the named plaintiffs and consider the payment in light of the overall fairness of the settlement. Under the Preferential Treatment method, the class settlement will often provide that the named plaintiff's award is payable immediately upon final approval of the settlement. In contrast, ordinary class members will be required to seek compensation through a claims procedure, which can take several months or more to complete. The named plaintiff receives the advantage of both an amount certain and a more immediate payment.

#### PROCEDURE FOR APPROVAL OF INCENTIVE AWARDS

Under Fed. R. Civ. P. 23(e), all class action settlements must be approved by the trial court. The trial court will review the settlement to ensure that it is “fair, adequate and reasonable.” There is a two-step process for settlement approval. *Manual for Complex Litigation 4th*, § 21.63 (Fed. Jud. Center 2004). The court makes a preliminary assessment of the settlement's fairness and looks for any obvious deficiencies. If there are no apparent problems identified in this preliminary review, the court will authorize

notice to the class and schedule a fairness hearing where any objections to the settlement may be heard and a final fairness determination will be made.

Where incentive awards have been negotiated with the defendant and are part of the proposed class settlement, the incentive payments are evaluated as part of the settlement approval process.<sup>3</sup> The court will carefully scrutinize the amount of compensation to the class representatives at both the preliminary and final stages of the fairness review. In making the preliminary assessment of fairness, courts are directed to analyze such problems as “unduly preferential treatment of class representatives or of segments of the class. . .” *Manual for Complex Litigation 4th*, § 21.632 (Fed. Jud. Center 2004). The court makes a similar evaluation at the final fairness hearing, taking into account any objections filed to the settlement or to the incentive awards themselves. In Amchem Products v. Windsor, 521 U.S. 591 (1997), the Supreme Court emphasized that district courts must exercise careful scrutiny to ensure that class settlements meet Rule 23(e) standards of fairness.

Thus, counsel must anticipate and carefully prepare to justify named plaintiff incentive bonuses as part of any class action fairness process under Fed. R. Civ. P. 23(e). This is particularly important because the trial court can only approve or disapprove a settlement in its entirety – it cannot rewrite a settlement. “The district court judge should not take it upon himself to modify the terms of the proposed settlement decree, nor should he participate in any bargaining for better terms.” Sheppard v. Consolidated Edison Co., 2000 U.S. Dist. LEXIS 20629 (E.D.N.Y. 2000), quoting Plummer v. Chemical Bank, 668 F.2d 654, 656 n.1 (2d Cir. 1982). Overly generous awards to named plaintiffs have resulted in the rejection of an entire settlement. Id.

## LEGAL STANDARDS FOR EVALUATING INCENTIVE AWARDS

There is no consistent legal standard for the evaluation and approval of incentive awards. While the U.S. Supreme Court has never directly addressed incentive awards to named plaintiffs, federal case law highlights a number of factors which may be relevant to the inquiry. In Cook v. Niedert, 142 F.3d 1004 (7th Cir. 1998), the Seventh Circuit provided a list of some pertinent considerations:

Because a named plaintiff is an essential ingredient of any class action, an incentive award is appropriate if it is necessary to induce an individual to participate in the suit. . . . In deciding whether such an award is warranted, relevant factors include the actions the plaintiff has taken to protect the interests of the class, the degree to which the class has benefitted from those actions, and the amount of time and effort the plaintiff expended in pursuing the litigation.

Cook, 142 F.3d at 1015 (citation omitted).

As another example, in Van Vranken v. Atlantic Richfield, 901 F.Supp. 294 (N.D. Cal. 1995), Judge Williams articulated a different list:

The criteria courts may consider in determining whether to make an incentive award include: 1) the risk to the class representative in commencing suit, both financial and otherwise; 2) the notoriety and personal difficulties encountered by the class representative; 3) the amount of time and effort spent by the class representative; 4) the duration of the litigation and; 5) the personal benefit (or lack thereof) enjoyed by the class representative as a result of the litigation.

