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## Good Representatives, Bad Objectors, and Restitution in Class Settlements

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# Good Representatives, Bad Objectors, and Restitution in Class Settlements

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*This Article uses two recent decisions—one prohibiting incentive awards to class representatives and one permitting disgorgement of side payments to class objectors—to explore deeper connections between class-action settlements and the law of restitution. The failure to correctly apply the law of restitution led both courts astray. First, courts can approve incentive awards, as long as an award properly reflects the benefit that the representative’s efforts bestowed on the class. Second, restitution provides a basis to disgorge improper side payments to objectors, but only under conditions different from those that the court described. More broadly, attention to the substantive and remedial principles of restitution can provide useful solutions to vexing problems of class-action practice.*

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Most class actions settle.<sup>1</sup> Class settlements are among the most fraught areas in class-action practice because the time of settlement, when the relief that class members might receive becomes apparent, often exposes rifts within the class.<sup>2</sup> Therefore, the law of class settlement – those rules that make settlement easier or harder to accomplish – is of critical importance, not only to the settlement process but also to the incentives to file a class action at all.

Two recent decisions may reshape these settlement dynamics. The first, *Johnson v. NPAS Solutions, LLC*,<sup>3</sup> holds that class representatives may not typically receive “incentive awards” to compensate them for work on behalf of the class.<sup>4</sup> If the ruling stands, *Johnson* might lead to fewer class actions, for most people would be unwilling to assume the burdens of representing a class without payment for their efforts. The second case, *Pearson v. Target Corp.*,<sup>5</sup> holds that objectors to class settlements act as fiduciaries of the class and must disgorge to the class side payments they receive in return for withdrawal of their objections.<sup>6</sup> If this ruling stands, fewer objectors will have an incentive to extort side payments, and class settlements will be easier to achieve.

Although the opinions seem to have little to do with each other, there is common ground. Both opinions involve the class-settlement process. Both buck the trend: most courts allowed class representatives

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1. See ALEXANDRA LAHAV, IN PRAISE OF LITIGATION 91 (2017); Rhonda Wasserman, *Ascertainability: Prose, Policy, and Process*, 50 CONN. L. REV. 695, 721 (2018).

2. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 854–59 (1999) (reversing the approval of a class settlement in part because the settlement improperly treated some class members who were similarly situated dissimilarly and improperly treated some class members who were dissimilarly situated similarly); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625–27 (1997) (affirming a judgment reversing the approval of a class settlement in part because the settlement failed to compensate some class members with valuable claims and treated other class members worse than those similarly situated).

3. *Johnson v. NPAS Sols., LLC.*, 975 F.3d 1244 (11th Cir. 2020), *reh'g denied*, 43 F.4th 1138 (11th Cir. 2022), *petition for cert. filed sub nom. Johnson v. Dickenson*, 2022 WL 14813880 (U.S. Oct. 21, 2022) (No. 22-389).

4. *Johnson*, 975 F.3d at 1260–61. In a class action, the class representative files and prosecutes the case on behalf of the class members. See FED. R. CIV. P. 23(a); *infra* notes 32–45 and accompanying text.

5. *Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020).

6. *Id.* at 834. When a class action settles, class members have the opportunity to object to the settlement before the court decides whether to approve or reject the settlement. See FED. R. CIV. P. 23(e); *infra* notes 156–65 and accompanying text.

to be compensated for their efforts;<sup>7</sup> and, despite the recognized threat that certain objectors pose to class settlements, no court had claimed the power to disgorge side payments to objectors. Moreover, both opinions plow the same methodological ground: they dug deep into the dustbin of Supreme Court precedent to justify their results.<sup>8</sup> Substantively, both strive for a kind of formal equality among class members, not allowing one person in the class (whether class representative or class objector) to obtain a benefit proportionately greater than others.

At the same time, the cases relate to distinct aspects of class settlements. As a matter of text, Rule 23 makes no mention of incentive awards;<sup>9</sup> Rule 23(e)(5), on the other hand, addresses the settlement and withdrawal of objections.<sup>10</sup> As a matter of policy, awarding appropriately modest incentive payments has generated almost no judicial, academic, or rulemaking criticism.<sup>11</sup> In that sense, *Johnson* is a solution in search of a problem; and it seems a likely source of mischief going forward. But at least *Johnson* starts from an accepted premise: the class representative acts as fiduciary for class members.<sup>12</sup> On the other hand, the problem of objectors —

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7. See *Johnson*, 975 F.3d at 1260 (calling awards to class representatives “commonplace in modern class-action litigation”). Courts have worried about the separate question of *excessive* incentive awards. See *infra* note 51 and accompanying text.

8. *Pearson* relied for its outcome principally on *Young v. Higbee Co.*, 324 U.S. 204 (1945). *Johnson* reached even further back to *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Central Railroad & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

9. The majority in *Johnson* relied in part on this silence to justify its decision. See *Johnson*, 975 F.3d at 1259.

10. See *infra* notes 186–88 and accompanying text.

11. The first reported decision to use *Greenough* and *Pettus* to attack the practice of incentive awards under Rule 23 appears to be *Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P.*, 888 F.3d 455, 466–67 (10th Cir. 2017). Decided more than fifty years after the modern version of Rule 23 was promulgated in 1966, *Chieftain* sidestepped the issue because the argument had not been raised in the district court. The following year, Supreme Court dicta acknowledged the practice of incentive awards without criticism. See *China Agritech, Inc. v. Resh*, 138 S. Ct. 1800, 1810–11 & n.7 (2018) (noting that the class representative received a \$25,000 incentive award as “an attendant financial benefit”). In dissent, Justice Thomas has raised some concerns about incentive payments, but his skepticism appears to relate to the outsized amounts of awards—not to the practice of awarding incentive payments *per se*. See *Frank v. Gaos*, 139 S. Ct. 1041, 1047 (2019) (Thomas, J., dissenting) (arguing that class representation was inadequate when the class representatives and class counsel “secur[ed] significant benefits for themselves” while the class members obtained no relief).

12. On the fiduciary nature of the representative’s responsibilities, see *infra* note 106 and accompanying text.

in particular, objectors who seek to extort side payments for themselves rather than to improve the quality of the settlement for all—has received considerable academic and rulemaking attention, although a workable solution has proven illusory.<sup>13</sup> *Pearson* assays a clever approach to a serious problem. To reach its result, however, *Pearson* starts from an indefensible premise: objectors act as fiduciaries for class members.

When we consider the two cases from the viewpoint of theory, the concern that motivates *Johnson's* skepticism about incentive payments is the *bête noire* of all class actions: the cost of a faithless agent.<sup>14</sup> *Pearson's* contempt for bad-faith objectors reflects the converse concern: the capacity of someone who does not represent the class to delay or defeat class recovery as leverage for private gain. A common theme underlies both situations: someone (the class representative or the class objector) stands to profit from the settlement of the class's claims, and this profit might be unjustified.

Framed in this fashion, a common solution to both issues emerges: restitution. Restitution contains two halves: it is both a theory of liability and a remedy.<sup>15</sup> The remedy is the easier half to

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13. For a sample of the literature, see PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.08 cmts. a–b (AM. L. INST. 2009) [hereinafter AGGREGATE LITIGATION]; Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 411 (2003); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009); John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to do about them?*, 39 FLA. ST. U. L. REV. 865, 896–901 (2012).

14. The agency cost is the difference between the asset's hypothetical value if the agent had in costless fashion advanced the principal's best interest and the asset's actual value. For a seminal treatment of agency costs, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 308 (1976) ("In most agency relationships the principal and the agent will incur positive monitoring and bonding costs (non-pecuniary as well as pecuniary), and in addition there will be some divergence between the agent's decisions and those decisions which would maximize the welfare of the principal."). For applications of the principle to class actions, see John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883–89 (1987) (describing agency-cost problems in class actions); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12–27 (1991) (same).

15. "Restitution" usually refers to both the substantive theories of liability that require a restitutionary remedy and the rules that determine the scope of that remedy. "Unjust enrichment" usually refers only to the substantive theories of liability. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. b (AM. L. INST. 2011) ("The law of restitution is predominantly the law of unjust enrichment, but 'unjust enrichment' is a term of art. The substantive part of the law of restitution is concerned with identifying those forms of enrichment that the law treats as 'unjust' for purposes of imposing liability.").

understand: disgorge the reasonable value of benefits wrongfully obtained.<sup>16</sup> The theory of liability describes the wrongs that make the disgorgement remedy just.<sup>17</sup>

Until recently, restitution had sunk beneath the surface of American law<sup>18</sup> due to a lack of understanding of the operation and meaning of unjust enrichment. Unjust enrichment had merely been seen as a vague principle of justice, indefinable, and commonly treated as a loose framework for normative inquiry. Although the *Restatement of the Law of Restitution* of 1937<sup>19</sup> did not elaborate on the nature nor operation in detail, the reporters of the *Restatement* were alive to the need for further refinement and development.<sup>20</sup> Despite this, over time bits of restitution popped up like islands in the sea: for instance, *quantum meruit* in the law of contracts;<sup>21</sup> disgorgement of profits in intellectual property matters;<sup>22</sup> and breaches of

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16. Despite the principle's apparent simplicity, some devils lie in the details. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 49–61 (AM. L. INST. 2011) (describing methods for valuing benefits and accomplishing restitution).

17. Generally, the wrongs that justify restitution are the same as those that justify damages: for example, breach of contract, fraud, trespass or conversion, and breach of fiduciary duty. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 13, 37–40, 43 (AM. L. INST. 2011). Restitution also applies to a few situations for which no theory of damages is available. One example is restitution to a performing party that has no claim for breach of contract. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–22, 31–36 (AM. L. INST. 2011).

18. See Lance Liebman, *Foreword*, in RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT xiii (AM. L. INST. 2011) (“Restitution has remained intellectually important in other common-law countries, but in the United States attention to it has declined over the past half century.”).

19. The original *Restatement of Restitution*, RESTATEMENT OF RESTITUTION (AM. L. INST. 1937).

20. JAMES EDELMAN & ELISE BANT, UNJUST ENRICHMENT 12–13 (2d ed. 2016).

21. See, e.g., *Bloomgarden v. Coyer*, 479 F.2d 201 (D.C. Cir. 1973) (declining to award a finder's fee on a quasi-contractual theory); LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW 507 (8th ed. 2006).

22. See, e.g., *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492 (2020) (holding that willful infringement is not required for an award of profits in a trademark suit); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 669 (2014) (stating that the infringer's profits can form part of the award in a case for copyright infringement). See also *Liu v. SEC*, 140 S. Ct. 1936 (2020) (permitting disgorgement of a wrongdoer's net profits in an SEC civil enforcement proceeding).

fiduciary duty.<sup>23</sup> The work of a cadre of scholars,<sup>24</sup> eventually bolstered by the *Restatement (Third)* kept restitution afloat and exposed the principle connecting these doctrines: “Liability in restitution derives from the receipt of a benefit whose retention without payment would result in the unjust enrichment of the defendant at the expense of the claimant.”<sup>25</sup> Or, as the Supreme Court put it, the “foundational principle” reflected in the disgorgement of profits is that it “would be inequitable that [a wrongdoer] should make a profit out of his own wrong.”<sup>26</sup>

That simple principle is sufficient to resolve the problems in both *Johnson* and *Pearson*. With incentive awards, the class representative receives a benefit not generally available to (or, in the language of the *Restatement*, “at the expense of”) other class members. The issue is whether the payment *unjustly* enriches the class representative.<sup>27</sup> With class objectors, the objector receives a benefit not generally available to (or “at the expense of”) other class members. The issue, once again, is whether the payment *unjustly* enriches the class objector.

Working out whether and why an *injustice* arises in these two situations implicates both the substantive and the remedial halves of restitution. As Part I shows, the injustice that an incentive award threatens is payment in excess of the fair value of the time and money that a class representative expends on behalf of the class. The theory of liability under the substantive law of restitution is undisputed: fiduciaries like class representatives cannot profit from their disloyalty to the class members.<sup>28</sup> The issue is whether the

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23. See, e.g., *Parke v. First Reliance Standard Life Ins. Co.*, 368 F.3d 999, 1009 (8th Cir. 2004) (noting that accounting for profits may be an appropriate remedy for breach of fiduciary duty); *Gelfand v. Horizon Corp.*, 675 F.2d 1108, 1111 (10th Cir. 1982) (finding no abuse of discretion when the trial court limited disgorgement to profits that the fiduciary realized).

24. For treatises on restitution, see JOHN P. DAWSON, *UNJUST ENRICHMENT: A COMPARATIVE ANALYSIS* (1951); GEORGE E. PALMER, *THE LAW OF RESTITUTION* (1978).

25. *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 1 cmt. a (AM. L. INST. 2011).

26. *Liu*, 140 S. Ct. at 1943 (quoting *Root v. Ry. Co.*, 105 U.S. 189, 207 (1881)).

27. Or, framed differently, whether the class is *unjustly* enriched by receiving the benefit of the representative’s services without paying for them.

28. See *RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT* § 43 cmt. d (AM. L. INST. 2011) (“[D]isloyalty involves the pursuit of self-interested objectives in a setting where the fiduciary is obliged to act in the interest of the beneficiary.”). If the payment is a

remedy of restitution is proper. Contrary to *Johnson's* argument, there is nothing wrong with an incentive award that constitutes fair value for the representative's time and expenses.<sup>29</sup> Like any fiduciary, class representatives can receive reasonable fees for their services.

Part II turns to the thornier problem of class objectors. *Pearson's* effort to convert class objectors into class fiduciaries—a move that, if successful, would justify a restitutionary remedy<sup>30</sup>—is improper. People trade on their membership in groups for personal advantage all the time, and there is nothing *unjust* (in a restitutionary sense) about their behavior. Therefore, *Pearson's* sensible desire to corral excessive side payments requires a theory of liability cognizable under the relevant law of restitution.<sup>31</sup> Part II develops theories to recover objectors' excessive payments out of the law of torts and contracts. These theories are broad enough to eliminate the methods by which objectors receive illegitimate side payments, flexible enough to protect legitimate objections, and grounded enough in a relevant source (state law) to avoid concerns for impermissible judicial lawmaking.

The failure of *Johnson* and *Pearson* to attend to the law of restitution led both courts astray. We must take care to distinguish between restitution's substantive and remedial aspects—and to apply each aspect with precision. It is important not to become too enchanted, as *Johnson* and *Pearson* did, with the general maxim of disgorging unequal benefits. Invoking the law of restitution

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bribe, the breach of fiduciary duty is clear. *See id.* ("The taking of a bribe or 'secret commission' is condemned, without regard to economic injury, because it poses a risk of divided loyalty."). *Cf.* RESTATEMENT (THIRD) OF AGENCY § 8.01 (AM. L. INST. 2006) ("An agent has a fiduciary duty to act loyally for the principal's benefit in all matters connected with the agency relationship.").

29. *Cf. Liu*, 140 S. Ct. at 1943 ("At the same time courts recognized that the wrongdoer should not profit 'by his own wrong,' they also recognized the countervailing equitable principle that the wrongdoer should not be punished by 'pay[ing] more than a fair compensation to the person wronged.'") (quoting *Tilghman v. Proctor*, 125 U.S. 136, 145–46 (1888)).

30. *See* RESTATEMENT (THIRD) OF AGENCY § 8.05 (AM. L. INST. 2006) ("An agent has a duty . . . not to use property of the principal for the agent's own purposes . . .").

31. The qualification—"the relevant law of restitution"—is consequential. One critique of *Pearson* is its reliance on some type of federal common law of fiduciaries, even though federal common law is traditionally limited to narrow enclaves. *See Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (stating that "the Court has recognized the need and authority in some limited areas to formulate what has come to be known as 'federal common law,'" but noting that these areas are "'few and restricted'" (quoting *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963))).



requires courts to identify the exact conduct at issue in a class settlement, ensure that the substantive law of restitution regards this conduct as actionable, and craft a remedy that returns benefits to their rightful owners.

## I. INCENTIVE AWARDS

### A. *The Benefits and Risks of Incentive Awards*

In a class action, the class representative sues on behalf of the class members. If the requirements of the class-action rule are met, the result that the representative obtains – favorable or not – binds those members.<sup>32</sup> To encourage faithful representation, Rule 23 of the Federal Rules of Civil Procedure<sup>33</sup> employs loyalty, voice, and exit strategies.<sup>34</sup> Loyalty is the most significant, in part because the

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32. For a class action to have binding effect, due process requires adequate class representation. *See* *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) (“[T]here has been a failure of due process only in those cases where it cannot be said that the [class-action] procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it.”); FED. R. CIV. P. 23(a)(4), (g)(1) (requiring adequate representation by class representatives and class counsel).

33. For simplicity, this Article uses Federal Rule 23 to discuss class actions. Most states have comparable rules. *See* Thomas D. Rowe, Jr., *State and Foreign Class-Actions Rules and Statutes: Differences from – and Lessons for? – Federal Rule 23*, 35 W. ST. U. L. REV. 147, 147–48 (2007) (noting that most states have adopted Rule 23 nearly verbatim and others interpret their class-action rule consistently with Rule 23); *id.* at 148 (noting that only Mississippi and Virginia have no class-action rule). *See also* THE LAW OF CLASS ACTION: FIFTY-STATE SURVEY 2020 (AM. BAR. ASS’N 2020) (describing state class-action rules).

34. Albert Hirschman described loyalty, voice, and exit as strategies to ensure that corporate management works to benefit shareholders or owners of firms. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970). Professor Coffee applied the concept to class actions. John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 376 (2000) (“To use a standard typology borrowed from the vocabulary of corporate governance, one can focus on ‘exit,’ ‘voice,’ or ‘loyalty’ as alternative mechanisms by which to modify behavior within the organization.”). For discussion of the loyalty strategy, see *supra* note 32, *infra* notes 36, 98–99, 101 and accompanying text. For voice strategies, see FED. R. CIV. P. 23(c)(2) (requiring notice to class members in certain circumstances), *id.* at 23(d)(1)(B)(iii) (permitting notice to allow members “to signify whether they consider the representation fair”), and *id.* at 23(e)(5) (providing a right to class members to object to a class settlement). For exit strategies, see FED. R. CIV. P. 23(c)(2)(B)(vi) (requiring notice to members in a (b)(3) class action of their right to opt out), and *id.* at 23(e)(4) (permitting a district judge to provide, at the time of settlement, a second opt-out right in a previously certified (b)(3) class action).

other strategies are of limited use<sup>35</sup> and in part because loyalty is compelled constitutionally and by rule.<sup>36</sup> The class representative must, in every case, adequately represent the interests of class members.

