ENFORCING THE FIDUCIARY DUTIES OF CLASS REPRESENTATIVES: A RESPONSE TO PROFESSORS GREEN AND KENT

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Professors Bruce A. Green and Andrew Kent have drawn much-needed attention to ethical issues that can arise when class-action lawyers simultaneously represent named individual plaintiffs and putative or certified classes.[1] They analyze three scenarios of potential conflict for which the scholarly literature has been surprisingly scant: (1) the holdout scenario, in which "the class may benefit from a settlement that the class representative opposes";[2] (2) the sellout scenario, in which the class representative "proposes to settle the individual claim on its own," without a class-wide deal;[3] and (3) the payout scenario, in which a named plaintiff "negotiat[es] an individual windfall payout" for herself "before a settlement is approved, sometimes as a condition of . . . supporting the settlement."[4]

Professors Green and Kent's focus is to ensure that lawyers comply with ethical rules when the interests of their individual clients diverge from the interests of the class.[5] And they suggest fixes: class-action attorneys should provide "greater disclosures of risks" to their individual clients, and courts should provide "greater judicial oversight" over these scenarios, including through a possible amendment to Rule 23 of the Federal Rules of Civil Procedure.[6]

This Response agrees with Professors Green and Kent's suggestions. This Response also suggests that we can address the root of the problem: the unfaithful class representative. Each of Professors Green and Kent's scenarios stems from class representatives' decisions made "in their own self-interest," to the potential detriment of the class whose interests they are duty-bound to protect.[7] So class representatives should be compelled, as a condition of serving in that role, to prioritize their duties to absent class members over personal interests whenever the two conflict. This Response suggests enhancing judicial scrutiny of a putative class

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* Professor, Case Western Reserve University School of Law. Thanks to Bruce Green for honoring me with a draft of his and Andrew Kent's excellent article and the *Florida Law Review Forum* for inviting this response.

1. Bruce A. Green & Andrew Kent, *May Class Counsel Also Represent Lead Plaintiffs?*, 72 FLA. L. REV. 1083 (2020).

2. *Id*. at 1103.

3. *Id*. at 1106.

4. *Id*. at 1111.

5. *See* MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR ASS'N 2019) (barring lawyers from representation involving "a concurrent conflict of interest").

6. Green & Kent, *supra* note 1, at 1133.

7. Green & Kent, *supra* note 1, at 1088; *see also id*. at 1102.

representative's adequacy[8] and requiring courts to police that adequacy whenever appropriate throughout the litigation. Doing so would, in turn, ease the burden on class counsel, significantly reducing even the potential for the ethical dilemmas presented in Professors Green and Kent's three scenarios.

Class representatives owe fiduciary duties to absent class members, as Professors Green and Kent acknowledge.[9] These duties flow from their power to compromise or litigate absent class members' rights.[10] "Federal courts have referred to this requirement as being of crucial importance in terms of ensuring due process to members of the proposed class who will not have their individual day in court."[11] These duties exist throughout the proceedings,[12] sometimes even before class certification.[13]

A class representative's fiduciary duties obviously matter most at particular junctures where they make strategic litigation or settlement decisions that have negative or questionable implications for absent class members. But there is no judicial scrutiny of a class representative's adequacy at all such junctures. Instead, that scrutiny—like the scrutiny of counsel's adequacy[14]—occurs only at the moments of certification[15] and

8. *See* FED. R. CIV. P. 23(a)(4) (conditioning class certification on the court's determination that "the representative parties will fairly and adequately protect the interests of the class"). Professors Green and Kent's focus on class counsel implicates a different subsection of Rule 23. *See* FED. R. CIV. P. 23(g). Prior to the 2003 addition of Rule 23(g), the adequacy of class counsel was scrutinized as part of the Rule 23(a)(4) analysis. *See* Green & Kent, *supra* note 1, at 1086 n.8. As a result of the amendment, the inquiry under Rule 23(a)(4) should focus exclusively on the class representative himself.

9. *See* Green & Kent, *supra* note 1, at 1088 (referring to class representative's "fiduciary undertaking"). *But see* Maywalt v. Parker & Parsley Petroleum Co., 155 F.R.D. 494, 496 (S.D.N.Y. 1994), *aff'd*, 67 F.3d 1072 (2d Cir. 1995) ("Absent a finding of conflict of interest, then, no additional legal obligation—including a fiduciary obligation—appears to have been imposed upon class representatives under Rule 23(a)(4) by the Courts.").

10. Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968) ("Traditionally, courts have expressed particular concern for the adequacy of representation in a class suit because the judgment conclusively determines the rights of absent class members.").