Id. at 300.

Notably, even where the cases cite the same or similar factors in evaluating incentive awards, how those factors are actually applied in a particular case will vary greatly. The inquiry is often very fact-based. The size of the proposed incentive award, the benefits of the overall settlement and the substantive nature of the case will all play a

role in determining whether the award is approved. Below we discuss some of the most commonly cited factors.

**Proportionality Inquiry** - Most fundamentally, courts will evaluate named plaintiff awards by looking at the overall benefits of the settlement and by comparing the named plaintiffs' awards to the range of monetary recovery available to the class. See e.g. Ingram v. Coca-Cola, 200 F.R.D. 685, 694 (N.D. Ga. 2001); Roberts v. Texaco, 979 F.Supp. 185, 204 (S.D.N.Y. 1997); Sheppard v. Consolidated Edison, 2000 U.S. Dist. LEXIS 20629 at 16-17 (E.D.N.Y. 2000).

The purpose of this inquiry is to ensure that special benefits to the class representatives have not compromised the adequacy of representation. McBean v. The City of New York, 2005 WL 991906 \*7 (S.D.N.Y. 2005) (district court rejected argument that proposed incentive awards demonstrated plaintiff's inability to adequately represent class where class member awards had been found to be adequate); Green v. Battery Park City Authority, 44 F.E.P. Cases 623 (S.D.N.Y. 1987) (approving \$4000 awards where it did not appear that it compromised ability of named plaintiff to obtain fair class settlement). At least one court has suggested that disparities between the benefits provided to the named plaintiffs and those provided to the class are "prima facie evidence that the settlement is unfair to the class." Plummer v. Chemical Bank, 91 F.R.D. 434, (S.D.N.Y. 1981), aff'd 668 F.2d 654 (2d Cir. 1982).

The challenge for practitioners is that there is no numerical rule of thumb about the proper ratio between the named plaintiff award and the class member awards. Sheppard, supra, (district court rejects settlement where named plaintiff payments "are more than 100 times" the largest amount available to class members); Roberts, supra,

(court awards incentive payment ranging from \$2500 to \$85,000 where range of payments to class members was \$60,000 to \$80,000 and common fund totalled \$115 million); Ingram, supra, (court approves payments of \$300,000 for each class representative where funds over \$100 million created, with average class member pay-out of \$38,000). Practitioners should provide the court with examples of similarly-sized settlements where comparable incentive awards have been approved. See Nichols v. SmithKline Beecham Corp., 2005 WL 950616 \*24 (E.D. Penn. 2005) (incentive awards approved where similar awards had been approved in comparable class actions in same jurisdiction).

Not surprisingly, courts will exercise particularly close scrutiny of settlements in which the class representatives receive monetary compensation but the class does not. Franks v. Kroger Co., 649 F.2d 1216 (6th Cir. 1981) (court of appeal rejected class settlement that provided compensation to the named plaintiffs and attorneys but not to the class); Plummer v. Chemical Bank, 91 F.R.D. 434 (S.D.N.Y. 1981).

**Time and effort** - Apart from the proportionality inquiry, courts will evaluate what the named plaintiffs have done to earn the incentive award. Among the most frequently cited factors in support of named plaintiff awards is the time and effort that the named plaintiff has put into the litigation. Cook, 142 F.3d at 1015; Van Vranken, 901 F. Supp. at 299. Typically, plaintiffs are credited with the time spent attending depositions and hearings and responding to discovery. In re Oracle Securities Litigation, (N.D. Cal. 1994) (\$500 award for deposition and discovery responses). However, some courts have rejected compensation for such activities, finding that these are the ordinary incidents of

litigation. Sheppard v. Consolidated Edison, 2000 U.S. Dist LEXIS 20629, \* 18 (E.D.N.Y. 2000); Wesley v. Spear, Leeds & Kellogg, 711 F. Supp. 713 (E.D.N.Y. 1989).