One of the fears of the class mechanism is that class representatives will fail to do so. In economic terms, class actions, like corporations, divide ownership of an asset from its control. Therefore, the risk of agency cost exists; an agent (whether corporate management or a class representative) might pursue his or her own economic interest, thus failing to maximize the value of the principal's asset (whether a shareholder's stake or a class member's claim).<sup>37</sup> The most craven failure of adequacy is collusion between the class representative and the person opposing the class.<sup>38</sup> Other conflicts of interest might also lead a representative to neglect class members' interests.<sup>39</sup>

At the same time, class representatives take on responsibilities that class members do not. Class representatives are

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35. See THOMAS E. WILLGING, ET AL., FED. JUD. CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 55-57 (1996) (noting that requests to intervene "occurred relatively infrequently," with judges granting only half of the requests, and that objections to settlements were filed in only half of settled cases); Coffee, *supra* note 34, at 419 ("[T]he right to exit today is often compromised or eclipsed by a variety of stratagems that the settling parties use to minimize opt outs."); Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 367 ("While the right to opt out may indeed offer protection to class members in exceptional high individual value litigation, in most class actions it is of limited utility . . .").

36. See *supra* note 32. In addition to Rules 23(a)(4) and (g)(1), which explicitly reference adequate representation, Rules 23(a)(2) and (a)(3) serve, in part, to ensure adequate representation. See *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982) (noting that the requirements of Rule 23(a)(2)-(4) "tend to merge" and together work to ensure both economy and a sufficient connection between the claims of the class representative and class members "that the interests of the class members will be fairly and adequately protected in their absence").

37. See sources cited *supra* note 14.

38. See *Hansberry v. Lee*, 311 U.S. 32, 45 (1940) (stating that the due process requirement of substantial similarity of interest can avoid "opportunities . . . for the fraudulent and collusive sacrifice of the rights of absent parties").

39. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-27 (1997) (finding that the terms of a class settlement generated conflicts of interest by treating some claims less favorably than others); *Falcon*, 457 U.S. at 157-59 (reversing the affirmance of a class-certification order when the claim of the class representative and those of the class members lacked sufficient commonality).

deposed and subject to other discovery.<sup>40</sup> They provide information about the class's claims,<sup>41</sup> and they consult with class counsel on major litigation decisions.<sup>42</sup> They may attend settlement conferences,<sup>43</sup> appear at the fairness hearing for the settlement,<sup>44</sup> or testify at trial.<sup>45</sup> They may incur expenses or suffer attacks on their privacy.<sup>46</sup> "Incentive awards," which are payments above and beyond the award given to all class members, compensate representatives for their efforts.<sup>47</sup>

The tension between avoiding conflicts of interest and fairly compensating class representatives works itself out in the law of incentive awards. Rule 23 makes no explicit provision for

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40. See, e.g., *Low v. Trump Univ., LLC*, 246 F. Supp. 3d 1295, 1314 (S.D. Cal. 2017) (noting that several class representatives sat for depositions and provided discovery), *aff'd on other grounds*, 881 F.3d 1111 (9th Cir. 2018); *Van Vranken v. Atl. Richfield Co.*, 901 F. Supp.294, 300 (N.D. Cal. 1995) (noting that the class representative had his deposition taken twice).

41. See *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998) (noting that the class representative "spent hundreds of hours with his attorney and provided them with an 'abundance of information'" that helped generate a \$13 million settlement); *Brotherton v. Cleveland*, 141 F. Supp. 2d 907 (S.D. Ohio 2001) (estimating that the class representative spent 800 hours aiding class counsel).

42. See *Low*, 246 F. Supp. 3d at 1314 (detailing the efforts of a class representative who participated in the settlement process, reviewed the draft agreement, and authorized class counsel to enter the settlement).

43. See *id.* at 1314–15 (noting that four class representatives attended settlement conferences).

44. A court must approve any settlement that binds class members. Approval requires a finding that the settlement is "fair, reasonable, and adequate." See FED. R. CIV. P. 23(e)(2). The court holds a "fairness hearing" as part of this approval process. See *id.* (permitting approval only "after a hearing"). Class representatives often attend and testify at this hearing. See, e.g., *In re Lease Oil Antitrust Litig. (No. II)*, 186 F.R.D. 403, 449 (S.D. Tex. 1999) (stating that two representatives testified at the fairness hearing and others attended "several hearings").

45. See *Van Vranken*, 901 F. Supp. at 300 (mentioning the class representative's testimony).

46. See *Hyland v. Navient Corp.*, 48 F.4th 110, 124 (2d Cir. 2022) (affirming incentive awards for class representatives who "opened their lives to scrutiny; laid bare their financial circumstances, their career choices, and their personal histories; suffered personal attacks; and were subjected to vitriol") (internal quotation marks omitted); *Dial Corp. v. News Corp.*, 317 F.R.D. 426, 439 (S.D.N.Y. 2016) (noting that representatives fronted nearly \$1 million in attorney's fees and risked "antagonizing a longstanding, powerful business partner and suffering sweeping consequences in the marketplace"); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 374 (S.D. Ohio 1990) (noting that one class representative suffered business disruptions as a result of fulfilling its responsibilities).

47. See, e.g., *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009). Incentive awards can go by other names, such as a "fee," an "incentive payment," or a "risk payment." See *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992) ("fee"); *Staton v. Boeing Co.*, 327 F.3d 938, 977 (9th Cir. 2003) ("incentive or risk payments").

these awards. The United States Supreme Court has yet to rule on the propriety or scope of incentive awards under Rule 23.<sup>48</sup> Some courts of appeal have approached them skeptically, declining to approve the practice until pressed.<sup>49</sup> Other courts have given trial judges the discretion to approve incentive awards, albeit with caution to ensure that the awards do not overbear the will of class representatives.<sup>50</sup> The factors that courts consider 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.”<sup>51</sup> Courts have rejected settlements that provide excessive payments<sup>52</sup> or that tie compensation to the representative’s approval of the settlement.<sup>53</sup> They have trimmed the size of an incentive award when appropriate—sometimes all the way

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48. See *supra* note 11.

49. Compare *Hadix v. Johnson*, 322 F.3d 895, 897–98 (6th Cir. 2003) (noting that “[t]his court has never explicitly passed judgment on the appropriateness of incentive awards” and denying an award when there was “neither authorization in the consent decree for this incentive award nor a common fund from which it could be drawn”), and *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 311 (6th Cir. 2016) (refusing to rule on the “difficult issue” of the propriety of incentive awards” without a better factual record), with *Vassalle v. Midland Funding LLC*, 708 F.3d 747, 756 (6th Cir. 2013) (“While we have ‘never explicitly passed judgment on the appropriateness of incentive awards,’ we have found that ‘there may be circumstances where incentive awards are appropriate.’” (quoting *Hadix*, 322 F.3d at 897–98)).

50. See, e.g., *Radcliffe v. Experian Info. Sols. Inc.*, 715 F.3d 1157, 1164 (9th Cir. 2013) (“[D]istrict courts must be vigilant in scrutinizing all incentive awards to determine whether they destroy the adequacy of the class representatives.”); *Cobell v. Salazar*, 679 F.3d 909, 922–23 (D.C. Cir. 2012) (affirming both the denial of expenses for class representatives and the award of an incentive payment to one representative whose “singular, selfless, and tireless investment of time, energy, and personal funds . . . ensure[d] survival of the litigation”); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 333 n.65 (3d Cir. 2011) (approving incentive awards).

51. *Cook v. Niedert*, 142 F.3d 1004, 1016 (7th Cir. 1998); accord *Staton*, 327 F.3d at 977 (9th Cir. 2003) (adding as a factor, in an employment discrimination claim, the risk of retaliation).

52. See *Vassalle*, 708 F.3d at 756 (reversing approval of a settlement in part because the representatives received relief that class members did not).

53. See *Roes, 1–2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1056–57 (9th Cir. 2019) (reversing the approval of a settlement in part because two class representatives received \$20,000 for their individual releases, in addition to \$5,000 incentive awards); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 959–61 (finding that five class representatives were inadequate after they entered into “incentive agreements” that obligated class counsel to request incentive awards that were constructed to induce the representatives to agree to settle and did not reflect their contributions to the case).

to zero.<sup>54</sup> In doing so, however, courts have also acknowledged the vital role that appropriate incentive payments play in class-action litigation.<sup>55</sup> Even though courts adopt different attitudes and approaches it is clear that “incentive awards . . . are fairly typical in class action cases.”<sup>56</sup> Despite some outlier cases, the data do not suggest a widespread problem with their use.<sup>57</sup>

### B. Johnson’s *Wrong Turn*

Familiarity and utility do not, however, equate with legality,<sup>58</sup> especially now that one court of appeals has rejected virtually all incentive awards. The reasoning in *Johnson v. NPAS Solutions, LLC*<sup>59</sup> sounds hard to resist: incentive payments are impermissible

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54. See *In re Cont’l Ill. Sec. Litig.*, 962 F.2d 566, 571–72 (affirming the denial of an award for the representative’s “admittedly modest services”); *Schneider v. Chipotle Mexican Grill, Inc.*, 336 F.R.D. 588, 602–03 (N.D. Cal. 2020) (denying a request for \$5,000 incentive awards when the harm suffered by class members was small and the theory of liability was questionable); *In re Puerto Rican Cabotage Antitrust Litig.*, 815 F. Supp. 2d 448, 469 (D.P.R. 2011) (reducing incentive awards from \$20,000 to \$8,000 per representative based on the representatives’ “level of involvement, time, effort and risk”).

55. See, e.g., *Roes*, 1–2, 944 F.3d at 1057 (noting that “reasonable incentive awards are permitted”). Cf. *Sullivan*, 667 F.3d at 333 n.65 (noting that incentive awards “compensate named plaintiffs for the services they provided and the risks they incurred during the course of class action litigation” and further “reward the public service of contributing to the enforcement of mandatory laws”) (internal quotation marks omitted); *Cook*, 142 F.3d at 1016 (“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.”).

56. *In re Online DVD–Rental Antitrust Litig.*, 779 F.3d 934, 943 (9th Cir. 2015) (quoting *Rodriguez*, 563 F.3d at 958)); see Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1303 (2006) (finding that, in 374 opinions from 1993 to 2002, twenty-eight percent of class settlements included incentive awards); Katherine Cienkus, *Privacy Class Action Settlement Trends: Industry Practice or Improper Incentives?*, 40 REV. LITIG.—THE BRIEF, at 25 (Spring 2021) (noting that, in eighty privacy class actions settled between 2010 and 2020, seventy-nine involved incentive awards, with “the arithmetic median and average . . . both about \$5,000”), [https://3df293a1-fef9-437f-ab31-33059461a7e2.filesusr.com/ugd/6bae56\\_1daf611e51a14410a0d3f5f834f90c3a.pdf](https://3df293a1-fef9-437f-ab31-33059461a7e2.filesusr.com/ugd/6bae56_1daf611e51a14410a0d3f5f834f90c3a.pdf).

57. See Eisenberg & Miller, *supra* note 56, at 1347 (describing “a degree of coherence and modesty in the pattern of incentive awards,” which “tend to be given in cases where the economics of the case might most call for an award” and whose size “consumes a trivial portion of the class recovery”).

58. See 5 WILLIAM B. RUBENSTEIN, *NEWBERG ON CLASS ACTIONS* § 17:4 (5th ed. 2015) (“There are only a few scattered references in the reported case law to the legal basis for incentive awards, with no court addressing the question head on.”); cf. *In re Dry Max Pampers Litig.*, 724 F.3d 713, 722 (6th Cir. 2013) (“[T]o the extent that incentive awards are common, they are like dandelions on an unmowed lawn—present more by inattention than by design.”).

59. *Johnson v. NPAS Sols., LLC*, 975 F.3d 1244 (11th Cir. 2020).

because Supreme Court precedent makes them so.<sup>60</sup> The cases that *Johnson* cites — *Trustees v. Greenough*<sup>61</sup> and *Central Railroad & Banking Co. v. Pettus*<sup>62</sup> — are best known as the precursors to the modern “common fund” theory,<sup>63</sup> by which a person whose efforts establish a fund benefitting a group may collect reasonable attorney’s fees and expenses from the fund.<sup>64</sup> This theory is an equitable exception to the American rule, which requires parties to bear their own attorney’s fees.<sup>65</sup> In 1980, the Supreme Court applied the common-fund theory to class actions, allowing class counsel to draw fees from the class recovery.<sup>66</sup> This holding is critical to the fate of class-action practice: in most cases, class representatives would be unable to pay counsel’s fees. While granting fees to the class counsel, however, *Greenough* also contained a second holding: it denied the class representative’s request for an award for his own time and expense in pursuing the case.

In *Greenough*, a bondholder of a railroad company, Francis Vose, filed a federal suit in equity “on behalf of himself and other bondholders”<sup>67</sup> after bond payments fell into arrears. The suit alleged waste and fraud in a trust fund that was pledged to pay the interest on the bonds.<sup>68</sup> After litigation lasting nearly a decade, Vose obtained the removal of the fund’s trustees and the appointment of a receiver whose actions allowed the bondholders to receive a dividend; in short, “a large amount of the trust fund was secured and saved . . .”<sup>69</sup> Most of the bondholders “came in and took the

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60. *Id.* at 1260 (“[W]e are not at liberty to sanction a device or practice, however widespread, that is foreclosed by Supreme Court precedent.”).

61. *Tr. v. Greenough*, 105 U.S. 527 (1882).

62. *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885).

63. *See* *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“Since the decisions in [*Greenough*] and [*Pettus*], this Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”).

64. *See* Charles Silver, *A Restitutionary Theory of Attorneys’ Fees in Class Actions*, 76 *CORNELL L. REV.* 656, 657 n.12 (1991) (“A common fund case brings a fund of money, to which a number of persons are entitled, within the jurisdiction of a court. Typically, funds are created when defendants make damage or settlement payments to a court.”).

65. *Van Gemert*, 444 U.S. at 478.

66. *Id.* at 479–81 (“[T]he named respondents have recovered a determinate fund for the benefit of every member of the class whom they represent . . . [T]he attorneys’ fee award in this case is a proper application of the common-fund doctrine.”).

67. *Tr. v. Greenough*, 105 U.S. 527, 528 (1882).

68. *Id.* at 528–29.

69. *Id.*

benefit of the litigation,” even though the plaintiff “bore the whole burden of this litigation, and advanced most of the expenses which were necessary for the purpose of rendering it effective and successful.”<sup>70</sup> Vose requested the court to reimburse, out of the trust fund, both his attorney’s fees (amounting to nearly \$54,000) and his personal “services and expenses” (amounting to just over \$40,000). The “services” were the hours that Vose had spent on the case, and the “expenses” were railroad fares and hotel bills. The circuit court allowed \$60,131.96 to Vose, with more than half earmarked for Vose’s own services and expenses.<sup>71</sup>

The Supreme Court held that the trial court had discretion to award, out of the trust fund, Vose’s reasonable attorney’s fees—thus beginning the modern common-fund doctrine.<sup>72</sup> Although the Court principally canvassed equity suits from Great Britain and the state courts,<sup>73</sup> it also argued that this result was fair. Vose had “bestow[ed] his time for years almost exclusively to” the case, “expended a large amount of money,” and “saved the fund.”<sup>74</sup> Though not formally a trustee, he had “at least acted the part of a trustee in relation to the common interest,” and he had “worked for [other bondholders] as well as for himself . . . .”<sup>75</sup> To deny him attorney’s fees “would not only be unjust to him, but it would give to the other parties entitled to participate in the benefits of the fund an unfair advantage.”<sup>76</sup> The other bondholders “ought to contribute their due proportion of the expenses,” and making “a charge upon the fund is the most equitable way of securing such contribution.”<sup>77</sup>

This reasoning makes *Greenough*’s second holding—the holding on which *Johnson* relied—shocking. The Court found that Vose’s request for “personal services and private expenses” was

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70. *Id.* at 529.

71. *Id.* at 529–31.

72. *Id.* at 537. Just over three years later, *Pettus* both confirmed and extended *Greenough*’s common-fund holding, allowing counsel to seek reimbursement directly from the fund, authorizing recovery to be based on a percentage of the fund, and recognizing the court’s power to limit the requested award. *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116, 124–25, 128 (1885).

73. *Greenough*, 105 U.S. at 532–37.

74. *Id.* at 532.

75. *Id.*

76. *Id.*

77. *Id.*

“decidedly objectionable.”<sup>78</sup> Here the Court relied principally on a lack of prior cases authorizing such an award. It acknowledged that, in some states, trustees received awards for services and expenses, although not in other states or England.<sup>79</sup> No longer willing to designate Vose the de facto trustee of the bondholders’ common interest, the Court declared that Vose “was not a trustee.”<sup>80</sup> Jurisdictions that allowed compensation to trustees did so “with a view to secure greater activity and diligence in the performance of the trust, and to induce persons of reliable character and business capacity to accept the office of trustee.”<sup>81</sup> In language calling to mind the “officious intermeddler” doctrine, the Court described the bad consequences if creditors like Vose received similar compensation:

It 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, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid.<sup>82</sup>

On the surface, *Greenough’s* second holding seems devastating to the prospect for incentive awards to class representatives.<sup>83</sup>

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78. *Id.* at 537.

79. *See id.* (“In England and some of the States, no such allowance is made even to trustees *eo nomine*. In other States it is.”).

80. *Id.*

81. *Id.* at 537–38.

82. *Id.* 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. *See* Cent. Laborers’ Pension Fund v. Blankfein, 971 N.Y.S.2d 282, 288 (N.Y. App. Div. 2013) (“[A]n officious intermeddler who gratuitously foists an unrequested benefit upon another is not entitled to compensation from the recipient because the other party’s receipt of the benefit without compensation does not constitute unjust enrichment.”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 20–30 (AM. L. INST. 2011) (describing limited situations in which restitution for unrequested benefits may be required); *see also* John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1602 (1974) (justifying *Greenough’s* result because compensating Vose “would present too great a temptation to litigants to ‘intermeddle’ in the management of funds”).

83. *Johnson* relied on both *Greenough* and *Pettus* in refusing to authorize incentive awards. *Pettus* did not address this issue at all. Nonetheless, because it expanded on *Greenough’s* common-fund holding, *see supra* note 72, *Johnson* thought that *Pettus* provided some support for its result. *See Johnson v. NPAS Sols.*, 975 F.3d 1244, 1257 (11th Cir. 2020) (“[A]s relevant to our analysis of incentive awards, *Pettus* is significant principally as a



Ironically, one of the leading cases permitting incentive awards, *In re Continental Illinois Securities Litigation*, relied on *Greenough* as authority to do so.<sup>84</sup> Judge Posner nodded at *Greenough*'s two holdings, acknowledging that expenses can be awarded from a common fund "provided they are not personal."<sup>85</sup> But he failed to discuss the meaning that *Greenough* gave to the word "personal," instead slipping into a policy argument about the value of incentive awards: class actions require class representatives and class representatives require an inducement to serve.<sup>86</sup>

Good policy arguments, however, can't trump Supreme Court precedent.<sup>87</sup> And in *Greenough* the Supreme Court banned what today we would call an incentive award. So how much trouble are incentive awards in?