11. Marks v. C.P. Chem. Co., 509 N.E.2d 1249, 1253 (Ohio 1987).

12. *See* Addison Automatics, Inc. v. Hartford Cas. Ins. Co., 731 F.3d 740, 742 (7th Cir. 2013) (finding a class representative "owes *continuing* fiduciary obligations to the class it represents") (emphasis added).

13. *See, e.g.*, Masztal v. City of Miami, 971 So. 2d 803, 808 (Fla. Dist. Ct. App. 2007) (holding that "failure of" class certification "cannot be used to circumvent or undermine a fiduciary relationship"). *See also* Green & Kent, *supra* note 1, at 1093 (discussing class counsel's obligations to absent class members even before certification).

14. *See* Green & Kent, *supra* note 1, at 1086–87.

15. *See* FED. R. CIV. P. 23(a)(4) (assessing adequacy of putative class representative as condition of class certification); *see also, e.g.*, Rossini v. Ogilvy & Mather, Inc., 80 F.R.D. 131, 135 (S.D.N.Y. 1978) (noting that a court can reject a putative class representative where "antagonism or potential conflict is likely to prevent or impede proper discharge of his or her fiduciary duties").

class-wide settlement.[16] So Professors Green and Kent's three scenarios tend to fly under the judicial radar. And it is precisely the absence of judicial scrutiny that places counsel in the ethical dilemmas that Professors Green and Kent describe.

At the certification stage, "[t]he adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent."[17] Courts will not find a putative class representative adequate "if the representative's interests are antagonistic or in conflict with the objectives of those being represented"[18] or where the economic interests and objectives of the named representatives differ significantly from the economic interests and objectives of unnamed class members.[19] But that concern over a class representative's ability to serve the class faithfully disappears from judicial view once the class is certified, reappearing only if the court is called upon to assess the fairness of a class-wide settlement.[20] That lack of court scrutiny leaves class representatives in a position to sacrifice the interests of the class in the three scenarios Professors Green and Kent identify. It then becomes the job of counsel to navigate the conflict they now face between their individual client and the class they have been appointed to represent.

Moreover, when courts assess adequacy at the certification stage, they focus myopically on conflicts that are apparent at that moment and fail to assess the likelihood that a class representative will betray the class. For example, the Supreme Court requires the representative to "be part of the class and 'possess the same interest and suffer the same injury' as the class members."[21] That analysis tends to emphasize the pleadings—the

16. *See* FED. R. CIV. P. 23(e)(2)(A) (in approving class-wide settlement, judge assesses whether "the class representatives. . . have adequately represented the class").

17. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997); *see also* Valley Drug Co. v. Geneva Pharms., Inc., 350 F.3d 1181, 1189 (11th Cir. 2003); *In re* Mego Fin. Corp. Sec. Litig., 213 F.3d 454, 462 (9th Cir. 2000); *In re* Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions, 148 F.3d 283, 312 (3d Cir. 1998); Marisol A. v. Giuliani, 126 F.3d 372, 378 (2d Cir. 1997); *In re* W. Va. Rezulin Litig., 585 S.E.2d 52, 57 (W. Va. 2003).

18. Freeman v. Blue Ridge Paper Prods., Inc., No. 2:08-CV-35, 2011 WL 13098808, at *6 (E.D. Tenn. Sept. 30, 2011) (quoting 7A WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE CIVIL 3d § 1768 (4th ed. 2022)); *see also In re* Se. Milk Antitrust Litig., No. 2:08–MD–1000, 2010 WL 3521747, at *6 (E.D. Tenn. Sept. 7, 2010).

19. *See Valley Drug*, 350 F.3d at 1190.

20. *See* FED. R. CIV. P. 23(e)(2)(A).

21. *Windsor*, 521 U.S. at 625–26 (quoting East Tex. Motor Freight Sys., Inc. v. Rodriguez, 431 U.S. 395, 403 (1977) (quoting Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 216 (1974))). There is no reason, however, to believe that the Court intended common interest and identical injury to be the only criteria. The Court borrowed the interest-and-injury language from cases involving the named plaintiff's lack of standing, not inadequacy. *See East Tex. Motor*, 431 U.S. at 403; *Schlesinger*, 418 U.S. at 216. And because lack of standing is fatal to any federal claimant, it cannot be the only aspect of adequacy that a class-action plaintiff must establish under Rule 23(a)(4). Such a construction would also render Rule 23(a)(4) superfluous in light of the separate typicality requirement found in Rule 23(a)(3). *See* FED. R. CIV. P. 23(a)(3).