Courts have varied on what kind of documentation, if any, is required of the time spent by the plaintiffs. Some courts have required specific evidence of the time spent to justify an award. Pozzi v. United States, 952 F. Supp. 218 (E.D. Pa. 1997) (incentive award reduced from \$7500 to \$1600 based on documentation of actual time spent); Clement v. American Honda Finance Corp., 1997 U.S. Dist. LEXIS 17745 (D.Conn. 1997)(\$1500 incentive award rejected in part because no significant time expended); Genden v. Merrill Lynch Pierce, Fenner & Smith, 700 F.Supp. 208 (S.D.N.Y. 1988) (named plaintiff/attorney received “consultative services” compensation but award cut in half for lack of documentation); Van Vranken, 901 F. Supp at 299-300 (\$100,000 award reduced to \$50,000 for lack of documentation); Lake v. First Nationwide Bank, 900 F. Supp. 926 (E.D. Pa. 1995) (\$2000 requested award reduced to \$250).

Other courts have relied, in a more conclusory fashion, on the time and effort rationale without specific proof. Dornberger v. Metropolitan Life Insurance, 2001 U.S. Dist LEXIS 15948 (S.D.N.Y. 2001); Yap v. Sumitomo Corp. of America, 1991 U.S. Dist. LEXIS 2124 (S.D.N.Y. 1991) (award justified in part because named plaintiffs actively participated and were deposed for several days each); Lachance v. Harrington, 965 F. 2Supp. 630 (E.D. Pa. 1997); Huguley v. General Motors Corp., 128 F.R.D. 81, 85 (E.D. Mich. 1989) (award justified because of the “onerous burden of litigation”); Cimarron Pipeline Construction Inc. v. National Council on Compensation Insurance, 1993 WL 355466 (W.D.Okla. 1993). In still other courts, courts have deferred to the representations of plaintiff’s counsel about the work performed by the plaintiff.

Brotherton v. Cleveland, 141 F. Supp. 2d 901 (S.D. Ohio 2001) (\$50,000 award based on counsel's estimate that plaintiff performed 800 hours work); Selzer v. Board of Education, 1993 U.S. Dist. LEXIS 1714 (S.D.N.Y 1993).

Where time and effort form the basis for incentive awards, courts have approved different levels of compensation for class representatives based upon the evidence of their individual participation. Hughes v. Microsoft, 2001 U.S. Dist. LEXIS 5976 (W.D. Wash. 2001).

**Incentive or Reward Rationale** - Some courts have focused on the need to encourage litigants to bring class litigation, which will further the public policy underlying the statutory scheme. Thornton v. East Texas Motor Freight, 497 F.2d 416, 420 (6th Cir. 1974) (“We also think that there is something to be said for rewarding those drivers who protect and help to bring rights to a group of employees who have been the victims of discrimination”); Denney v. Jenkins & Gilchrist, 2005 WL 388562 \*31 (S.D.N.Y. 2005) (\$10,000 award approved where class representatives were in a “position to capitalize on lawsuits already filed to attempt to get a full or at least far greater recovery for themselves”); Roberts v. Texaco, 979 F. Supp. 185, 201 n. 25 (S.D.N.Y. 1997); In re Smithkline Beckman Corp. Securities Litig., 751 F. Supp. 525, (E.D.Pa. 1990) (\$5000 award approved because named plaintiffs “rendered a public service” and “conferred a monetary benefit” on the shareholder class); In re Jackson Lockdown/MCO Cases, 107 F.R.D. 703, 710 (E.D. Mich. 1985) (prison litigation in which active protesters received larger award than passive participants).

**Financial Risk** - Another factor is whether the class representatives have assumed direct or indirect financial risks on behalf of the class. Enterprise Energy Corp.

v. Columbia Gas Transmission Corp., 137 F.R.D. 240, 250 (S.D.Ohio 1991) (class representatives paid all litigation expenses).

**Risk of Retaliation** - Named plaintiffs, particularly in discrimination litigation, have earned incentive awards for running the risk of retaliation in the workplace.