Not as much as it appears. Thus far, *Johnson* has received a decidedly frosty reception. Since *Johnson*, the First, Second, and Ninth Circuits have found *Johnson* wanting and have affirmed the practice of permitting incentive awards.<sup>88</sup> A number of district courts have done the same.<sup>89</sup> For the most part, however, the reasoning of these decisions has not been deep. Two methods to distinguish *Greenough* and *Pettus* have emerged: first, the opinions point to prior circuit precedent permitting incentive awards (and sometimes to Supreme Court dicta seemingly approving these awards); and second, they observe that *Greenough* and *Pettus* are

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reiteration of" *Greenough*'s second holding.); *id.* ("We take the rule of *Greenough*, confirmed by *Pettus*, to be fairly clear . . .").

84. See *In re Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 571 (7th Cir. 1992).

85. *Id.*

86. *Id.*

87. *Johnson*, 975 F.3d at 1260 ("Although it's true that such awards are commonplace in modern class-action litigation, that doesn't make them lawful, and it doesn't free us to ignore Supreme Court precedent forbidding them."); cf. *Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 729 (2d Cir. 2023) (Jacobs, J., concurring) (accepting circuit authority that permitted incentive awards, but acknowledging that *Greenough* did not allow such awards and stating that *Johnson* was a "thorough and well-reasoned opinion").

88. *Fikes*, 62 F.4th at 721; *Murray v. Grocery Delivery E-Servs. USA Inc.*, 55 F.4th 340, 352-54 (1st Cir. 2022); *In re Apple Inc. Device Performance Litig.*, 50 F.4th 769, 785-87 (9th Cir. 2022); *Hyland v. Navient Corp.*, 48 F.4th 110, 123-24 (2d Cir. 2022), *petition for cert. filed sub nom.* *Yeatman v. Hyland*, No. 22-566 (U.S. Dec. 16, 2022), 2022 WL 17833049, and *petition for cert. filed sub nom.* *Carson v. Hyland*, No. 22-634 (U.S. Jan. 5, 2023), 2023 WL 144877.

89. See, e.g., *Grace v. Apple, Inc.*, No. 17-CV-551, 2021 WL 1222193, at \*7 (N.D. Cal. Mar. 31, 2021) ("*Johnson*'s novel reading of old Supreme Court decisions . . . contravenes Ninth Circuit precedent."); *Somogyi v. Freedom Mortg. Corp.*, 495 F. Supp. 3d 337, 353 (D.N.J. 2020) ("[T]he Court respectfully declines to follow *Johnson*").

musty decisions that long predate the development of the modern Rule 23.<sup>90</sup> The impression that these opinions give off is that *Johnson* is a bit of wacky mischief, not worthy of sustained legal analysis.<sup>91</sup>

But facially on-point Supreme Court precedent cannot be so cavalierly dismissed.<sup>92</sup> *Greenough* and *Pettus* deserve greater respect. At the same time, respect does not require acquiescence. A deeper understanding of the history and law of class actions reveals the flaws of *Johnson*'s reading of *Greenough* and *Pettus*.

*Johnson* is a classic case of law-office history.<sup>93</sup> It skims off facts buttressing its argument without true understanding of *Greenough*'s legal and historical context or the reasons that *Greenough*, a creature of its time, does not control the propriety of modern incentive awards. *Johnson*'s reliance on *Greenough* ultimately fails for two reasons: one grounded in the class-action rule that governed in *Greenough*'s day and one grounded in the text of present Rule 23.

### 1. Former Equity Rule 48

At the time of *Greenough*, the relevant class-action rule was Rule 48 of the 1842 Equity Rules.<sup>94</sup> Rule 48 had only two requirements

90. In addition, three opinions have argued that, in *Greenough*, Vose was essentially seeking a salary for his years-long efforts—one worth as much as \$1.4 million in today's dollars. See *In re Apple Device*, 50 F.4th at 786 (mentioning that Vose's request amounted to a salary of \$76,000 per year); *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138, 1148 (11th Cir. 2022) (Pryor, Jill, J., dissenting) (stating that Vose's "salary" request was worth \$1.4 million); *Johnson*, 975 F.3d at 1268 (Martin, J., dissenting) (arguing that impermissible incentive payments act "more like salaries than awards for litigation expenses").

91. The two exceptions, and the most sustained critiques of *Johnson*, are Judge Martin's partial dissent in *Johnson*, see 975 F.3d at 1265, and Judge Jill Pryor's dissent to rehearing in *Johnson*, see *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138, 1139 (11th Cir. 2022) (Pryor, Jill, J., dissenting). For a pre-*Johnson* opinion that offered a cursory two-sentence dismissal of *Greenough* and *Pettus* as "inapposite" and presenting "factual settings [that were not] akin to those here," see *Melito v. Experian Mktg. Sols., Inc.*, 923 F.3d 85, 96 (2d Cir. 2019).

92. Cf. *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

93. See *Velasquez v. Frapwell*, 160 F.3d 389, 393 (7th Cir. 1998) (Posner, J.) ("The term 'law-office history' is properly derisory and the derision embraces the efforts of judges and law professors, as well as of legal advocates, to play historian.").

94. See Rule XLVIII, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, reprinted in 42 U.S. (1 How.) xxxix, lvi (1843). We have rendered Latin-numeric Rules (e.g., "Rule XLVIII") in Hindu-Arabic numerals (e.g., "Rules 48"). Between 1848 and

for a suit to proceed as a class action. First, the “very numerous” parties could not all be joined “without manifest inconvenience and oppressive delays.”<sup>95</sup> Second, the suit joined “sufficient parties,” so that “all the adverse interests” were represented.<sup>96</sup>

Students of present Rule 23 will note two critical differences in Equity Rule 48: the court did not appoint the class representative and, relatedly, there was no requirement that the representative *adequately* represent the class’s interests. Rule 38 of the Federal Equity Rules of 1912, which replaced Rule 48, likewise made no mention of court approval of the class representative or of adequate representation.<sup>97</sup> Only with the adoption of Federal Rule of Civil

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*Greenough* (in 1881), the Federal Equity Rules, which the Supreme Court also called the “Chancery Rules” or the “General Rules,” were amended four times: in 1850 (*see* Rules of Court, *reprinted in* 51 U.S. (10 How.) v, v (1850) (amending Equity Rule 40)), in 1861 (*see* General Rules, *reprinted in* 66 U.S. (1 Black) 6, 6-7 (1861) (amending Equity Rule 67)), in 1869 (*see* General Rules, *reprinted in* 76 U.S. (9 Wall.) vii, vii (1869) (further amending Equity Rule 67)), and in 1871 (*see* General Rules, *reprinted in* 80 U.S. (13 Wall.) xi, xi-xii (1871) (amending Equity Rule 41)). No amendments touched on Rule 48.

95. Rule 48 provided in full:

Where the parties on either side are very numerous, and cannot, without manifest inconvenience and oppressive delays in the suit, be all brought before it, the court in its discretion may dispense with making all of them parties, and may proceed in the suit, having sufficient parties before it to represent all the adverse interests of the plaintiffs and the defendants in the suit properly before it. But in such cases the decree shall be without prejudice to the rights and claims of all the absent parties.

Rule XLVIII, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, *reprinted in* 42 U.S. (1 How.) xxxix, lvi (1843).

96. *Id.*

97. *See* Rule 38, RULES OF PRACTICE FOR THE COURTS OF EQUITY OF THE UNITED STATES, *reprinted in* 226 U.S. 649, 659 (1912). Rule 38 provided in full: “When the question is one of common or general interest to many persons constituting a class so numerous as to make it impracticable to bring them all before the court, one or more may sue or defend for the whole.” Although Rule 38 contained no explicit requirement of adequate representation, the Supreme Court (in the context of a decision about federal courts’ subject-matter jurisdiction over class suits) noted that, in a class suit brought under Rule 38, “the decree when rendered must bind all of the class properly represented.” *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 367 (1921). *Ben-Hur* further noted that the class representatives in the case “truly represented the interested class,” and that the entire class was bound by the judgment. *Id.* It also specifically noted that Rule 38 did not contain the second sentence of former Rule 48 (which it quoted in full). It thought that this omission was “significant.” *Id.* at 366. Nonetheless, although we have teased out the relevant and suggestive language, the Court did not go quite so far as to hold that adequate representation was a necessary condition under Rule 38 or that, in the absence of adequate representation, a class suit had no binding effect on class members. In any event, *Ben-Hur* shows that the central point holds: under Rule 48, which was operative at the time of *Greenough*, neither adequate representation nor binding effect was an element of a federal class suit.

Procedure 23 in 1938 did adequate representation become an element of a class claim,<sup>98</sup> and not until two years later, in *Hansberry v. Lee*, was adequacy seen as a constitutional requirement.<sup>99</sup> The court's power to certify a class action – and thus to declare that the representative was adequate – came into existence only with the 1966 amendment to Rule 23.<sup>100</sup>

Adequate representation is essential to understanding why *Greenough* is less devastating to incentive awards than it appears. After *Hansberry*, adequate representation is essential for a judgment in a class action to enjoy preclusive effect.<sup>101</sup> In contrast, the 1842

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98. See Rule 23(a), RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS OF THE UNITED STATES, reprinted in 308 U.S. 663, 689 (1939). Rule 23(a) provided in part: “If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued . . . .”

99. *Hansberry v. Lee*, 311 U.S. 32 (1940).

100. See FED. R. CIV. P. 23(c)(1)(A) (“At an early practicable time after a person sues or is sued as a class representative, the court must determine by order whether to certify the action as a class action.”). As the note to the 1966 amendment explained,

In order to give clear definition to the action, this provision requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained. The determination depends in each case on satisfaction of the terms of subdivision (a) and the relevant provisions of subdivision (b).

FED. R. CIV. P. 23(c)(1) advisory committee's note to 1966 amendment.

101. *Hansberry*, 311 U.S. at 42–43 (“It is familiar doctrine of the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present . . . .”). *Hansberry's* claim that adequate representation was a “familiar doctrine” in federal court is disputable, at least before Rule 23's adoption in 1938. The earliest reported federal decision mentioning adequate representation was in 1939. *Peelas v. Caterpillar Tractor Co.*, 30 F. Supp. 173, 175–76 (S.D. Ill. 1939) (noting that plaintiff would not be an adequate representative under Rule 23(a)). A few earlier state cases in Illinois and Missouri mentioned adequacy, but none hinged on the point. See *Groves v. Farmers St. Bank of Woodlawn*, 12 N.E.2d 618, 624 (Ill. 1937) (noting in dicta that “[n]ot only the stockholders but the other creditors of the state bank were also adequately represented” in a class suit); *Dickey v. Volker*, 11 S.W.2d 278, 285 (Mo. 1928) (noting in dicta that, when a class suit is brought, “the court may determine the adequacy of the representation”). The issue of adequacy was usually raised in a subsequent case, when the judgment from the class suit was enforced by or against class members. See *Harmon v. Auditor of Pub. Accts.*, 13 N.E. 161, 163 (Ill. 1887) (“The complainants in this proceeding were represented by the complainants in the former suit, and are therefore bound by the decree therein entered.”); cf. RESTATEMENT OF JUDGMENTS § 86 (AM. L. INST. 1942) (“A person who is one of a class of persons on whose account action is properly brought or defended in a representative action or defense is bound by and entitled to the benefits of the rules of res judicata with reference to the subject matter of the action.”). The Advisory Committee that drafted the original Rule 23 did not discuss its reason for inserting an adequacy requirement. See FED. R. CIV. P. 23 advisory committee's note (1937).

Equity Rules were explicit that class actions had no preclusive effect whatsoever: “[T]he decree shall be without prejudice to the rights and claims of all the absent parties.” Members of the class might take advantage of the stare decisis effect of a judgment,<sup>102</sup> but they were in no manner bound by it. Conversely, the person suing on behalf of the class had no need to avoid conflicts of interest. Class representatives and class members were fellow travelers along a road, not bound by each other’s journeys.

In that world, expecting others to pay for your services is officious intermeddling, with all the attendant risks of class representatives enriching themselves at class members’ expense. It made sense that the representative would receive nothing for the time and expense to generate a result that others in the class may or may not choose to accept and may or may not be in their best interest. The representative had no duty of loyalty toward the class, nor even the commonality or typicality of claim that fosters adequate representation. Representatives could be in it entirely for themselves, dragging along others’ claims for whatever benefit they provided; indeed, recall that Vose sought nearly as much money for himself as for his attorney.<sup>103</sup> The law of restitution does not require payment for foisted-upon services such as these.<sup>104</sup>

Contrast that world with the modern class action. Today a judge must find that the class representative adequately represents the class.<sup>105</sup> Cases describe the class representative as a fiduciary of the class or state that the representative has fiduciary obligations toward the class.<sup>106</sup> The representative is not an officious

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102. *Cf.* *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 167 (1939) (allowing an award of attorney’s fees when “a fund is for all practical purposes created for the benefit of others,” regardless of “the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through stare decisis rather than through a decree”).

103. And the circuit court awarded him more money than it awarded his attorney. *See supra* note 71 and accompanying text.

104. *See supra* note 82.

105. *See supra* note 100 and accompanying text; *see also* *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 810 (1985) (“[A]n absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”); *see also supra* notes 36–37 and accompanying text (discussing adequate representation).

106. *See, e.g., Eubank v. Pella Corp.*, 753 F.3d 718, 723 (7th Cir. 2014) (“Class representatives are . . . fiduciaries of the class members . . .”); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987) (stating that even compliance with Rule 23(a)(4) “might

intermeddler intruding without license upon private rights held by others, but a court-appointed guardian whose conduct is under constant judicial monitoring.<sup>107</sup>

In this sense, a class representative is comparable to a trustee working to advance the interests of a trust's beneficiaries.<sup>108</sup> Recall that *Greenough* had rejected the analogy between trustees and class representatives like *Vose*.<sup>109</sup> In *Greenough's* time, this distinction was right, because members of the class were fellow creditors in no way bound by the result that *Vose* achieved. Today, however, class representatives are fiduciaries, just like trustees. Class representatives and class members are united to each other through the commonality and typicality of their claims<sup>110</sup> and bound to each other through fiduciary obligations arising from the adequacy-of-representation requirement.<sup>111</sup> The legal difference between *Vose*, who was a stranger to other class members, and a modern class representative, who assumes fiduciary duties toward other class members upon the court's finding of adequacy, is so great that even

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not qualify [the named plaintiffs] as adequate class representatives because they do not possess the personal characteristics and integrity necessary to fulfill the fiduciary role of class representative"; *In re Fine Paper Litig.*, 632 F.2d 1081, 1086 (3d Cir. 1980) ("After an affirmative determination [to certify a class] is made, the class representative acts as a fiduciary."). Some courts hold that these fiduciary obligations commence when a class-action complaint is filed, even before certification. *See, e.g., Roper v. Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978) ("By the very act of filing a class action, the class representatives assume responsibilities to members of the class.").

107. *See* FED. R. CIV. P. 23(c)(1)(C) (giving district courts power to alter or amend class certification before final judgment); *id.* at 23(d)(2) (giving district courts other powers "to protect class members"); *Stampley v. Altom Transp., Inc.*, 958 F.3d 580 (7th Cir. 2020) (affirming decertification of a class when the class representative was no longer adequate).

108. Trustees owe fiduciary duties. *See Bator v. Dist. Council 4*, 972 F.3d 924, 929-30 (7th Cir. 2020) (discussing whether an ERISA plan trustee violated fiduciary duties to beneficiaries of the plan); *McGarry & McGarry, LLC v. Bankr. Mgmt. Sols., Inc.*, 937 F.3d 1056, 1066 (7th Cir. 2019) ("[A] trustee in bankruptcy owes a fiduciary duty to an estate's creditors . . ."); 3 RESTATEMENT (THIRD) OF TRUSTS §§ 77-84 (AM. L. INST. 2007) (discussing duties and liability of a trustee toward beneficiaries); 4 RESTATEMENT (THIRD) OF TRUSTS § 100 (AM. L. INST. 2012) (same).

109. *See supra* note 80 and accompanying text.

110. FED. R. CIV. P. 23(a)(2)-(3). All class actions must further meet at least one requirement of Rule 23(b), further strengthening the cohesion within the class. *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) ("The Rule 23(b)(3) predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation."); *Harris v. Union Pac. R.R.*, 953 F.3d 1030, 1033 (8th Cir. 2020) ("The touchstone of a 23(b)(2) class is that the class claims must be cohesive.").

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

*Greenough's* logic supports compensation for the modern class representative.

Although not critical to this argument, policy concerns also confine *Greenough's* ban on incentive awards to its historical context. *Greenough* noted that Vose was “a large holder of bonds” of the defendant.<sup>112</sup> Vose could not have known at the time that he commenced suit whether he might recover his attorney’s fees and expenses. Hence, Vose must have had a sufficient stake in the dispute to sustain the litigation for nearly ten years without regard to whether he might receive an award from the common fund. Contrast that fact with the modern class action, which is designed principally to address “negative-value” claims — claims that are not economically viable to bring independently.<sup>113</sup> Without incentive awards, fewer people might be willing to assume the responsibilities of the class representative, for the value of their time and expenses might exceed the value of their settlement award. That unwillingness might diminish the value of Rule 23, which, like all Federal Rules of Civil Procedure, “should be construed, administered, and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.”<sup>114</sup>

One objection to reading *Greenough* in this manner is that it proves too much: if Vose was an officious intermeddler not entitled to personal expenses, he likewise was not entitled to attorney’s fees. Yet the Court allowed Vose to obtain attorney’s fees. This is a fair point. Exactly why *Greenough* split the baby as it did is difficult to justify; the Court seemed to be influenced by the existence of some (albeit conflicting) precedent allowing attorney’s fees and the absence of precedent allowing personal expenses. Leading scholars used to argue that *Greenough's* allowance of attorney’s fees was

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112. *Tr. v. Greenough*, 105 U.S. 527, 528 (1882).

113. *See Amchem*, 521 U.S. at 617 (“While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.” (internal quotation marks omitted)).