In discrimination-based litigation, the plaintiff is frequently a present or past employee whose present position or employment credentials or recommendation may be at risk by reason of having prosecuted the suit, who therefore lends his or her name and efforts to the prosecution of litigation at some personal peril.

Roberts v. Texaco, 979 F. Supp. 185 (S.D.N.Y.1997). In Roberts, a special master made extensive findings about the actual burdens and risks that each of the named plaintiffs bore, resulting in incentive awards between \$2500 and \$85,000. The report drew a distinction between the likely retaliation experienced by plaintiffs who remained employed during the litigation, and those who departed. The district court, in affirming the decision of the Special Master to award only \$2500 to a former employee, concluded that the risk of retaliation to ex-employees, at least by a large corporation, was “nil.” See Women’s Committee for Equal Employment Opportunity v. National Broadcasting Co., 76 F.R.D. 173, (S.D.N.Y. 1977) (court weighed “risk to job security and good will with co-workers” among other considerations); Yap v. Sumitomo Corp. of America, 1991 U.S. Dist. LEXIS 2124 (S.D.N.Y. 1991) (Title VII plaintiffs risked retaliation and future advancement in bringing the suit).

The courts have found this rationale less persuasive in the securities or consumer context, where the plaintiff faces little personal risk from the defendant. See In Re Compact Disc Minimum Advertised Price Antitrust Litigation, 292 F. Supp.2d 184, 189 (D. Maine 2003) (district court reduced incentive award where class representatives had

put forth some effort in the litigation but had faced no risk of retaliation); Roberts, 979 F. Supp. at 201; Lake v. First Nationwide Bank, 900 F.Supp. 726, (E.D. Pa. 1995) (no realistic risk of retaliation to named plaintiff in class challenge to mortgage practices). But see In Re Linerboard Antitrust Litigation, 2004 WL 1221350 \*18 (E.D. Penn. 2004) (incentive award of \$25,000 approved where class representatives risked relationship with suppliers).

At least one court has questioned whether incidents of retaliation, which are independently compensable under Title VII, can form the basis for an incentive payment. Sheppard, 2000 U.S. Dist. Lexis 20629, \*16 (E.D.N.Y. 2000).

*Assessment of Individual Claims* - Preferential treatment awards are often justified on the basis that the named plaintiff has a stronger claim on the merits or unique individual claims. Women's Committee for Equal Employment Opportunity v. National Broadcasting Co., 76 F.R.D. 173, 180 (S.D.N.Y. 1977). Frequently, in employment discrimination class cases, named plaintiffs have separate claims for wrongful termination or retaliation which justify additional compensation. But see Holmes v. Continental Can Company, 706 F.2d 1144 (11th Cir. 1983) (appellate court reversed settlement approval where named plaintiffs' benefits were justified by representation of counsel of the "value of the unique, individual claims"); Plummer v. Chemical Bank, 668 F.2d 654, 660 (2d Cir. 1982) (settlement disproved because of lack of evidence to support disparity in benefits to named plaintiffs).

#### LEGAL AUTHORITY REJECTING OR QUESTIONING INCENTIVE AWARDS

Practitioners should be aware that there is some older case law that holds that extra compensation for class representatives is *never* appropriate. For example, a number

of Court of Appeal cases held that by choosing to bring their cases as a class action, the named plaintiffs “disclaimed any right to a preferred position in the settlement.” Flinn v. FMC Corp., 528 F.2d 1169, 1176 (4th Cir. 1975). Accord Officers for Justice v. Civil Service Commission, 688 F.2d 615, 632 (9th Cir. 1982); Kincade v. General Tire and Rubber Co., 635 F.2d 501 (5th Cir. 1981).