114. FED. R. CIV. P. 1; *cf. Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (stating that, in a class of 17 million victims whose damages ranged from \$15 to \$30, “[t]he 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”).

wrong under the law of restitution.<sup>115</sup> In light of former Rule 48's non-fiduciary nature, we are sympathetic to this view. Today, however, attorneys have fiduciary obligations toward the class.<sup>116</sup> Therefore, *Greenough's* arguable wrong turn on attorney's fees is irrelevant today and provides no reason to refuse to recognize the evidently different legal positions of a Rule 48 pseudo class "representative" like Francis Vose and a true Rule 23 class representative like Charles Johnson – or to refuse compensation to a true class representative whom a court appoints to work for the benefit of the class.

## 2. Present Rule 23

In any event, a second distinction confines *Greenough* to its facts. *Greenough's* request for an incentive award arose after judgment. In nearly all modern cases, however, requests for incentive awards

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115. John Dawson published two articles severely critiquing *Greenough's* award of fees to counsel and applauding *Greenough's* refusal to compensate Vose. See John P. Dawson, *Lawyers and Involuntary Clients in Public Interest Litigation*, 88 HARV. L. REV. 849, 851–52 (1975) (stating that Vose's claim for his time and expenses "is not restitution as ordinarily conceived but a means of spreading costs" and that, for the common-fund theory for attorney's fees, "our domestic, land-based law of restitution supplies no analogies whatever"); Dawson, *supra* note 82, at 1601–12 (critiquing the "common fund" rationale of *Greenough* and *Pettus* but agreeing with the denial of recovery to Vose). Also regarding *Greenough* as a restitution case, the *Restatement (Third) of Restitution* has rejected Dawson's view; it proposed that restitution is permissible for actions that create a common fund. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29(2) (AM. L. INST. 2011) ("A claimant may require those beneficiaries for whom the claimant is not acting by agreement to contribute to the reasonable and necessary expense of securing the common fund for their benefit . . . as necessary to prevent unjust enrichment."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt. d, illus. 3, reporter's note d (AM. L. INST. 2011) (approving *Greenough's* award of attorney's fees).

116. Rule 23(g)(4) demands that class counsel "fairly and adequately represent the interests of the class." FED. R. CIV. P. 23(g)(4); See *In re Auto. Parts Antitrust Litig., End-Payor Actions*, 33 F.4th 894, 904 (6th Cir. 2022) ("Class counsel indeed have a fiduciary duty to protect the interests of all class members . . ."); *Briseño v. Henderson*, 998 F.3d 1014, 1025 (9th Cir. 2021) ("[B]ecause a district court has appointed class counsel who owes a fiduciary duty to the class members, class counsel would be ethically forbidden from sacrificing the class members' interests."); *Med. & Chiropractic Clinic, Inc. v. Oppenheim*, 981 F.3d 983, 990–93 (11th Cir. 2020) (discussing in detail "the fiduciary obligations owed by counsel in class action litigation").

In any event, Rule 23(h) provides all necessary authority for a federal court to award attorney's fees. See FED. R. CIV. P. 23(h). Whether or not *Greenough* was wrong to authorize an award of attorney's fees in its own day, fee awards are authorized today.



arise at settlement.<sup>117</sup> The reason that this distinction matters is Rule 23(e)(2), which provides a standard against which the court's approval of a class settlement is measured: the settlement must be "fair, reasonable, and adequate . . ."<sup>118</sup> To make this determination, a court must consider a series of factors.<sup>119</sup>

In other words, *Greenough's* holding – at least in the context of class settlements – has been superseded by a Federal Rule of Civil Procedure validly enacted pursuant to a grant of rulemaking authority.<sup>120</sup> In *Greenough's* time, the decision to compensate a class representative for time and expenses was a matter of general equity practice. Today the decision to award an incentive payment is determined by the "fair, reasonable, and adequate" standard of

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117. Class complaints sometimes make a demand for an incentive award. *See, e.g.,* *Connector Castings, Inc. v. Joseph T. Ryerson & Son, Inc.*, No. 4:15-CV-851 SNLJ, 2016 WL 228743, at \*2 (E.D. Mo. Jan. 19, 2016) (noting that an offer of judgment did not include the incentive award that plaintiff sought in the complaint). But reported cases providing an incentive award after judgment are rare; and virtually none of the cases that our research disclosed discussed the propriety of doing so. *See* *Weil v. Metal Techs., Inc.*, No. 2:15-cv-00016-JMS-MPB, 2019 WL 5781895, at \*5 (S.D. Ind. Nov. 6, 2019) (awarding a \$2,500 incentive payment out of a \$93,153 class judgment); *Yang v. Assisted Credit Servs., Inc.*, No. SACV 15-02118 AG, 2017 WL 9939710, at \*3 (C.D. Cal. Nov. 7, 2017) (ordering a \$3,000 incentive award as part of a default judgment). The exception is *Boynton v. Headwaters, Inc.*, No. 1:02-cv-01111-JPM-egb, 2012 WL 12546853, at \*3 (W.D. Tenn. Mar. 27, 2012), in which a court granted class counsel's request for incentive payments, ranging from \$10,000 to \$100,000, to be paid from the \$7.27 million judgment. The court noted the large size of the awards but thought them justified in light of the efforts of the representatives. *Id.* The representatives also obtained more than \$8.7 million as compensation for their own claims. *Id.* at \*1. *See also* *Physicians Healthsource, Inc. v. A-S Medication Sols., LLC*, 950 F.3d 959, 964, 969–71 (7th Cir. 2020) (noting that the district court had entered, subject to revision, a distribution plan regarding incentive awards and attorney's fees after judgment, but not analyzing the incentive awards).

118. FED. R. CIV. P. 23(e)(2).

119. The factors include whether "the class representatives . . . have adequately represented the class," *see* FED. R. CIV. P. 23(e)(2)(A); whether "the relief provided for the class is adequate, taking into account," among other factors, "the effectiveness of any proposed method for distributing relief to the class," *see id.* at 23(e)(2)(C), (C)(ii); and whether "the proposal treats class members equitably relative to each other." *see id.* at 23(e)(2)(D). In her dissent from the denial of rehearing in *Johnson*, Judge Jill Pryor specifically seized on Rule 23(e)(2)(D) – the requirement of equitable treatment among class members – to argue that Rule 23 "irrevocably altered" *Greenough's* denial of awards to class representatives. *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138, 1149 (11th Cir. 2022) (Pryor, Jill, J., dissenting).

120. Congress delegated to the Supreme Court the authority to promulgate federal procedural rules, *see* 28 U.S.C. § 2072(a), as long as the rules do not "abridge, enlarge or modify any substantive right." *See* § 2072(b). *Cf.* *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality opinion) ("Rule 23 – at least insofar as it allows willing plaintiffs to join their separate claims against the same defendants in a class action – falls within § 2072(b)'s authorization.").

Rule 23. Whatever vitality *Greenough's* holding might have had before Rule 23(e)'s enactment—or might continue to have in class actions that do not settle—the propriety of incentive payments in class settlements is governed not by *Greenough* but by Rule 23.

There are two objections to this conclusion. First, because Rule 23 does not expressly authorize incentive payments, *Greenough* should be seen as remaining in force. The problem with this objection is that Rule 23 also does not mention many types of provisions found in class settlements—such as “clear sailing” agreements,<sup>121</sup> incentive agreements,<sup>122</sup> “most favored nation” clauses,<sup>123</sup> kicker clauses,<sup>124</sup> and cy pres distributions<sup>125</sup>—that courts must approve or disapprove under the authority of Rule 23(e)(2). Simply put, “a district court’s authority to administer a class-action settlement derives from Rule 23 . . . .”<sup>126</sup> We no longer operate in the

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121. In a “clear sailing” agreement, the defendant agrees not to object to class counsel’s fee request. See *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947–49 (9th Cir. 2011) (explaining why clear-sailing agreements, while not prohibited, are “disfavored”).

122. An incentive agreement, as distinct from an incentive award, is part of the retention agreement between the class representative and class counsel. It requires class counsel to request an incentive award only when certain conditions are met. See *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 959–60 (9th Cir. 2009) (disapproving of an incentive agreement that created a disincentive for the class representative to decline the settlement and go to trial).

123. Under a “most favored nation” clause, the class agrees to modify the settlement’s terms in the event that class counsel enters a settlement with another defendant that contains materially better terms for the other defendant than it does for the present defendant. As a result, class members are at risk of receiving less relief from the settlement than they expect. See, e.g., *In re Motor Fuel Temperature Sales Pracs. Litig.*, No. 07-MD-1840-KHV, 2015 WL 5010048, at \*19 (D. Kan. Aug. 21, 2015) (finding that the “most favored nation” clause at issue “is not unfair to class members.”).

124. A kicker clause “provides that if the judge reduces the amount of fees that the proposed settlement awards to class counsel, the savings shall enure not to the class but to the defendant.” *Pearson v. NBTY, Inc.*, 772 F.3d 778, 786 (7th Cir. 2014); *id.* at 787 (“[A]t the very least there should be a strong presumption of [a kicker clause’s] invalidity.”).

125. A cy pres award allocates undistributed amounts in a class settlement to an organization, usually a charity or educational institution, whose mission often aligns with the goals of the lawsuit. The legitimacy of these awards is contested. Compare, e.g., *Lane v. Facebook, Inc.*, 696 F.3d 811, 820–22 (9th Cir. 2012) (upholding a \$9.5 million settlement in which class counsel received \$3 million and the balance established a new charity dedicated to online privacy), with *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 480 (5th Cir. 2011) (holding that the district court abused its discretion by ordering a cy pres distribution), and AGGREGATE LITIGATION, *supra* note 13, § 3.07 (rejecting cy pres recovery except when “the amounts involved are too small to make individual distributions economically viable” or when “other specific reasons exist that would make further distributions impossible or unfair.”).

126. *Klier*, 658 F.3d at 475.

uncharted waters of equity practice. For incentive awards in class settlements, Rule 23(e)(2) has eased *Greenough* into retirement.<sup>127</sup>

The second objection follows from this fact: *Greenough*'s prohibition against incentive awards still pertains when the class action results in a favorable judgment for the class. That discrepancy seems like bad policy: it provides a huge inducement for class representatives to agree to a settlement, thus creating a potentially disabling conflict of interest between the class representative, who might want an incentive payment that only settlement can provide, and those class members who may be better served by trial.

This policy objection fails for two reasons. First, policy concerns cannot outweigh the commands of Rule 23, and Rule 23(e)(2) permits a court to approve a "fair, reasonable, and adequate" settlement. An incentive award's potential to overbear the class representative's duty to advance the interests of the class is one factor that the court can meld into its consideration of the representative's adequacy and the settlement's fairness.<sup>128</sup> Second, these concerns ignore the first, and equally dispositive, reason to reject *Greenough*—a reason that applies to both settled class actions and class actions litigated to judgment.<sup>129</sup> In class settlements, Rule 23(e)(2) decisively renders *Greenough* a dead letter, but the case wasn't alive in any event.

### C. Johnson's Enduring Lesson

Because subsequent developments sheared *Greenough* of all force, *Johnson* is wrong.<sup>130</sup> This fact does not, however, establish the converse proposition: that incentive awards are permissible. *Johnson* highlights the lack of Supreme Court precedent allowing incentive awards. *Johnson*'s denial of incentive awards, while too

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127. Cf. Brian T. Fitzpatrick, *Why Class Actions Are Something Both Liberals and Conservatives Can Love*, 73 VAND. L. REV. 1147, 1152 (2020) (noting that judges do not need common-law authority to permit cy pres awards in most cases because "their authority comes from the terms of the settlement agreement that call for cy pres").

128. See *supra* notes 105–07, 119 and accompanying text.

129. See *supra* Section I.B.1.

130. For one early rejection of *Johnson*, see *Somogyi v. Freedom Mortg. Corp.*, 495 F. Supp. 3d 337, 354 (D.N.J. 2020) ("Until and unless the Supreme Court or Third Circuit bars incentive awards or payments to class plaintiffs, they will be approved by this Court if appropriate under the circumstances.").

draconian, has one benefit: it invites judges and lawyers to examine these payments – and the justification for them – more closely.

Our sense is that parties negotiating incentive payments and courts approving them have become lazy. Nearly all incentive awards end in three zeroes: \$5,000, \$10,000, and so on.<sup>131</sup> It defies belief that, across all the class representatives in a case and across all class actions, the value of the representatives' time and expenses always rounds so nicely.<sup>132</sup>

What is required is a clear theory of incentive awards. Two approaches are possible: one economic and one restitutionary.<sup>133</sup> The economic theory justifies incentive awards as necessary to provide an inducement to serve as class representative; on this theory, it is unsurprising that courts choose round numbers of a size sufficient to encourage class representatives to step forward. On the other hand, the restitutionary theory justifies incentive awards as necessary to ensure that class members are not unjustly enriched by failing to pay for a class representative's labor on their behalf. This theory sets a different limit on an incentive award: the reasonable value of the representative's services to the class.<sup>134</sup>

Courts have tended not to be clear about which theory they are using. The Ninth Circuit, for instance, has suggested that both are viable: incentive awards "are intended to compensate class representatives for work done on behalf of the class, to make up for financial or reputational risk undertaken in bringing the action,

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131. Some awards, albeit ending in three zeroes, are much higher. *See, e.g., In re Titanium Dioxide Antitrust Litig.*, No. 10-CV-00318(RDB), 2013 WL 6577029, at \*1 (D. Md. Dec. 13, 2013) (approving awards of \$125,000 and \$25,000 to class representatives).

132. What may also help to explain this phenomenon is that in addition to the more objective cost-reimbursement view of incentive awards, class representatives are compensated for the perceived quality of their performance, and the fact that it is attorneys who typically suggest the proprietary and amount of incentive awards to courts. Eisenberg & Miller, *supra* note 56, at 1314-18.

133. *Cf. Silver*, *supra* note 64, at 657-61 (discussing economic and restitutionary theories in the award of attorney's fees).

134. There are different ways to calculate the value of nonreturnable benefits like payments to class members. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 49(3) (AM. L. INST. 2011). As a rule, however, "[t]he liability in restitution of an innocent recipient of unrequested benefits may not exceed the cost to the claimant of conferring the benefits in question . . ." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 50(4) (AM. L. INST. 2011). In the context of a class action, the "innocent recipient of unrequested benefits" is the class and the "claimant" is the class representative. This amount may be reduced based on other considerations discussed *infra* notes 142-49 and accompanying text.

and, sometimes, to recognize their willingness to act as a private attorney general.”<sup>135</sup> Most courts, when allowing an award, tend to emphasize the restitutionary theory in the sense that they focus on the results that the class representatives achieved *in that case* and the work that the class representatives undertook for the class members *in that case*, not on the incentive required to bring future class actions.<sup>136</sup> But courts tend not to rely on the restitutionary theory in choosing the amount of the award: they do not typically require billing records or time sheets from class representatives or set an hourly rate for their services.<sup>137</sup> Moreover, their concern that excessive incentive payments might weaken the resolve of class representatives to protect the class shows that the economic theory of incentive payments is never far from the surface.<sup>138</sup>

In our view, *Greenough* remains the critical case in choosing the right theory. *Greenough* saw the questions posed in that case – the entitlement of counsel to a fee and the entitlement of Vose to recover for his time and expenses – through the lens of restitution. *Greenough* grounds counsel’s entitlement to a fee in the power of courts of equity “to make such allowance to the parties out of the fund as justice and equity may require.”<sup>139</sup> Its refusal to compensate Vose for his time and expenses arose from the fear that Vose was

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135. *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009). *See also* *Garner Props. & Mgmt., LLC v. City of Inkster*, 333 F.R.D. 614, 628 (E.D. Mich. 2020) (reducing requested incentive award from \$10,000 to \$1,000 because the lower amount “fairly compensates Plaintiff for its efforts in this litigation and adequately incentivizes others to serve as class representatives in similar cases”).

136. *See* *Carlin v. DairyAmerica, Inc.*, 380 F. Supp. 3d 998, 1024–27 (E.D. Cal. 2019) (slicing requested incentive awards from \$90,000 to \$45,000 for four class representatives after considering the efforts of the representatives and the ratio of the award to the recovery of the class members). *See also supra* note 51 and accompanying text (describing factors courts use to set the amount of an incentive award).

137. There are exceptions. *See* *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 311 (6th Cir. 2016) (“[C]ounsel must provide the district court with specific documentation – in the manner of attorney time sheets – of the time actually spent on the case by each recipient of an award.”).

138. *See, e.g.,* *Staton v. Boeing Co.*, 327 F.3d 938, 976 (9th Cir. 2003) (noting the “considerable danger of individuals bringing cases as class actions principally to increase their own leverage to attain a remunerative settlement for themselves and then trading on that leverage in the course of negotiations” as a reason to disapprove a settlement with large incentive payments).

139. *Tr. v. Greenough*, 105 U.S. 527, 535 (1882).

an officious intermeddler, to whom the law of restitution provided no recovery.<sup>140</sup> Scholars also see *Greenough* as a restitution case.<sup>141</sup>

Because the substantive law of restitution provides the basis for a class representative's award, the remedy of restitution specifies the amount of the award. As we have described, restitution's remedial principle awards class representatives the reasonable value of their services to the class members.<sup>142</sup> Restitution also imposes limits on this award. First, class members must not be left worse off, as a result of the incentive payment, than they had been before the class action commenced.<sup>143</sup> Second, the representative's recovery generally "may not exceed the cost to the [representative] of conferring the benefits in question . . ."<sup>144</sup> Third, the representative's award must be limited to the lesser of the class representative's costs or the value of the relief to the class members.<sup>145</sup> Fourth, "[r]ecovery on a theory of common fund depends on a showing of net benefit conferred in consequence of the claimant's intervention; restitution affords no basis for the reimbursement or sharing of unproductive expenditures."<sup>146</sup> Fifth, no recovery of an incentive award is possible "if the result of the claimant's intervention is to vindicate personal interests rather than the interests of a class"<sup>147</sup> or if the class representative acted gratuitously.<sup>148</sup>

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140. See *supra* note 82 and accompanying text.

141. See *supra* note 115 and accompanying text.

142. See *supra* notes 16, 134 and accompanying text.

143. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 50(3) (AM. L. INST. 2011) ("The liability in restitution of an innocent recipient of unrequested benefits may not leave the recipient worse off (apart from the costs of litigation) than if the transaction giving rise to the liability had not occurred."). This limit is unlikely to have an effect in most class actions. *But see* Kamilewicz v. Bank of Boston Corp., 92 F.3d 506, 508 (7th Cir. 1996) (recounting how one class member ended up receiving a \$2 settlement award and a \$91 charge for attorney's fees).

144. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 50(4) (AM. L. INST. 2011) (noting that this limit might be increased under the principles of § 53, which would not ordinarily apply to an incentive award).

145. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 50(2)(a) & cmt. c (AM. L. INST. 2011).

146. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 50 cmt. c (AM. L. INST. 2011).

147. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt. f (AM. L. INST. 2011).

148. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29(3)(c) (AM. L. INST. 2011) (denying restitution when the claimant "acted gratuitously [or] received full compensation from others").

Finally, and above all, payment is required only “as necessary to prevent unjust enrichment.”<sup>149</sup>

The upshot of this analysis is that courts may need to examine more closely the incentive awards they make. Moreover, on a restitutionary theory, class representatives are not entitled to compensation for such elements as “financial or reputational risk undertaken in bringing the action” or “willingness to act as a private attorney general.”<sup>150</sup> Restitution provides a remedy based on the gain to the class members, and these elements are of no benefit to class members whatsoever. More broadly, awards intended as an incentive for class representatives to step forward are impermissible. And in class actions in which representatives obtain a recovery sufficient to have justified the commencement of an individual lawsuit—in other words, in cases like *Greenough*—a fact-specific inquiry must determine whether the class representative’s efforts *unjustly* enriched the class members. In other words, *Greenough*’s denial of an award to Vose may have been correct on its facts even under modern law.<sup>151</sup>

The evident objection to this approach is its failure to consider the role of incentives in class actions—in other words, its blindness to the economic theory that underlies incentive awards. But economic theory is not legal doctrine. To justify an incentive award, we need a legal theory of recovery: under what source of law is an

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149. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29(2) (AM. L. INST. 2011).

150. *Cf. Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958–59 (9th Cir. 2009) (suggesting that these considerations are relevant in determining the propriety of an award).

151. In modern parlance, *Greenough* would have brought into play the fifth exception to recovery, *see supra* notes 147–48 and accompanying text. A poster child for this situation is *Boynton v. Headwaters, Inc.*, No. 1:02-cv-01111-JPM-egb, 2012 WL 12546853, at \*1–3 (W.D. Tenn. Mar. 27, 2012), in which the district court awarded incentive payments from \$10,000 to \$100,000 to class representatives who had already recovered more than \$8.7 million out of a \$16 million judgment. The awards were paid out of the remaining \$7.2 million due to class members. In view of the class representative’s own stake in the outcome, the basis for incentive awards in *Boynton* was questionable. *See also Fikes Wholesale, Inc. v. HSBC Bank USA, N.A.*, 62 F.4th 704, 720–23 (2d Cir. 2023) (approving the bulk of \$900,000 in incentive awards given to eight class representatives, including two incentive awards of \$200,000 each, but remanding the awards to deduct any amounts that were awarded for legislative lobbying efforts that did not benefit the class); *id.* at 722 (noting that the out-of-pocket expenses for two representatives were \$70,000 and \$39,000, but rejecting the argument that their recoveries should be limited to this restitutionary recovery).

award justified?<sup>152</sup> Restitution is a long-standing field of law, and in appropriate circumstances it permits the compensation of class representatives. But we must take the bitter with the sweet. If the substantive law of restitution establishes the liability of class members to the class representative, then the remedial law of restitution must measure the extent of that liability. As *Greenough* demonstrates and the *Restatement (Third) of Restitution* says, “[g]eneral principles of restitution disfavor such liability.”<sup>153</sup> Instead, “[t]he law’s strong preference [is] for contractual over restitutionary liability . . . .”<sup>154</sup> While the procedural form of a class action requires a compromise on this preference,<sup>155</sup> the remedial limits of restitution put guardrails on the compromise.

The economic theory of incentive awards is not tied to any comparable substantive or remedial doctrine. An incentive award that gives class representatives money for anything other than the actions that benefit class members is in effect a wealth transfer: it takes money from a class member and gives it to a class representative. This wealth transfer may attain a noble social purpose: inducing future class representatives to enforce the law. But courts have no power to tax, whether under the Federal Rules

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152. In her dissent from rehearing in *Johnson*, Judge Jill Pryor made a related point: that *Greenough* was wrong because it relied on the now-discredited notion of federal general common law. For Judge Pryor, that reliance made *Greenough* suspect; she argued that federal common law was the source of the right to award incentive payments in federal court, at least in federal-question cases like *Johnson*. See *Johnson v. NPAS Sols., LLC*, 43 F.4th 1138, 1143 n.9 (11th Cir. 2022) (Pryor, Jill, J., dissenting). Without disagreeing with this critique of *Greenough*, our point here is slightly different. Granting that a federal court must decide, in class actions concluded by settlement, that an incentive award is “fair, reasonable, and adequate,” see FED. R. CIV. P. 23(e)(2), courts still require a principle under which to make that determination. It is difficult to argue that an incentive award is “fair, reasonable, and adequate” if the class representative has no legal right to the award. Restitution provides that right and thus makes an award fair: class members must not unjustly profit from the labors of class representatives. See *supra* note 25 and accompanying text. For further discussion of the source-of-law point, see *supra* note 31, *infra* notes 197, 285–87 and accompanying text.

153. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt. c (AM. L. INST. 2011).

154. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt. g (AM. L. INST. 2011).

155. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 29 cmt. c (AM. L. INST. 2011) (describing “certain recognized features of class-action procedure [that] make it consistent, in theory at least, with the ordinary requirements of restitution”).



of Civil Procedure or under any other doctrine.<sup>156</sup> No statute allows courts to hand over class members' property to the class representative. The class members breached no contract, committed no tort, and did no legal wrong. There is no substantive legal theory other than restitution, with its remedial limitations, on which to base incentive awards.<sup>157</sup>

"Incentive awards" may be the victim of bad labeling. Perhaps "restitutionary awards" would be a better phrase. *Johnson* was wrong to believe that such awards are forbidden. The substantive theory that allows them is well recognized. But the remedy available is constrained, and *Johnson* is a wake-up call to make sure that courts keep "restitutionary awards" within proper bounds.

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156. Cf. *Missouri v. Jenkins*, 495 U.S. 33, 50–52 (1990) (reversing a district court's tax levy to fund improvements mandated in a desegregation order because the levy exceeded the court's equitable discretion); *id.* at 65 (Kennedy, J., concurring in part) ("Our cases throughout the years leave no doubt that taxation is not a judicial function.").

157. If class representatives are confined to a restitutionary award, it is a fair question whether class counsel should be similarly confined. The answer is yes. In approving attorney's fees, courts usually adopt one of two methods: a "lodestar" approach or a "percentage of the fund" approach. The lodestar method multiplies the hours that class counsel reasonably expended by the prevailing hourly rate; the court can adjust this award upward or downward depending on the quality of representation, the degree of success, the risk associated with the litigation, the complexity of the case, and other factors. See *Blum v. Stenson*, 465 U.S. 886, 895 (1984) ("[R]easonable fees' under § 1988 are to be calculated according to the prevailing market rates in the relevant community . . ."). The percentage-of-the-fund approach awards counsel a share of the overall settlement proceeds. The court determines the appropriate percentage by examining essentially the same factors relevant to a lodestar enhancement: the quality of the representation, the risks of the litigation, and so on. Courts have trended toward the percentage-of-the-fund approach in cases involving the creation of a common fund. See *id.* at 900 n.16 (noting the availability of a percentage-of-the-fund method when counsel's efforts create a common fund); *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 121 (2d Cir. 2005) (affirming the district court's use of a percentage-of-the-fund approach); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 49 (2d Cir. 2000) (rejecting a "blanket prohibition . . . against percentage fees"). Whichever approach a court uses, it may, and often does, cross-check the award by comparing it to the award that would have resulted from the other method. See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 176–77 (3d Cir. 2013) ("Whichever method is chosen, . . . it is sensible for a court to use a second method of fee approval to cross check its initial fee calculation." (internal quotation marks omitted)); *Goldberger*, 209 F.3d at 50 ("[T]he lodestar remains useful as a baseline even if the percentage method is eventually chosen."). Under either method, the ultimate goal—to limit the fee to an amount that "is 'reasonable' under the circumstances," *id.* at 47—aligns with the theory of restitution.

## II. CLASS OBJECTORS

Class objectors present the obverse problem. For incentive awards, the substantive theory of restitution that justifies an award is simple; the difficulty lies in imposing the appropriate remedial limit. For class objectors, the restitutionary remedy – disgorgement of benefits received by objectors – is simple; but the substantive theory to achieve this objective has proven elusive. This Part shows how close attention to the substantive law of restitution establishes a theory of liability that permits disgorgement.

### A. *The Benefits and Risks of Class Objectors*

Begin with the law of class objectors and the problems that objectors can pose. As we have described, a central concern of class actions is preventing faithless class representatives and class counsel from leveraging class members' claims for personal advantage.<sup>158</sup> One of the "loyalty, voice, and exit" strategies<sup>159</sup> built to protect class members is the right of each class member who does not opt out of the class to object to the settlement.<sup>160</sup>

Objections serve as a critical backstop against settlements that disserve the class. When a settlement proposes to bind class members, the court must approve it; and it can do so only if it finds, after a hearing, that the settlement is "fair, reasonable, and adequate."<sup>161</sup> At the point of settlement, however, class counsel and the defendant agree: they want the court's approval. The court has limited powers of investigation, and in an adversarial system, it must remain neutral. So how is the court to know if the settlement is in the best interests of the class? One answer is to empower class members to voice their objections, thus generating the kind of adversarial disagreement that can frame the settlement's fairness for the court.<sup>162</sup>

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158. *See supra* notes 37–39 and accompanying text.

159. *See supra* note 34 and accompanying text.

160. FED. R. CIV. P. 23(e)(5)(A) ("Any class member may object to the proposal if it requires court approval under this subdivision (e).").

161. FED. R. CIV. P. 23(e)(2); *see supra* note 118 and accompanying text.

162. To ensure that class members can take advantage of their right to object, class members receive notice of the settlement's terms and their right to object or (in some cases) to opt out. *See* FED. R. CIV. P. 23(e)(1) (requiring the court to "direct notice" to class members bound by a settlement agreement); *id.* 23(c)(2) (describing the general contents of notices sent

Objections are not uncommon in practice: according to one study, perhaps half of all class settlements involve at least one objector.<sup>163</sup> The same study found that the most common objections were insufficient compensation, excessive attorney's fees, unfair treatment of groups within the class, collusion, unduly favorable treatment of class representatives, and insufficient deterrence.<sup>164</sup> At the same time, the absolute number of objections tends to be small,<sup>165</sup> perhaps because the modest recoveries that class members receive in small-stakes class actions make objection economically infeasible.<sup>166</sup> Objections do not necessarily translate into changes in class settlements; in about ninety percent of the cases involving objectors, the court approved the settlement without alteration.<sup>167</sup>

Nonetheless, objectors can do important work.<sup>168</sup> At their best, objectors point out flaws in a settlement that lead to greater net recoveries for class members.<sup>169</sup> Greater net recoveries can arise

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to a class); *id.* 23(e)(4) (giving the court discretion to permit a second opt-out period at the time of settlement in a previously certified (b)(3) class action); *Lora v. To-Rise, LLC*, 452 F. Supp. 3d 5, 11 (E.D.N.Y. 2019) (approving a proposed notice of a class settlement); see generally Fitzpatrick, *supra* note 13, at 1630 (“[I]t is especially important that class members be given the opportunity to object to settlements; without objectors there would be no adversarial testing of class action settlements at all.”).

163. See WILLGING ET AL., *supra* note 35, at 57 (finding that “[t]he percentage of cases in which there was no objection ranged from 42% to 64% in the four districts” studied). Class members are not the only objectors; other defendants or shareholders of a settling defendant can object. *Id.* at 56-57.

164. See *id.* at 178 tbl.38.

165. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1546 tbl.1 (2004) (reporting a median of three objectors per case across 236 class-action settlements); *id.* at 1550 tbl.3 (stating that the median case saw no objectors and the mean objection rate was 1.1 percent of class members).

166. See Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007) (“Objecting entails costs, and the stakes for individual class members are often low.”).

167. See WILLGING ET AL., *supra* note 35, at 58. Even in those cases in which a court required changes as a condition of approval, it was not always clear that the changes resulted from an objection. *Id.*

168. See, e.g., *Eubank v. Pella Corp.*, 753 F.3d 718, 720-21 (7th Cir. 2014) (noting that “[m]embers of the class who smell a rat can object to approval of the settlement,” thus “underscor[ing] the importance . . . of objectors . . .”).

169. Objectors can also focus the court on procedural problems with a settlement, such as an inadequate notice, that benefit the class. See *In re Nat’l Prescription Opiate Litig.*, 976 F.3d 664, 700 n.38 (6th Cir. 2020) (Moore, J., dissenting) (describing objections to class definitions and to the form and content of class notices); *Duhaime v. John Hancock Mut. Life*

from a number of sources, including a larger settlement fund, a reduction in class counsel's fees,<sup>170</sup> or an extension of the period within which to file a claim. Because their efforts check self-serving behavior by class counsel and may put additional money in the pockets of class members, objectors who seek to achieve these results can be described as "good objectors."<sup>171</sup>

Although not mentioned frequently in the literature, another type of objector is the class member whose unique circumstances lead the objector to believe that the objector (and perhaps a similarly situated subset of class members) is due a larger award than the payout given to other class members.<sup>172</sup> Although similarly situated class members should be treated alike, a class settlement must also respect relevant differences.<sup>173</sup> For self-serving objectors who have legitimate grounds to want more for themselves, we might coin the term "ugly objectors"—self-interested but reasonably so.

Then there are the "bad objectors." "Bad" objections can take the form of either "good" or "ugly" objections: they can oppose the class settlement either because the deal is bad for the class or because the deal is bad for the objectors individually. The fact distinguishing bad objections is their frivolousness. Bad objectors take improper advantage of their one power: leverage to delay the

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Ins. Co., 183 F.3d 1, 2 (1st Cir. 1999) (noting that one objector's concern with notice was adequately addressed).

170. Cf. *Eubank*, 753 F.3d at 723 (reversing approval of a proposed settlement in part because of a term providing that any judicially ordered reductions in the proposed \$11 million fee award would revert to the defendant rather than inure to the benefit of the class).

171. See *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (referring to "beneficial objectors"); AGGREGATE LITIGATION, *supra* note 13, §3.08 cmt. b (referring to "good-faith objections"). See also FED. R. CIV. P. 23 advisory committee's note to 2018 amendment (describing "good-faith objections").

172. See *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 424 F. Supp. 3d 456, 476–80 (E.D. La. 2020) (describing twenty-seven objections, many of which argued that the objector's circumstances justified a larger award); *In re Teletronics Pacing Sys., Inc.*, 137 F. Supp. 2d 985, 1023 (S.D. Ohio 2001) (noting that higher payments to some class objectors reflected their unique claims).

173. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 839–40, 854–61 (1999) (holding that a class action could not be certified in part because the class settlement failed to provide differential compensation for class members who occupied legally and factually different positions). Indeed, one factor that a court considers in determining the fairness of the settlement is whether "the proposal treats class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D). The relevant word is *equitably*, not *equally*.

settlement's implementation.<sup>174</sup> Some delay occurs as the district court evaluates the objections; much more occurs when objectors appeal.<sup>175</sup> An appeal may hold up the distribution of the settlement and the award of fees for a year or more.<sup>176</sup>

Facing a world in which the class's recovery, counsel's fees, and the defendant's global peace might be withheld for an extended period, class counsel or the defendant sometimes caves to the pressure and settles with the objector in return for the objection's withdrawal.<sup>177</sup> Typically these side agreements provide some payment to the objector as well as a hefty fee to the objector's lawyer.<sup>178</sup> The source of this payment may be the defendant, but the money often comes out of class counsel's pocket—specifically, out of the fee that class counsel earned.<sup>179</sup>

When the objection is not made in good faith and the side agreement does nothing to benefit the class, the objector (and the objector's lawyer) are engaging in a form of rent-seeking often referred to as "objector blackmail."<sup>180</sup> Although rent-seeking by *bad*

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174. Robert Klonoff has likewise characterized objectors as "good," "bad," and "ugly," although his definitions differ. We agree on the meaning of a "good objector"; but Dean Klonoff's "ugly objector" is our *bad objector*, and his "bad objector" gets at a different concern than our *ugly objector*. See Robert Klonoff, *Class Action Objectors: The Good, the Bad, and the Ugly*, 89 *FORDHAM L. REV.* 475, 477 (2020).

175. See *Devlin v. Scardelletti*, 536 U.S. 1 (2002) (permitting any objecting class member to file a notice of appeal from a decision approving a settlement).

176. See Fitzpatrick, *supra* note 13, at 1634 ("It can take 'months or even years' for courts of appeals to rule on civil appeals, and this delay in finalizing settlements can also delay when class counsel receive their fee awards (which are almost always contingent on the settlements).") (quoting *AGGREGATE LITIGATION*, *supra* note 13, § 3.08 cmt. b)).

177. See *AGGREGATE LITIGATION*, *supra* note 13, § 3.08 cmt. a ("Under recent class-action practice, counsel for objectors were in some instances compensated as a result of side deals with counsel for the class and counsel for the defense.").

178. See *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 2-3 (1st Cir. 1999) (describing the side settlement of the claims of certain objectors and opt-out plaintiffs on terms more favorable than those provided to class members); Lopatka & Smith, *supra* note 13, at 866-67 (discussing as "professional objectors" the attorneys who make a living by filing frivolous objections on behalf of class members).

179. See Fitzpatrick, *supra* note 13, at 1634 (noting that class counsel may "dip into their own pockets to pay objectors to drop their appeals.").

180. See *Pearson v. Target Corp.*, 968 F.3d 827, 829 (7th Cir. 2020) (describing "a recurring problem in class-action litigation known colloquially as 'objector blackmail.'"); Fitzpatrick, *supra* note 13, at 1633 ("This concern over objector 'blackmail' is a specific application of the more general concern with rent-seeking by 'holdouts.'"). Sometimes the word *extortion* is used. See *In re Petrobras Sec. Litig.*, No. 14cv-9662 (JSR), 2018 WL 4521211, at \*1 (S.D.N.Y. Sept. 21, 2018) ("In recent years . . . it has become obvious that some objectors

*objectors* is an article of faith in class-action practice,<sup>181</sup> it is difficult to find clear instances of successful rent-seeking in reported cases, in which judges regularly reject meritless objections by “professional objectors”<sup>182</sup> or “spoiler[s].”<sup>183</sup> Indeed, the apparent ease with which judges in reported decisions sniff out and sanction these objectors<sup>184</sup> calls into question whether rent-seeking is an economically sustainable practice on a scale sufficient to warrant attention. Of course, reported decisions can mask the problem: cases in which side payments occur are unlikely to be reported.<sup>185</sup>

In any event, objector blackmail had seized the legal imagination. There is no shortage of proposals to respond to bad objectors. The proposals divide into two camps: procedural and substantive. For both types, the trick is to discourage bad objections while encouraging good ones.

On the procedural side, Rule 23 has been amended twice – in 2003 and 2018 – to bring side agreements into the open. In 2003, a new Rule 23(e)(4)(A) made the right of objection explicit and Rule 23(e)(4)(B) required court approval before an objection’s withdrawal.<sup>186</sup>

seek to pervert the process by filing frivolous objections and appeals, not for the purpose of improving the settlement for the class, but of extorting personal payments in exchange for voluntarily dismissing their appeals.”).

181. *See, e.g.*, AGGREGATE LITIGATION, *supra* note 13, § 3.08 cmt. a (noting that some objections may be “insubstantial and not reasonably advanced for the purpose of maintaining a valid settlement.”); Brunet, *supra* note 13, at 411 (discussing “free-riding objectors who contribute nothing new to a class action . . . .”); Fitzpatrick, *supra* note 13, at 1636 (“Many courts and commentators believe objector blackmail is a serious problem.”); Lopatka & Smith, *supra* note 13, at 867 (“[P]rofessional objectors profit by extorting payments from class counsel.”).

182. *O’Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000).

183. *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000).

184. *See In re Polyurethane Foam Antitrust Litig.*, 165 F. Supp. 3d 664, 671–72 (N.D. Ohio 2015) (imposing a \$10,000 Rule 11 sanction against a frivolous objector); AGGREGATE LITIGATION, *supra* note 13, § 3.08(d) (recommending sanctions when “objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement . . . .”). *But see* Lopatka & Smith, *supra* note 13, at 896–901 (discussing mechanisms “to impose sanctions . . . for extortionate behavior” and their limits).

185. *Cf.* MARIE LEARY, STUDY OF CLASS ACTION OBJECTOR APPEALS IN THE SECOND, SEVENTH, AND NINTH CIRCUIT COURTS OF APPEALS 12 (Oct. 2013) <https://www.fjc.gov/sites/default/files/2015/Class-Action-Objector-Appeals-Leary-FJC-2013.pdf>, (stating that 19 out of 30 terminated appeals by objectors were decided on the merits in one circuit, 0 out of 27 in another circuit, and 9 out of 69 in yet another circuit).

186. *See* FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment. As part of the restyling of the Federal Rules of Civil Procedure in 2007, Rules 23(e)(4)(A) and (B) were combined in a new Rule 23(e)(5).

Side agreements that changed the terms of the class settlement already required court approval; but now, “[i]f the objector simply abandons pursuit of the objection, the court may inquire into the circumstances.”<sup>187</sup> Under the 2018 amendment, no objector may receive “payment or other consideration” for withdrawing an objection or forgoing an appeal without court approval given “after a hearing.”<sup>188</sup> The flaws with these well-intentioned tweaks are that parties still have some incentive to enter into side agreements and courts still have some incentive to approve them to get the case off the docket.<sup>189</sup>

Other procedural proposals have been floated. Professor Brunet has suggested judicial screening of objectors, with only the meritorious allowed to intervene and proceed.<sup>190</sup> Professor Lopatka and Judge Smith have argued that objectors should be required to post appeal bonds of substantial size.<sup>191</sup> Although admittedly too draconian, objectors could also be deprived of their right to appeal.<sup>192</sup> Unfortunately, all these proposals suffer from the flaws

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187. See FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment.

188. FED. R. CIV. P. 23(e)(5)(B). Provision was also made for withdrawals or dismissals of objections while the matter was on appeal. See FED. R. CIV. P. 23(e)(5)(C) (subjecting any approval or rejection after appeal to the provisions of Rule 62.1).

189. See Brian T. Fitzpatrick, *Objector Blackmail Update: What Have the 2018 Amendments Done?*, 89 FORDHAM L. REV. 437, 448 (2020) (examining cases after the 2018 amendment, and while recognizing that the data is limited, noting that “qualitative analysis of the data does not inspire confidence that district court judges will have the requisite backbone to reject blackmail-minded side payments” while also noting that “the side payments approved may have become less lucrative under the new rule”). Nonetheless, requiring the court to sign off on side settlements will likely discourage some bad objections. Cf. *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 334 F.R.D. 62, 64 (S.D.N.Y. 2019) (indicating disapproval of a side agreement because approval “would make this Court complicit in a practice that undermines the integrity of class action procedure, and needlessly provide putative objectors with potentially dubious claims precedential support for a practice of fee extraction”).

190. See Brunet, *supra* note 13, at 473 (describing “a neutral screening approach, much like intervention, to assess the class action objector”). Brunet also advocated for “the discretion to deny any attorneys’ fee request of any objector that does not genuinely help the case.” *Id.* (an idea we examine *infra* notes 194–95, 198–99 and accompanying text).

191. See Lopatka & Smith, *supra* note 13, at 872 (“District courts should be permitted in all cases to impose appeal bonds on nonnamed class member objectors that reflect the full expected cost of appeal, including attorneys’ fees and the cost of delay incurred by class members and their attorneys.”). The court of appeals could reduce the amount of the bond when “the appeal is legitimate and the appellant is financially unable to post a bond in the full amount.” *Id.*

192. Not only would this idea require overruling a Supreme Court decision permitting objectors to appeal, see *Devlin v. Scardelletti*, 536 U.S. 1 (2002), but it would also disempower

of Rule 23(e)(5) or, even worse, threaten to discourage good objectors from proceeding.

Substantive proposals go directly to the heart of the objector issue. Tapping into the property literature on holdouts and blackmail, Professor Fitzpatrick proposed making an objector's claim inalienable (in other words, not subject to sale).<sup>193</sup> Mr. Greenberg suggested giving the court the power to limit the attorney's fee of an objector: without a monetary incentive, objectors' counsel might well end the practice of frivolous objection.<sup>194</sup> Judge Posner grounded this restriction on fees in the law of restitution: "The principles of restitution . . . require . . . that the objectors produce an improvement in the settlement worth more than the fee they are seeking; otherwise they have rendered no benefit to the class."<sup>195</sup>

The substantive proposals are a heavy lift. An inalienability rule is an academic construct that violates the free alienability that generally attaches to property.<sup>196</sup> Unless federal common law could be bent to the task—an unlikely prospect<sup>197</sup>—the law of all fifty states would need to coalesce around a concept contrary to their usual policies favoring alienability. Limiting attorney's fees holds

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good objectors and severely hamper the voice strategy intended to protect class members. See Fitzpatrick, *supra* note 13, at 1658 (depriving objectors of a right to appeal "would come at a very steep price").

193. See Fitzpatrick, *supra* note 13, at 1659 ("This literature shows how inalienability rules can completely solve the holdout problem posed by class action objectors.").

194. See Bruce D. Greenberg, *Keeping the Flies out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949, 994 (2010) (proposing to "refus[e] requests for objector counsel fees except when objectors present issues that the court would not otherwise already perceive and which substantially benefit class members . . ."). For a similar suggestion, see Mike Absmeier, *The Professional Objector and Revised Rule 23: Protecting Voice Rights While Limiting Objector Abuse*, 24 REV. LITIG. 609, 636 (2005).

195. *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 288 (7th Cir. 2002).

196. See, e.g., *Grigsby v. Russell*, 222 U.S. 149, 156 (1911) (describing as one of "the ordinary characteristics of property" the "right to sell"); *Alta Vista Props., LLC v. Mauer Vision Ctr., PC*, 855 N.W.2d 722, 732 (Iowa 2014) ("The law generally favors free alienability of property." (quoting *Dromy v. Lukovsky*, 161 Cal. Rptr. 3d 665, 669 (Cal. Ct. App. 2013))).

197. See *supra* note 31 and accompanying text. In proposing an inalienability rule, Professor Fitzpatrick did not identify the source—whether federal or state law—for the rule. See Fitzpatrick, *supra* note 13, at 1659–66 (principally discussing academic literature). It is unlikely that such a rule could be adopted through rulemaking. See 28 U.S.C. § 2072(b) (stating that no Federal Rule of Civil Procedure may "abridge, enlarge or modify any substantive right.").



more promise, but it is fraught with logistical issues<sup>198</sup> as well as, once again, a lack of clear authority for a court to constrain the objector's fee.<sup>199</sup>

Still, Judge Posner raised an intriguing idea: might the law of restitution be brought to bear on the question of bad objectors?

### B. Pearson's *Wrong Turn*

*Pearson v. Target Corp.*<sup>200</sup> took up this idea to craft a solution. *Pearson* was the last battle in a long-running dispute over the defendant's allegedly false claims about dietary supplements. An initial settlement was approved over objection, but the court of appeals reversed because the settlement was "a 'selfish deal' between class counsel and defendants that 'disserv[e]d' the class."<sup>201</sup> A revised settlement followed. Three class members – Nunez, Buckley, and Sweeney – objected because the settlement failed to provide adequate recovery for the class. After the district court approved the revised settlement, the objectors appealed.<sup>202</sup> All three settled on appeal and withdrew their objections: the two objectors represented by counsel (Nunez and Buckley) received \$60,000 apiece, while the *pro se* Sweeney received \$10,000.<sup>203</sup>

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198. A paradigmatic case for limiting fees would be a situation in which the class received no more recovery, the objector received \$5,000, and the objecting lawyer received \$300,000. See *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 334 F.R.D. 62, 63–64 (S.D.N.Y. 2019) (discussing this agreement and indicating to the court of appeals that it should be disapproved). But murkier cases exist: suppose that the objector's counsel negotiated an additional \$100,000 for the class, \$100,000 for the objector, and \$200,000 in fees. Or suppose that the defendant paid the objector and the objector's counsel, so the money did not come directly from the recoveries of the class and class counsel.

199. Courts have authority to award fees to class counsel. See FED. R. CIV. P. 23(h) ("[T]he court may award reasonable attorney's fees . . ."). Rule 23 provides no explicit authority to limit awards to objectors' counsel, unless the award comes out of the common fund available to the class. See *In re Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 226, 228 (N.D. Ill. 2019) (awarding class counsel \$13.45 million in fees and objectors' counsel \$1.42 million in fees from the settlement fund).

200. *Pearson v. Target Corp.*, 968 F.3d 827 (7th Cir. 2020).

201. *Id.* at 830 (quoting *Pearson v. NBTY, Inc.*, 772 F.3d 778, 787 (7th Cir. 2014)).

202. *Pearson v. Target Corp.*, 893 F.3d 980, 983 (7th Cir. 2018).

203. *Pearson*, 968 F.3d at 829–31. The opinion does not describe the breakdown in the payouts to client and counsel. Because the side settlement and withdrawal of the appeal occurred before the 2018 amendment to Rule 23(e)(5) became effective; see *Pearson*, 893 F.3d at 897 (noting that "[t]he pending amendments to Rule 23 may solve the problem prospectively, but that does nothing for the case before us"), the provisions of that section – in particular, the power of a district court to enter an indicative ruling that approved or disapproved of the objector settlement on appeal – did not apply.

Class counsel paid \$22,500 of this \$130,000 settlement, and the defendant paid the remainder.<sup>204</sup>

Having first won the right to contest the side settlements,<sup>205</sup> the objector to the original settlement argued that the proceeds of the side agreements should be disgorged and distributed to the class members. The Seventh Circuit agreed. Relying principally on “ancient principles” of restitution and a seventy-five-year-old Supreme Court decision, *Young v. Higbee Co.*,<sup>206</sup> it imposed a constructive trust, for the benefit of the class, on the funds received by the objectors.<sup>207</sup>

On its face, *Young* is an apposite case. In *Young*, a department store sought bankruptcy reorganization.<sup>208</sup> Two members of its board of directors (Bradley and Murphy) acquired a \$1.95 million debt owed by the company. This debt was subordinate to the rights of preferred stockholders. In the reorganization plan, the holders of this debt were to receive \$600,000 in notes and common stock. Among the groups that needed to approve the reorganization plan was a committee of preferred stockholders, who arguably received less value for their claims due to the \$600,000 payment. Nonetheless, the preferred stockholders’ committee approved the reorganization plan. At this point, two members of the committee (Potts and Boag) resigned and formed “a new committee to press their objections to the junior debt allowance.”<sup>209</sup>

After the district court confirmed the plan over their objections, Potts and Boag appealed. While on appeal, the case settled; Potts and Boag agreed to sell their stock and their right to appeal to Bradley and Murphy. The settlement gave Potts and Boag seven times the recovery of other preferred stockholders.<sup>210</sup> *Young*, a stockholder in the same class as Potts and Boag, petitioned the district court either to force Potts and Boag to disgorge their profit or to force the directors to pay the same amount to all stockholders

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204. *Pearson*, 968 F.3d at 836.

205. *Pearson*, 893 F.3d at 980.

206. *Young v. Higbee Co.*, 324 U.S. 204 (1945).

207. *Pearson*, 968 F.3d at 832, 837.

208. *Young*, 324 U.S. at 205–06.

209. *Id.* at 206.

210. *Id.* at 207, 210. Potts and Boag received \$115,000 from the directors, even though the par value of their stock was \$26,000 and its market value was \$17,000.

in the class.<sup>211</sup> A special master found that Potts and Boag had appealed on their own behalf, not on behalf of the class of stockholders. The district court dismissed the case on this basis, and the court of appeals affirmed.<sup>212</sup>

The Supreme Court reversed, rejecting the view that “since Potts and Boag did not expressly specify that they appealed in the interest of the whole class of preferred stockholders, but appealed only in their own names, they owed no duty to any stockholders but themselves.”<sup>213</sup> Rather, “the rights of Potts and Boag and the other preferred stockholders were inseparable. Thus, even though their objection to confirmation contained no formal class suit allegations, the success or failure of the appeal was bound to have a substantial effect on the interests of all other preferred stockholders.”<sup>214</sup> In fact, “Potts and Boag, by appealing from a judgment which affected a whole class of stockholders, owed an obligation to them, the full extent of which we need not now delineate. Certainly, at the very least they owed them an obligation to act in good faith.”<sup>215</sup> The Court summed up:

The appeal of Potts and Boag was alleged to be for the benefit of all preferred stockholders. In the contemplation of the statute which authorized the appeal, its fruit properly belongs to all the

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211. *Id.* at 207–08. Young also petitioned to intervene in the appeal that Potts and Boggs had filed. The court of appeals dismissed the petition without opinion. *Id.* at 207. Young and another stockholder then claimed that the directors who purchased the debt had a fiduciary relationship to the stockholders, so that the debt belonged to the stockholders. This claim also failed. See *In re Higbee Co.*, 50 F. Supp. 114 (N.D. Ohio 1943).

212. *Young*, 324 U.S. at 208; see also *Young v. Higbee Co.*, 142 F.2d 1004, 1004 (6th Cir. 1944) (“Potts and Boag represented no other stockholders than themselves and acted only for themselves individually and not as representatives of a class, both in the filing of objections to the confirmation of the amended plan of reorganization and in prosecuting their appeal from the court’s order confirming the amended plan of reorganization . . .”), *rev’d*, 324 U.S. 204 (1945).

213. *Young*, 324 U.S. at 209.

214. *Id.*

215. *Id.* at 210. The Court’s reference to “good faith” had a specific meaning under the reorganization statute then in effect. Creditors of a company who acted in bad faith—meaning that they acted with “selfish purpose . . . to obstruct a fair and feasible reorganization in the hope that someone would pay them more than the ratable equivalent of their proportionate part of the bankrupt assets,” *id.* at 211—could be denied a vote on the reorganization plan. See Act of June 22, 1938, Pub. L. No. 75–696, § 203, 52 Stat. 840, 894 (1938) (“If the acceptance or failure to accept a plan by the holder of any claim or stock is not in good faith, in the light of or irrespective of the time of acquisition thereof, the judge may, after hearing upon notice, direct that such claim or stock be disqualified for the purpose of determining the requisite majority for the acceptance of a plan.”).

preferred stockholders. One creditor, therefore, cannot make that fruit his own by a simple appropriation of it.<sup>216</sup>

That holding left only the issue of the bankruptcy court's power to order disgorgement. The Supreme Court's analysis was perfunctory. It noted that "[c]ourts of bankruptcy are courts of equity and exercise all equitable powers unless prohibited by the Bankruptcy Act."<sup>217</sup> But it ultimately located the power to disgorge in the reservation of a district court's authority to modify the reorganization plan, as well as in a provision of the bankruptcy statute providing similar authority.<sup>218</sup>

It is no difficult task to apply *Young's* language to class objectors. An objector who files an objection or appeal on grounds generally applicable to the class cannot seize the rights of all in return for private gain. The rights of objectors and other class members are "inseparable"; the success or failure of the objection will have "a substantial effect on the interests of all." Thus, the objector "owe[s] an obligation" – at a minimum, "an obligation to act in good faith" – to the "whole class." For breach of that duty, a court enjoys the equitable power to strip their gains and distribute them to the class.

As seductive as this reasoning is – and *Pearson* exploits it perfectly – a series of factual and legal distinctions make *Young* a weaker analogy than it seems. First, Potts and Boag had been members of the stockholders' committee – functionally equivalent to class representatives – before parting ways and working out a side deal. It is debatable that they could put their duty to the stockholders aside when they did not get their way. Unlike Potts and Boag, however, objectors typically have never been class representatives and have never assumed the fiduciary duties of representatives toward the class.<sup>219</sup>

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216. *Young*, 324 U.S. at 214.

217. *Id.*

218. *Id.* For the statutory provision, see Act of June 22, 1938, Pub. L. No. 75-696, § 222, 52 Stat. 840, 898 (1938) ("A plan may be altered or modified, with the approval of the judge, after its submission for acceptance and before or after its confirmation if, in the opinion of the judge, the alteration or modification does not materially and adversely affect the interests of creditors or stockholders.").