In In re Gould Securities Litigation, 727 F. Supp. 1201, 1209 (N.D. Ill. 1989), the district court concluded that incentive awards raised potential ethical problems:

Because the plaintiffs chose to be treated as class members, we deny any preferred treatment through an incentive award. To decide otherwise borders on permitting a lay plaintiff to share in the attorney’s fees. The real danger is a potentially undesirable precedent where every named plaintiff would expect a ‘fee’ or ‘bounty’ for the use of his or her name to create a class action. It is not difficult to envision a scenario...of prospective named plaintiffs becoming involved in a bidding war (with the ante spiraling upward for their ‘services’) with prospective class counsel.

Gould, 727 F.Supp. at 1208-09.

In In re Continental Illinois Securities Litigation, 962 F. 2d. 566, 571-72 (7th Cir. 1992), Judge Posner suggested a different analysis. In his view, the only basis for an incentive award to named plaintiffs (at least in a common fund case) was restitutionary. He concluded, however, that the named plaintiffs in that case were not entitled to an award for services because the right to restitution was limited to professionals such as doctors and lawyers. “If you dive into a lake and save a drowning person, you are entitled to no fee. The named plaintiff is not a professional; he is, at most, a public-spirited member of the class.” The named plaintiffs were limited to reimbursement for case-specific expenses. See In re Bioscience Securities Litigation, 155 F.R.D. 116 (E.D.Pa. 1994) (district court relied on Continental Illinois rationale to deny incentive awards). It is questionable whether Continental Securities or Gould Securities is still

good law in the Seventh Circuit after the more recent ruling in Cook v. Niedert, 142 F.3d 1004 (7th Cir. 1998), which endorsed the award of incentive awards.

In Women’s Committee for Equal Employment Opportunity, 76 F.R.D. at 181, the district court expressed “doubts about a general policy of awarding class representatives a settlement on terms different from the other class members.” Id.

It is undoubtedly true that the prospect of a substantial personal recovery will encourage aggrieved persons to bring lawsuits which are likely to advance the national policy of eliminating discrimination in employment. The same prospect may, however, run afoul of the named plaintiff’s duty to negotiate fairly on behalf of all members of the class.

Id. The district court ultimately approved the settlement, which included preferential treatment of the named plaintiffs, relying on other factors which “combine[d] to dispel the cloud of collusion which the settlement suggests. . .” Id.

Incentive payments were also disallowed in Rodriguez v. West Pub. Corp., 2007 WL 2827379 (C.D. Cal. 2007), where class counsel agreed in advance of filing the case to seek incentive awards pegged to the amount of any class settlement. In this anti-trust class action alleging price fixing by the publishers of bar review courses, the fee agreement between counsel and the class representatives obligated the attorneys to ask for \$75,000 incentive awards. The district court refused to approve any incentive award since the requested amount was not tied to the actual effort expended by the named plaintiffs. The court also found that the incentive agreement violated public policy.

#### STATUTORY PROHIBITION ON INCENTIVE AWARDS IN FEDERAL SECURITIES CASES

The Private Securities Litigation Reform Act of 1995 specifically limits incentive awards to class representatives in federal securities cases to litigation-related expenses.

The share of any final judgment or of any settlement that is awarded to a representative party serving on behalf of a class shall be equal, on a per share

basis, to the portion of the final judgment or settlement awarded to all other members of the class. Nothing in this paragraph shall be construed to limit the award of reasonable costs and expenses (including lost wages) directly relating to the representation of the class to any representative party serving on behalf of a class.

15 U.S.C. § 78u-4(a)(4)

#### INCENTIVE AWARDS FOR ACTIVE CLASS MEMBERS WHO ARE NOT NAMED PLAINTIFFS

There is authority for providing incentive awards to active class members who are not named plaintiffs. Ingram v. Coca Cola, 200 F.R.D. 694 (N.D. Ga. 2001) (\$3000 for class members who provided affidavits). Huguley v. General Motors Corp., 128 F.R.D. 81, 85 (E.D. Mich. 1989). See also Bryan v. Pittsburgh Plate Glass Co., 59 F.R.D. 616 (D. Pa. 1973).

In Staton v. Boeing, the Ninth Circuit questioned the propriety of incentive awards to active class members, based on the record in that case. 327 F.3d 938 (9th Cir. 2003). In Staton, plaintiffs proposed to grant a group of 264 named class members and class representatives – two percent of the class – incentive awards that on average were 16 times greater than the damages awards to unnamed class members. Significantly, the amount to be awarded to this group constituted *more than half of* the total monetary damages paid by the defendant. Id. at 948. The court approved the incentive awards for the class representatives but rejected the awards for the named class members (ranging from \$5000 to \$50,000), arguing that there was no rationale for distinguishing between the claims of the named and unnamed class members based on the record. Id. at 977-78. The plaintiffs had argued that these active class members deserved these incentive awards based on the strength of their individual cases, their willingness to step forward and risk retaliation and their contributions to attorney costs. Id. The court held that there was

nothing in the record substantiating the assertion that these identified class members had stronger individual cases, and absent a showing of actual retaliation or a strong showing of potential past or future retaliation, they were not eligible for incentive awards in this case. Id.

#### SAMPLING OF INCENTIVE AWARDS APPROVED AND DISAPPROVED

The following is a sampling of incentive awards, approved and disapproved, in various kinds of class actions.

Pelletz v. Weyerhaeuser Co., 592 F. Supp. 2d 1322 (W.D.Wash. 2009) - Incentive awards of \$7500 for named plaintiffs in class action challenging defective deck-building materials.

Roberts v. Texaco, 979 F. Supp 185 (S.D.N.Y.1997) - Incentive payments of \$2500 to \$85,000 for named plaintiffs in nationwide employment discrimination class action creating a common fund of \$115 million.

Sheppard v. Consolidated Edison, 2000 U.S. Dist. LEXIS 20629 (E.D.N.Y. 2000) - Settlement disapproved where named plaintiffs received \$400,000 each, compared to maximum range of \$3502 for class members and a total class fund of \$4.5 million.

Van Vranken v. Atlantic Richfield Co, 901 F. Supp. 294 (N.D. Cal. 1995) - Named plaintiff entitled to \$50,000 for work in gasoline pricing class action which created \$76 million common fund.

Yap v. Sumitomo Corp. of America - 1991 U.S. Dist. LEXIS 2124 (S.D.N.Y. 1991) - Named plaintiffs entitled to \$30,000 incentive payment in addition to class member compensation and undisclosed severance package in Title VII settlement in

which class members receive between \$1500 and \$17,000 back pay, and prospective salary increases.

In re Oracle Securities Litigation, 1994 WL 502054 (N.D.Cal. 1994) - \$500 incentive awards to eight named plaintiffs in pre-PSLRA securities class action involving \$25 million common fund.

Clement v. American Honda Finance Corp., 1997 U.S. Dist. LEXIS 17745 (D.Conn. 1997) Coupon settlement disapproved; \$1500 incentive award rejected in part because class representative did not expend significant time .

Cimarron Pipeline Construction Inc. v. National Council on Compensation Insurance, 1993 WL 355466 (W.D.Okla. 1993) - Corporate named plaintiffs awarded \$10,000 each for time and effort in creating \$35 million common fund.

In re Jackson Lockdown/MCO Cases, 107 F.R. D. 703 (E.D.N.Y. 1985) - Incentive payments of \$500 to \$2000 to named plaintiffs in prison conditions lawsuit which created \$70,000 in two funds for class members as well as comprehensive injunctive relief.

Dornberger v. Metropolitan Life Insurance, 203 F.R.D. 118, 124-25 (S.D.N.Y. 2001). Incentive payments of \$1500 and \$10,000 in insurance fraud class action creating \$13 million damage fund.

Ingram v. Coca-Cola, 200 F.R.D. 685, 694 (N.D. Ga. 2001) - Preferential treatment awards of \$300,000 to named plaintiffs in employment discrimination class action which created \$84 million damage funds and a fund for future salary increases.