219. On the fiduciary nature of class representatives' duties, see *supra* note 106 and accompanying text. Because Potts and Boag had left the creditors' committee by the time that they sold their appeal, their position was not that different from stockholders who had never

Second, bankruptcy has a longstanding commitment to the equal treatment of those in the same class of creditors.<sup>220</sup> In bankruptcy reorganizations, this principle finds its present home in 11 U.S.C. § 1123(a)(4), which requires that a reorganization plan “provide the same treatment for each claim or interest of a particular class, unless the holder of a particular claim or interest agrees to a less favorable treatment of such particular claim or interest.” This same “general rule of ‘equality between creditors’” pertained at the time of *Young*.<sup>221</sup>

In contrast, Rule 23(b)(3) class actions like *Pearson* are an amalgamation of individuals’ separate claims;<sup>222</sup> the principle of equality among class members is not so firmly rooted.<sup>223</sup>

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served on the committee and never owed the duty of committee members. Nor did *Young* hinge its discussion of the duty of Potts and Boag, which it analogized to a fiduciary duty, see *Young*, 324 U.S. 212 n.12, on their membership in the creditors’ committee. In itself, therefore, this distinction is not sufficient to prevent *Young*’s application to class objectors, but it adds weight to the remaining distinctions.

220. See, e.g., *Developments in the Law: Unjust Enrichment*, 133 HARV. L. REV. 2062, 2108 (2020) (stating that “the spirit of the Bankruptcy Code is the equal treatment of similarly situated creditors” and describing “[t]he Bankruptcy Code’s ‘equal treatment’ dictum”); cf. David A. Skeel, Jr., *The Empty Idea of “Equality of Creditors,”* 166 U. PA. L. REV. 699, 700–01 (2018) (stating that, although “creditor equality seems to be rapidly disappearing,” “[t]he equality of creditors norm is widely viewed as the single most important principle in American bankruptcy law” and that “[e]quality of creditors teaches that similarly situated creditors should be treated similarly”).

221. *Am. United Mut. Life Ins. Co. v. City of Avon Park*, 311 U.S. 138, 147 (1940) (quoting *Clarke v. Rogers*, 228 U.S. 534, 548 (1913)).

222. See FED. R. CIV. P. 23 advisory committee’s note to 1966 amendment (“In the situations to which [Rule 23(b)(3)] relates, class-action treatment is not as clearly called for as in those described above, but it may nevertheless be convenient and desirable depending upon the particular facts.”).

223. The commonality, adequacy, and typicality requirements of Rule 23(a) ensure a degree of similarity among claims, but (b)(3) claims need not be perfectly aligned. See *In re Schering Plough Corp. ERISA Litig.*, 589 F.3d 585, 598 (3d Cir. 2009) (“Complete factual similarity is not required; just enough factual similarity so that maintaining the class action is reasonably economical and the interests of the other class members will be fairly and adequately protected in their absence.”). A principle of equitable (not equal) treatment is a feature of Rule 23(b)(1)(B) and (b)(2) class actions. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 839 (1999) (stating three elements for a (b)(1)(B) “limited fund” class, including that “the claimants . . . were treated equitably among themselves”); FED. R. CIV. P. 23(b)(2) (permitting certification when “the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole”) (emphasis added). There is a similar principle of equitable treatment for class settlements, see FED. R. CIV. P. 23(e)(2)(D) (requiring a court to consider, before approving a settlement, whether “the proposal treats class members

Thus, efforts by some class members to obtain additional monetary benefits does not run as contrary to the historical grain of Rule 23 as comparable efforts by some bankruptcy creditors.

Third, and building on this last observation, the bankruptcy statute in *Young* banned the type of side deal that Potts and Boag made. Under Section 203 of the 1938 reorganization statute, stockholders were bound by an obligation of good faith in accepting or rejecting a plan. Section 203 enforced the obligation by allowing a judge to disregard the votes of stockholders who did not act in good faith.<sup>224</sup> The Supreme Court found that loss of voting rights was not the end of the matter; rather, it judicially crafted an additional disgorgement remedy to prevent violations of the duty.<sup>225</sup> The Court emphasized the statutory nature of Potts' and Boag's wrong repeatedly.<sup>226</sup>

The statutory basis for *Young's* holding cannot be ignored. Leaving aside the Supreme Court's exceptional reluctance in recent years to fashion private rights of action<sup>227</sup>—a reluctance that calls *Young's* result into question—there is no comparable statutory obligation of good faith that binds objectors to other class members,

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equitably relative to each other"); but this is only one factor among four in approving settlements. It is notable that the provision concerning side agreements with objectors includes no requirement of equitable treatment before a court approves an agreement. See FED. R. CIV. P. 23(e)(5)(B).

224. For the text of § 203, see *supra* note 215. Other provisions alluded to or reinforced this good-faith obligation. See Act of June 22, 1938, Pub. L. No. 75-696, § 212, 52 Stat. 840, 895 (1938) (allowing the judge to "restrain the exercise of any power which he finds to be unfair or not consistent with public policy" when exercised by, among others, any committee purporting to represent stockholders, as Potts and Boag were attempting to do); *id.* § 221(4), 52 Stat. 897 (requiring that all payments made by persons after reorganization be subject to judicial approval); *id.* § 222, 52 Stat. 898 (permitting a judge to modify a plan only if the modification "does not materially and adversely affect the interests of creditors and stockholders").

225. *Young v. Higbee Co.*, 324 U.S. 204, 212 (1945) ("[A]ccepting money as the end result of such a statutory violation cannot vest [Potts and Boag] with a right to keep it.").

226. See *id.* ("The statute contemplates, and the appeal was taken on the assumption, that the less the junior claimants were awarded the more all the preferred stockholders would receive."); *id.* ("The situation which enabled [Potts and Boag] to traffic in the interests of others was created by a statute passed to protect the interests of all of [the preferred stockholders].").

227. See *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002) ("[E]ven where a statute is phrased in such explicit rights-creating terms, a plaintiff suing under an implied right of action still must show that the statute manifests an intent 'to create not just a private right but also a private remedy.'" (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001))).

at least until Congress by statute or the Supreme Court in its rulemaking capacity fashions one.

Finally, related to the question of the substantive violation of the bankruptcy statute is the question of enforcement: the Supreme Court found the source of the remedial power to disgorge Potts' and Boag's gains in the reorganization statute itself.<sup>228</sup> No comparable statutory power exists to disgorge benefits that class objectors obtain in side settlements. Nor does it exist under Rule 23. The 2018 amendment to Rule 23(e)(5) demonstrated exactly how far the Supreme Court was willing to go; Rule 23(e)(5) provided neither a substantive standard (such as "good faith") to guide a judge's approval of side settlements nor an express remedial power to claw back payments already made.

*Pearson* dubiously filled these gaps by resorting to the concept of the constructive trust.<sup>229</sup> Granting that federal courts enjoy "all the inherent equitable powers . . . for the proper and complete exercise of [their equitable] jurisdiction,"<sup>230</sup> the lack of a clear statutory theory of liability, combined with the lack of a clear statutory authority to order disgorgement, renders *Pearson* a very different case than *Young*, where neither the substantive nor the remedial authority was in doubt.

In any event, *Pearson* proves a very simple case for objectors to avoid. *Pearson* was premised on the view that the objectors asserted their claims on behalf of the class: it read *Young*, correctly, as providing a remedy when "Potts and Boag had taken it upon themselves to decide the fate of every preferred shareholder, even the fate of the company's entire reorganization."<sup>231</sup> But recall the distinction between "good" and "ugly" objectors.<sup>232</sup> "Good objectors" seek to improve the settlement for the class, while "ugly objectors" do not: they seek to improve only their own lot. If they have a good-faith argument for their position, there is nothing

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228. Specifically, the Court found the requisite authority under § 222, described *supra* notes 218, 224.

229. See *supra* note 207 and accompanying text.

230. *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946); see also *Liu v. SEC*, 140 S. Ct. 1936, 1946–47 (2020).

231. *Pearson v. Target Corp.*, 968 F. 3d 827, 832 (7th Cir. 2020); see *Young v. Higbee*, 324 U.S. 204, 212 (1945) ("[T]he consideration of the sale which Potts and Boag made was not merely their own interest in the bankrupt estate, but the interest of all the preferred stockholders.").

232. See *supra* notes 168–85 and accompanying text.

blameworthy about their effort; and if they succeed, the benefits they recover are theirs alone and need not be shared with the class. A bad objector who makes an “ugly” objection does not assert the “common rights of all”<sup>233</sup> within the meaning of *Young*; and without that assertion, the objector has no duty to represent the interests of class members.<sup>234</sup>

In other words, class objectors need only restyle their objections as “ugly” objections to avoid *Young*’s logic. Even if we grant *Pearson*’s doubtful reading of *Young* as applying to class objectors, *Pearson* simply shifts bad objectors’ strategy away from pressing class wide claims to launching claims that apply uniquely to the objector. These claims may be bogus; few class members occupy a sufficiently different legal position to succeed on an ugly objection. But success is beside the point: the assertion of an ugly objection gives the objector the delay and leverage needed to extort a side payment.

*Pearson*’s reasoning also sits poorly with class-action theory. *Pearson* hinges on the premise that a class member who objects to a settlement is a fiduciary for the class.<sup>235</sup> As we noted, class representatives are often described as fiduciaries for the class – hence the need to ensure that they are adequate representatives.<sup>236</sup> Never – at least until *Pearson* – were class objectors described in the same terms. Class objectors are not subject to the “adequate representation” standard of Rule 23(a)(4); only class representatives are.<sup>237</sup> Nothing in Rule 23(e)(5), which governs

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233. See *Young*, 324 U.S. at 212 (“This control of the common rights of all the preferred stockholders imposed on Potts and Boag a duty fairly to represent those common rights.”).

234. It is also possible in some situations to avoid *Pearson* through another mechanism. If the objector has filed a state-court case raising similar claims to those in the federal class action, the objector could use the settlement of the state case as the vehicle for obtaining a side settlement that also withdraws the federal objection. *Pearson* itself recognized that Nunez, one of the objectors in *Pearson*, had filed a state-court case, and could have “avoid[ed] . . . scrutiny” by settling that case. *Pearson*, 968 F.3d at 835. For exactly this scenario, in which a federal court declined to order disgorgement of the amounts an objector received for settling his state-court case, see *In re Wells Fargo & Co. S’holder Derivative Litig.*, 523 F. Supp. 3d 1108, 1117 (N.D. Cal. 2021) (noting that, despite the likelihood of the objector’s “constructive fraud . . . without any on-point authority, the Court will not interfere with a finalized settlement in another court, no matter how compelling the equities”).

235. *Pearson*, 968 F.3d at 834 (“We thus read *Young* to impose a limited representative or fiduciary duty on the class-based objector . . .”).

236. See *supra* note 106 and accompanying text.

237. See FED. R. CIV. P. 23(a)(4) (requiring that “the representative parties will fairly and adequately represent the interests of the class”).



objections, contains a comparable requirement; nor did the Advisory Committee, in discussing the problem of bad objectors, analyze the issue in fiduciary terms.<sup>238</sup>

Conceiving objectors as class fiduciaries presents a logical conundrum. As fiduciaries, they are subject to an adequate representation requirement. By definition, bad objectors fail this requirement.<sup>239</sup> Once they are rejected as class fiduciaries, what happens to their objections? When a putative class representative is deemed inadequate, the class representative's individual claim lives on; all that the class representative loses is the right to represent others.<sup>240</sup> In a 5,000-member class action, would not the objector be able to sue for 1/5,000<sup>th</sup> of the gain to the class if the objection were successful? What right does a court have to seize the proceeds of a private settlement of this residual, non-class claim?

Constructing a theory of why objectors are fiduciaries is also problematic.<sup>241</sup> Fiduciary relationships arise from the express delegation of responsibility to an agent, from the principal's reliance on the agent to preserve or advance the principal's interest in property, or from a confidential relationship.<sup>242</sup> The class does

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238. See FED. R. CIV. P. 23 advisory committee's note to 2018 amendment.

239. See *Lawrence v. First Fin. Inv. Fund V, LLC*, 336 F.R.D. 366, 377 (D. Utah 2020) (“[C]onflicts may exist when the class representative ‘put[s] [her] own interests above those of the class.’” (quoting *Carpenter v. Boeing Co.* 456 F.3d 1183, 1204 (10th Cir. 2006)); cf. *In re Whirlpool Corp. Front-Loading Washer Prods. Liab. Litig.*, 722 F.3d 838, 852–53 (7th Cir. 2013) (stating that the Rule 23(a)(3) typicality requirement “insures that the representatives’ interests are aligned with the interests of the represented class members so that, by pursuing their own interests, the class representatives also advocate the interests of the class members”).

240. See *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 477 (1978) (holding that denial of class certification is not immediately appealable because the putative class representative's claim has not been finally determined), *superseded by* FED. R. CIV. P. 23(f) (permitting discretionary interlocutory review of class-certification orders).

241. As an historical matter, fiduciary law as a field developed in the past fifty years. Samuel L. Bray & Paul B. Miller, *Against Fiduciary Constitutionalism*, 106 VA. L. REV. 1479, 1498 (2020). Before then, duties of loyalty and care were assigned to certain statuses or relationships without an overarching theory. *Id.* at 1501–02. At the time of the 1966 amendment to Rule 23 that introduced the possibility of objectors, objectors did not occupy a status or relationship imposing duties of loyalty and care. That fact may be sufficient for some to dismiss the notion of objectors as fiduciaries. On the assumption that this historical point is insufficient, we discuss modern theories of fiduciary responsibility.

242. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 126 (2006) (“Consent and reliance are not prerequisites for fiduciary relations . . . . In some circumstances, the common law treats persons in confidential relations as fiduciaries . . .”).

not delegate responsibility to the objector, nor is it refraining from protecting its own interests in reliance on the objector. Whether the class has a relationship of trust and confidence with the objector is doubtful. Each class member has an interest in maximizing the value of his or her claim. The commonality that arises from enforcement of a common right should not be confused with a trust relationship.

In theory, each class member has the ability to extract rents from the defendant or class counsel by filing an objection. How that rent becomes the property of a group of people who choose not to exercise their comparable right to object requires more than a fiduciary theory. Admittedly, we want to discourage rent-seeking behavior. But two wrongs do not make a right: seizing an illicit rent extorted from the rightful owner by one person and sharing it by means of a constructive trust with others who are no more entitled to it than the original objector is hardly consistent with the law of fiduciary responsibility.<sup>243</sup> If anything, a bad objector's rent should be returned to the person who paid it: class counsel or the defendant.

That result is not what *Pearson's* holding accomplishes. *Pearson* conceives of bad objectors' ploy as "private appropriation of value that belonged to the class."<sup>244</sup> Aside from the court's failure to explain why the right to seek rents belongs to the class, *Pearson's* notion that rents belong to the class raises a host of problems. For instance, does the failure of the class representative to file an objection to secure these rents for the class mean that the representative is inadequate? Should it matter whether the objection is meritorious or frivolous?<sup>245</sup> Or imagine a settlement in which class counsel's fees are paid by the defendant (rather than from the class's recovery), the objection concerns those fees, and the

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See also 1 RESTATEMENT (THIRD) OF TRUSTS § 2 cmt. b (AM. LAW INST. 2007) ("The trust relationship is one of many forms of fiduciary relationship, each of which reflects the legal principles of the substantive area of law in which it has developed.").

243. Indeed, in *Pearson* itself, the situation was even worse: due to the small amount of the rent, the court ordered the proceeds be distributed on a cy pres basis to a charitable foundation, which certainly had no entitlement to illicit rents. See *Pearson v. Target Corp.*, 968 F.3d 827, 837 (7th Cir. 2020).

244. *Id.*

245. If the objection had merit, then the objector has extracted value that the class could in theory have obtained by holding out for a better deal. But if the objection lacks merit, it has no value to the class; so the reason for handing over the rent to the class is unclear.

side settlement with the objector is paid from counsel's fees. In what sense does the amount of the side settlement belong to the class?<sup>246</sup>

Moreover, it is debatable whether expropriating the payment for the class will stop extortionate objections or just change the economics. A lawyer whose objection on behalf of a client results in additional recovery for the class is usually entitled to a reasonable fee for the effort.<sup>247</sup> Thus, under *Pearson's* approach, there is still money to be made from filing rent-seeking objections, even if some of the more egregious fees paid to rent-seeking counsel might be foreclosed.

Many of these same questions infected *Young*, which, like *Pearson*, failed to address them. Perhaps *Young* is guilty of sloppy thinking and therefore should be limited to its facts. Or, perhaps, we can justify *Young* as a rough-and-ready means for enforcing, in bankruptcy cases, a statutory good-faith obligation on creditors like Potts and Boag, where the people who paid the rent (Bradley and Murphy) were directors of the bankrupt company as well as its creditors.<sup>248</sup> So confining *Young*, however, leaves *Pearson* without a leg to stand on.

### C. *Pearson's Enduring Lesson*

Despite its tenuous legal grounding, *Pearson's* heart is in the right place. There is widespread agreement that bad objections must stop; the 2018 amendment to Rule 23(e)(5) also makes stopping them a matter of federal policy.<sup>249</sup> The solution to the

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246. See Absmeier, *supra* note 194, at 618 n.51 ("When a side settlement is paid by class counsel, . . . it necessarily only reduces class counsel's actual profit, and, therefore, arguably does not affect class recovery.").

247. See *In re Sw. Airlines Voucher Litig.*, 898 F.3d 740, 744 (7th Cir. 2018) ("Objectors who add value to a class settlement may be compensated for their efforts."); *Dewey v. Volkswagen of Am.*, 909 F. Supp. 2d 373, 397 (D.N.J. 2012) (using a percentage-of-the-recovery method to award \$22,530 in fees to counsel for an objector whose objection increased the class recovery by more than \$782,000); but see *Spark v. MBNA Corp.*, 289 F. Supp. 2d 510, 513 (D. Del. 2003) (noting that fee awards to class objectors are "few and far between").

248. *Young v. Higbee Co.*, 324 U.S. 204, 206-07 (1945).

249. See, e.g., sources cited *supra* notes 13, 182-83, 194; see also Elizabeth J. Cabraser & Adam N. Steinman, *What is a Fair Price for Objector Blackmail? Class Action Objectors and the 2018 Amendments to Rule 23*, 24 LEWIS & CLARK L. REV. 549, 570 (2020) ("The problem of 'strategic objections' or 'objector blackmail' has been a persistently vexing aspect of class action practice and procedure. The 2018 amendment to Rule 23 provides a new way to solve it.").

problem lies in the law of restitution—just not, as *Pearson* thought, in disgorgement for violation of fiduciary duties.

Three types of relevant conduct trigger substantive liability in restitution. One theory is breach of fiduciary duty.<sup>250</sup> As we have seen, the fiduciary theory does not support restitutionary liability for class objectors.<sup>251</sup> The second theory, sounding in tort, is “conscious interference with a claimant’s legally protected interests,” where such interference amounts to “conduct that is tortious, or that violates another legal duty or prohibition (other than a duty imposed by contract) . . . unless competing legal objectives make such liability inappropriate.”<sup>252</sup> The third ground justifying restitution sounds in contract; it arises when “one party to a contract demands from the other a performance that is not in fact due by the terms of their agreement, under circumstances making it reasonable to accede to the demand rather than to insist on an immediate test of the disputed obligation.”<sup>253</sup> Although the contract theory may involve “mistake or duress,” it need not.<sup>254</sup> Indeed, the recipient of the benefit “may have exerted no pressure that can be characterized as wrongful.”<sup>255</sup> All that is required for restitution is “a loss or liability whose expected value exceeds the

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250. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (AM. L. INST. 2011) (stating that a “person who obtains a benefit” as a result of a “breach of a fiduciary duty” or a “breach of an equivalent duty imposed by a relation of trust and confidence” is “liable in restitution to the person to whom the duty is owed”).

251. See *supra* notes 235–42 and accompanying text.

252. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44(1)–(2) (AM. L. INST. 2011). This duty has limits. As with all restitution, the person from whom restitution is sought must have obtained a “benefit,” and restitution must be “necessary to prevent unjust enrichment.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44(1) (AM. L. INST. 2011). A number of other limits—many going to remedial concerns like windfalls and difficulty of measurement, see RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44(3) (AM. L. INST. 2011)—also constrain liability.

253. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(1) (AM. L. INST. 2011). The person bestowing the benefit (in the context of objectors, class counsel or the defendant) must render performance “under protest or with reservation of rights,” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(1) (AM. L. INST. 2011), and must act “in good faith and in the reasonable protection of its own interests,” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(2) (AM. L. INST. 2011).

254. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 cmt. a (AM. L. INST. 2011).

255. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 cmt. a (AM. L. INST. 2011).

amount in controversy” if one party to the contract were required to wait for a judicial determination of the other party’s rights.<sup>256</sup>

As a solution to the problem of bad objectors, the tort theory initially sounds promising: a bad objector consciously interferes with the interests of class members in a speedy distribution of the proceeds and of class counsel in a speedy recovery of the fee. Nonetheless, the theory raises certain difficulties. Conduct that “violates [a] legal duty” begs the question: does the objector have a duty toward the class not to object for personal gain? The source of the duty is unclear.<sup>257</sup> Several torts come to mind: abuse of process,<sup>258</sup> interference with prospective economic advantage,<sup>259</sup> and arguably misrepresentation.<sup>260</sup> These theories generally require intentional misconduct.<sup>261</sup> Abuse of process also requires that misuse of the process be the primary motivation; cases of mixed motive (partly to gain advantage and partly to advance a justified

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256. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 cmt. a (AM. L. INST. 2011).

257. The *Restatement (Third) of Restitution* indicates that the circumstances fitting this “legal duty” category are limited. They generally arise from “a legal prohibition of general application” that is intended “to protect persons in the position of the claimant.” See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44 cmt. c (AM. L. INST. 2011). But there is no legal prohibition against bad objectors, either in Rule 23 or elsewhere. If there were, this discussion would be moot.

258. See RESTATEMENT (SECOND) OF TORTS § 682 (AM. L. INST. 1977) (“One who uses a legal process . . . against another primarily to accomplish a purpose for which it is not designed, is subject to liability to the other for the harm caused by the abuse of process.”).

259. See RESTATEMENT (SECOND) OF TORTS § 766B (AM. L. INST. 1977) (subjecting a person to liability for “intentional and improperly interfere[ing] with another’s prospective contractual relation”).

260. See RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1977) (recognizing liability of “[o]ne who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or refrain from action in reliance upon it”); RESTATEMENT (SECOND) OF TORTS § 552 (AM. L. INST. 1977) (recognizing liability for negligent misrepresentations); RESTATEMENT (SECOND) OF TORTS § 552C (AM. L. INST. 1977) (recognizing, in limited circumstances, liability for innocent misrepresentations). A roadblock to recovery on a misrepresentation theory is the element of reliance. It is unlikely that class counsel or the defendant (whichever pays the objector) is relying on the truth of the objector’s legal assertions when making the payment. See RESTATEMENT (SECOND) OF TORTS § 541 (AM. L. INST. 1977) (“The recipient of a fraudulent misrepresentation is not justified in relying upon its truth if he knows that it is false or its falsity is obvious to him.”).

261. The *Restatement (Third) of Restitution* also requires “conscious interference with a claimant’s legally protected interests.” RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44(1) (AM. L. INST. 2011) (emphasis added).

claim) generate no liability.<sup>262</sup> Interference with prospective advantage requires not just the intent to interfere but also the impropriety of the interference; and impropriety involves a balance of factors such as motive, the interests interfered with, the objector's interests, and the social interest.<sup>263</sup> In short, relying on tort principles to obtain restitution from an objector can quickly devolve into tricky problems of proof.<sup>264</sup>

The contract-based theory may therefore be best. It gets at exactly the type of conduct involved in objectors' claims: leveraging the slow pace of adjudication to extract from class counsel or the defendant a performance not required by their contracts. The retainer agreement with the class representatives establishes class counsel's contractual obligations to the class; the class settlement establishes the defendant's contractual obligations to the class. The failure of class counsel to overperform its contractual obligations (that is, paying some of the fee earned under the contract to the objector) threatens a loss: either to the class in a delayed recovery or to class counsel in a delayed fee. Similarly, the failure of the defendant to overperform its settlement agreement (that is, paying an objector additional compensation) threatens a loss to the defendant: delayed freedom from the class's claims. This risk of loss makes it reasonable for class counsel or the defendant to bestow on the objector a benefit that avoids the risk.

The contract-based theory fits the conduct of bad objectors perfectly. In addition, the remedy is clear. The objector must disgorge "the value of the benefit conferred in excess of the [objector]'s contractual entitlement."<sup>265</sup> In other words, the objector must give back the amount by which the payment to the objector and objector's counsel exceeds the amount that the objector would receive in the class settlement or judgment.

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262. See RESTATEMENT (SECOND) OF TORTS § 682 cmt. b (AM. L. INST. 1977) (noting that liability does not attach when "an incidental motive of spite or an ulterior purpose of benefit to the defendant" exists).

263. See RESTATEMENT (SECOND) OF TORTS § 767 (AM. L. INST. 1977) (also mentioning the nature of the objector's conduct, the proximity between the conduct and the interference, and the relations between the parties as relevant factors).

264. Cf. *Kennedy v. City of Villa Hills*, 635 F.3d 210, 218 (6th Cir. 2011) ("Because direct evidence of motive is difficult to produce, claims involving proof of a defendant's intent seldom lend themselves to summary disposition . . .") (internal quotation marks omitted).

265. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(1) (AM. L. INST. 2011).

Of course, the contract-based theory applies only to “a party to a contract [who] demands from the other [party] a performance that is not due by the terms of the agreement.”<sup>266</sup> Is the objector a contractual “party”? We believe so. The objector is bound by the settlement contract with the defendant<sup>267</sup> and by the class representative’s retainer contract with class counsel.

Although tort-based theories of restitution can be useful (and may be pleaded in the alternative<sup>268</sup>), this contract-based theory has distinct advantages over tort-based theories. First, it allows the side payment to be made and the settlement to be consummated, with litigation over the propriety of the side payment pushed off to a later restitution action. Next, the theory has no application when the “performance” (the defendant’s or class counsel’s additional payment) is “inadequate to discharge [the defendant’s or class counsel’s] obligation to the recipient.”<sup>269</sup> Thus, good objectors, who seek to benefit the class, and ugly objectors, whose unique situation demands extra compensation, are exempt from this theory’s reach. Finally, the theory works without subjecting the objector’s motivations to the bad-faith analysis inevitable with tort-based theories; the contract-based theory applies even when a “good-faith” dispute exists.<sup>270</sup>

The one demerit of the contract-based theory is the requirement that class counsel or the defendant must make the payment under protest or with a reservation of rights; restitution is unavailable to parties who enter into an accord and satisfaction of a disputed obligation.<sup>271</sup> An objector might use this caveat to insist on a release of the restitution claim as part of the side agreement.<sup>272</sup> That move

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266. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(1) (AM. L. INST. 2011).

267. The relevant contract is the final agreement that the district court approves. Hence good objectors whose objections improve the terms of the approved deal need not worry about liability for filing good objections that improve the settlement that is ultimately approved.

268. See FED. R. CIV. P. 8(d)(2) (permitting a complaint to state alternative theories of a claim).

269. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(2) (AM. L. INST. 2011).

270. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(2) (AM. L. INST. 2011); see *supra* note 255 and accompanying text.

271. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(2) & cmt. d (AM. L. INST. 2011).

272. The same concern for a release arises under the fiduciary theory or the tort-based theories. Under the fiduciary theory, however, class counsel or a defendant might be able to

is unlikely to succeed. Although recognizing that the question ultimately hinges on contract law, the Restatement (Third) of Restitution suggests that courts should look on releases with skepticism.<sup>273</sup>

Here is where the 2018 amendment to Rule 23(e)(5) can do useful work. Rule 23(e)(5)(B) requires court approval before the withdrawal of any objection or objector's appeal but provides no standard for approval.<sup>274</sup> Courts could develop a bright-line rule, refusing to approve any side settlement that contains a release of the payor's right to seek restitution from the objector. Like other efforts to establish flat rules,<sup>275</sup> this rule has the advantage of simplicity. But it has none of the unintended side effects—including the discouragement of good objections—of other approaches.<sup>276</sup> Instead, the objector can receive payment, the settlement can go through expeditiously, and the person who paid the objector can pursue a subsequent action to recover any benefits bestowed.

The need for the payor (class counsel or the defendant) to initiate a subsequent lawsuit seems a weakness of this approach. Gambling that they will not be sued, bad objectors might continue to lodge objections. Perhaps that is as it should be. The payor is likely to file a later suit only when the side payment is substantial, or the suit will deter bad objectors in future cases. Proof will not be difficult, particularly on the contract-based theory; the risk to the payor of losing is low if the objector acted in bad faith. If the amount paid to the objector is too trivial to sue, so be it. When bad objectors receive only trivial amounts, the practice of bad objections will

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escape the effect of a release with the argument that insisting on a release was a separate breach of a fiduciary duty. Cf. 3 RESTATEMENT (THIRD) OF TRUSTS § 78(2) (AM. L. INST. 2007) (“Except in discrete circumstances, the trustee is strictly prohibited from engaging in transactions that involve self-dealing or that otherwise involve or create a conflict between the trustee’s fiduciary duties and personal interests.”). A release is more problematic for tort-based theories.

273. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35 cmt. b (AM. L. INST. 2011) (“A court that accepts the underlying policy of [the overperformance theory] will closely scrutinize any transaction by which the party from whom an overperformance is demanded purports to surrender, in advance, the restitution claim that it would otherwise be entitled to reserve.”).

274. See *supra* notes 188–89 and accompanying text.

275. See, e.g., Fitzpatrick, *supra* note 13 (proposing an inalienability rule); Lopatka & Smith, *supra* note 13 (proposing a bond requirement).

276. See *supra* notes 186–99 and accompanying text.



peter out. Putting the decision to sue in the hands of the payor, who knows best the true strength of the objection, lets the market work.

A final feature of our proposal bears mentioning: the money that the defendant or class counsel pays typically returns to the payor. One of *Pearson's* anomalous features was its decision to give to the class the money that class counsel and the defendant paid.<sup>277</sup> Because the side payment was never the class's property, it is difficult as a matter of restitution to justify this move. Our proposal puts the money back in the pocket of the payor, where it belongs.

The return-to-payor remedy is clearest under the contract-based theory, where the overperforming party (class counsel or the defendant) is the appropriate person to recapture the value of the overperformance.<sup>278</sup> The tort-based theories give the right of restitution to the "claimant" with whose "legally protected interests" the objector interferes.<sup>279</sup> Class counsel and the defendant have "legally protected interests" in an approved settlement and fee award. The objection, however, also interferes with the class's interest in the settlement's speedy distribution. Is this a "legally protected" interest, so class members are "claimants" eligible to claim the proceeds of the side agreement?

One of the Restatement (Third)'s illustrations posits a comparable scenario, in which a fraudster steals a victim's identity and obtains a home-equity loan with which the fraudster absconds. Due to the rapid rise in home prices, the home sells at foreclosure for an amount that leaves an excess of \$50,000 after repayment of the bank's loan. The Restatement (Third) suggests that the bank, as lender, has a claim for the excess \$50,000. But the homeowner whose interests were violated also has a claim. If both assert claims,

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277. See *supra* notes 243–46 and accompanying text.

278. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 35(1) (AM. L. INST. 2011) ("[T]he party on whom the demand is made may . . . recover the value of the benefit conferred in excess of the recipient's contractual entitlement.").

279. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44(1)(2) (AM. L. INST. 2011). The fiduciary theory of restitution is also vague: the person entitled to restitution for breach of a fiduciary duty is "the person to whom the duty is owed." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 43 (AM. L. INST. 2011). As we described, it is difficult to construct an argument that the objector is acting as a class fiduciary. See *supra* notes 241–42 and accompanying text.

the illustration states that “the court will apportion the fund in the manner it considers equitable.”<sup>280</sup>

Even under this theory, the person who made the payment (the bank, in the illustration) is entitled to recover the full amount paid; at most, others with legal interests (the victim, in the illustration) might share in any profit above the amount that makes the payor whole. Suppose that a bad objector took the money extracted from class counsel and parlayed it into a winning lottery ticket. Once class counsel is repaid, the excess value from the lottery winnings might belong to the class—or it might be apportioned between the class and the payor.<sup>281</sup> But this happy problem is not the ordinary case. Primacy of payment goes to the payor: class counsel or the defendant.

Despite its creativity in dealing with objectors, *Pearson* got both the substantive theory of restitution and the remedy wrong. It is possible to carve out restitutionary theories to deny bad objectors their rents—just not a theory based on fiduciary law. The correct theories return the funds to the person who paid off the objector—class counsel or the defendant—and not the class.

#### CONCLUSION

Proper application of restitutionary principles can solve class-settlement problems. These principles rectify *Johnson’s* erroneous holding that class representatives may not typically receive incentive awards. Provided an award properly reflects the benefit which a class representative’s efforts bestows on the class, courts

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280. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44 illus. 2 (AM. L. INST. 2011). The illustration is based on *CTC Real Estate Services v. Lepe*, 44 Cal. Rptr. 3d 823 (Cal. Ct. App. 2006). In *CTC*, however, the bank made no claim for the excess, and the court, “in this novel case,” awarded it to the homeowner who was the victim of identity theft. *See id.* at 826 (“Although one might argue she is gaining a windfall, a victim is entitled to trace stolen assets into other assets and obtain the final product even though it may exceed the value of that which was stolen . . .”).

281. If money is allocated to the class, it is unlikely that the court will award objector’s counsel any fee. *Cf.* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 44(3)(b) (AM. L. INST. 2011) (denying restitution when there would be “an inappropriate windfall to the claimant, or [it] would otherwise be inequitable in a particular case”); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 (AM. L. INST. 2011) (recognizing a defense of unclean hands, under which a restitutionary recovery “may be limited or denied because of the claimant’s inequitable conduct in the transaction that is the source of the asserted liability”). Therefore, another incentive for objector’s counsel to object is removed.

can approve incentive awards. Likewise, while restitution provides a basis to disgorge improper side payments to objectors, *Pearson* operated from a mistaken premise: that objectors to class settlements act as fiduciaries of the class and that bad objectors misappropriate value belonging to the class. A court may order disgorgement of side payments to objectors, but only under conditions different from those that *Pearson* described. The substantive law of restitution provides two bases – one sounding in tort and one in contract – that permit disgorgement. The remedial law of restitution dictates a return-to-payor remedy, not the pay-to-class remedy that *Pearson* concocted.

In one sense, the use of restitutionary principles to resolve issues that arise in class settlements is no surprise. Class actions are equitable in origin,<sup>282</sup> as is restitution.<sup>283</sup> Restitution undergirds some aspects of class-action doctrine, such as common-fund fee awards.<sup>284</sup> The substantive and remedial principles of restitution could well provide insights on a range of class-action issues beyond those that we discuss here. Pursuing those connections must await another day.

One matter is worth discussing now. In describing how principles of restitution can help courts to deal with incentive awards and bad-faith objections, we treated the law of restitution as if it were monolithic, and we have been largely silent about the source of the law of restitution that courts should apply.<sup>285</sup> In fact, the source varies. For incentive awards in federal court, the source is federal law: the standard that a federal court must address (whether a settlement with an incentive award is “fair, reasonable, and adequate”) is given by Rule 23(e)(2). For state-court class

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282. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 832 (1999) (“[C]lass actions . . . developed as an exception to the formal rigidity of the necessary parties rule in equity . . . as well as from the bill of peace, an equitable device for combining multiple suits . . .” (citations omitted)).

283. See *Moses v. Macferlan* (1760) 97 Eng. Rep. 676, 681 (KB) (“In one word, the gist of this kind of action is, that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money.”).

284. See, e.g., *US Airways, Inc. v. McCutchen*, 569 U.S. 88, 100 (2013) (“[T]he common-fund doctrine has deep roots in equity. . . . Those roots, however, are set in the soil of unjust enrichment . . .”).

285. On sources of law, see *supra* notes 31, 152, 197.

actions, state law determines a representative's right to seek restitution for services rendered to the class.<sup>286</sup>

On the other hand, the question of obtaining restitution from bad-faith objectors is, for the most part, one of state law. The payor's entitlement to seek restitution under any theory (fiduciary, tort-based, or contract-based) rests on the law of the state that creates the claim in restitution. But our suggestion that federal courts should never approve a side settlement that releases the payor's restitution claim<sup>287</sup> is an aspect of the district court's power to "approve[]" a side settlement under Rule 23(e)(5)(B), and it is therefore an issue of federal law.

In discussing restitution, we used the *Restatement (Third) of Restitution* as a stand-in for state law. In the process, we left the impression that the law of restitution is identical everywhere. The reality is that the restitutionary theories we employed to prevent bad objections may vary somewhat from state to state. As a result, the ability to tamp down bad objectors may wobble a bit.

This fact is one consequence of a federal system. For the most part, however, adherence to the principles of restitution achieves two desirable results: paying good class representatives fair compensation for their services to the class and stopping bad objectors from hijacking a fair settlement for the class.

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286. In a multistate class action, presumably the restitutionary law of the forum would control. See RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 122 (AM. LAW INST. 1969) ("A court usually applies its own local law rules prescribing how litigation shall be conducted even when it applies the local law rules of another state to resolve other issues in the case.").

287. See *supra* notes 274–76 and accompanying text.