In re Synthroid Marketing Litigation, 110 F. Supp. 676, 685 (N.D.Ill 2000), aff'd 264 F.3d 712 (7th Cir. 2001). \$1000 and \$2500 payments to individual named plaintiffs

in drug pricing litigation which created common funds of approximately \$150 million.  
Court denied \$25,000 incentive payments to corporate named plaintiffs.

Hughes v. Microsoft Corp, 2001 U.S. Dist. LEXIS 5976 (W.D. Wash. 2001) -  
Court approved incentive payments of \$7500 to \$40,000 in class action challenging  
independent contractor status which created \$98 million settlement fund.

## STRATEGIES FOR OBTAINING APPROVAL OF INCENTIVE AWARDS

1. **Keep Time and Expense Records** - Have your named plaintiffs keep time records of all the time spent on litigation-related activities. Plaintiffs should also retain receipts for litigation-related expenses.

2. **Document Risks** - If your client experienced specific retaliation or other adverse consequences as a result of their role in the litigation, these events should be fully documented for the court. Even if the named plaintiffs were not specifically targeted for retaliation, document that they filed the lawsuit with knowledge that the defendant aggressively fights all litigation, or has retaliated against others for their role in litigation, if appropriate.

3. **Plead Individual Claims of Named Plaintiffs** - If the named plaintiffs have separate individual claims – such as retaliation or wrongful termination – in addition to their class claims, these claims may form the rationale for additional compensation as part of the settlement. Note that defendants may argue that the presence of additional claims affects the named plaintiffs’ typicality under Fed.R. Civ. Proc. Rule 23(a).

4. **Negotiate Individualized Awards for Named Plaintiffs** - Awards which are tailored to the specific efforts and risks of each named plaintiff will have greater credibility and look less like a “pay-off.”

5. **Create a Record that the Settlement Negotiations and Final Settlement Package are Fair** - Counsel should take steps to ensure that settlement negotiations are conducted at arms’ length without any appearance of collusion, particularly when seeking preferential treatment for named plaintiffs. The parties may want to employ a mediator or include a government agency in the negotiations. If possible, class monetary and

injunctive relief should be negotiated and resolved first, before initiating discussion of individual named plaintiff relief.

6. **Evaluate Proportionality** - Consider carefully the degree of disparity between the named plaintiff awards and 1) the overall class recovery; and 2) the range of individual class member recoveries.

7. **Keep Client Expectations Low** - Because there is uncertainty in the law concerning incentive bonuses, potential named plaintiffs should not be enticed to sign on with the promise of a big bonus at the end. Attorneys should provide nothing other than very modest estimates of possible incentive payments.

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2. Class Representatives, also known as Named Plaintiffs, are the plaintiff parties who are appointed by the court to bring a class action on behalf of themselves and the similarly situated unnamed class members. As part of the determination of the class certification motion, the trial court will determine if the proposed Class Representatives are “adequate” representatives of the class. Fed. R. Civ. Proc. Rule 23(a). This requires a determination that the proposed named plaintiffs will vigorously represent the interests of the class and do not have any conflicts with the class members.

3. In some cases, incentive awards have been evaluated as part of a Rule 54(d)(2) motion for attorneys’ fees. This approach is most typically used where the settlement involves the creation of a common fund and the court exercises its equitable jurisdiction to award attorneys’ fees and incentive payments. See e.g. Roberts v. Texaco, 979 F.Supp. 185 (S.D.N.Y. 1997); Van Vranken v. Atlantic Richfield Co, 901 F. Supp. 294 (N.D. Cal. 1995); In re Oracle Securities Litigation, 1994 WL 502054 (N.D. Cal. 1994); Lachance v. Harrington, 965 F. Supp. 630 (E.D. Pa. 1997); Cimarron Pipeline Construction Inc. v. National Council on Compensation Insurance, 1993 WL 355466 (W.D.Okla. 1993).