underlying "conduct alleged to be wrongful"[22] or the "relief sought" in the case.[23] But the conflicts reflected in Professors Green and Kent's three scenarios are of a different character; they derive not from the named plaintiff's antagonism for the pleaded claims, but instead from the leverage the named plaintiff acquires as a result of the appointment. Two of their scenarios reflect not mere violations of the class representative's fiduciary obligations, but rather brazen efforts to exploit the position for personal gain.[24]

To be sure, some courts at the certification stage also "consider the honesty and trustworthiness of the named plaintiff."[25] Some go so far as to require the named plaintiff to "exhibit enough integrity and credibility to convince the court that the named plaintiff will diligently perform its fiduciary duties to the class." But even those courts that scrutinize the character of the named plaintiff do so only predictively. Apart from the settlement-approval process,[26] Rule 23 contains no textual provision for evaluating the class representative's ongoing performance, even though a "[b]asic consideration of fairness" would seem to require it.[27]

And, while the Rule 23(a) factors "tend to merge," the Supreme Court has observed that "concerns . . . about conflict of interest" are unique to the "adequacy-of-representation requirement" of Rule 23(a)(4). *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157–58 n.13 (1982). So, any behavior on the part of a class representative that stems from a conflict with the absent class members is inconsistent with the fiduciary duties a class representative undertakes in assuming that role.

22. *See Valley Drug*, 350 F.3d at 1190 ("[N]o circuit has approved of class certification where some class members derive a net economic benefit from the very same conduct alleged to be wrongful by the named representatives of the class.").

23. *See, e.g.*, Safi v. Cent. Parking Sys. of Ohio, Inc., 45 N.E.3d 249, 255 (Ohio Ct. App. 2015) ("To ensure that the interests of the representative parties are coextensive with and not antagonistic to the interests of the absent class members, all class members must benefit from the relief sought.").

24. The two in question are the sellout and payout scenarios. In the sellout scenario, the class representative obtains a favorable settlement for herself only by exploiting (and ultimately negotiating away) the power to prosecute a lawsuit on behalf of the class. *See* Green & Kent, *supra* note 1, at 1107. In the payout scenario, the class representative exploits her fiduciary obligations by extracting an up-front price for supporting a class-wide settlement proposal. *See id*. at 1111. In both scenarios, "the class action procedure enables [the class representative] to benefit financially at the class's expense." *Id*. at 1088.

25. *See, e.g.*, Savino v. Comput. Credit, Inc., 164 F.3d 81, 87 (2d Cir. 1998).

26. *See* FED. R. CIV. P. 23(e)(2)(A).

27. *See* Shroder v. Suburban Coastal Corp., 729 F.2d 1371, 1374 (11th Cir. 1984); *see also* Susman v. Lincoln Am. Corp., 561 F.2d 86, 89 (7th Cir. 1977); Nat'l Ass'n of Reg'l Med. Programs, Inc. v. Mathews, 551 F.2d 340, 344–45 (D.C. Cir. 1976). These authorities call for "a stringent and continuing examination of the adequacy of representation by the named class representatives," not just at the certification stage but "at all stages of the litigation *where absent members will be bound by the court's judgment.*" *E.g.*, *Mathews*, 551 F.2d at 344–45 (emphasis added). Professors Green and Kent's scenarios do not necessarily bind absent class members, at least not directly. For example, the sellout scenario doesn't necessarily preclude any class member's ability to pursue her claims individually or through another certified class, at least if

An underlying premise of Professors Green and Kent's concerns is that the class representative is not accountable for the decision to forego her allegiance to absent class members. Professors Green and Kent explain, for example, that "nothing binds" the class representative "to earlier assurances" to "stay the course."[28] This Response suggests that if the underlying premise is shifted—if class representatives are *required* to stay the course as a condition of their appointment and retention—then the risk of conflict for counsel dissipates substantially.

That reemphasis on the class representative's loyalty could eliminate many instances of the sellout scenario.[29] Rule 23 can be amended to require a named plaintiff in a putative class action to sign an undertaking, filed with the first pleading seeking class-wide relief, agreeing not to compromise her individual claim without obtaining court approval (and to disgorge any settlement proceeds received without court approval).[30] In determining whether to approve such a settlement, the court can consider the individual's motives and the implications for the class. For example, the court can deny the motion if it concludes that the individual exploited the class-action process for their own benefit or that it would compromise the absent class members' claims. By contrast, the court could grant the motion if it concludes that the circumstances surrounding the settlement are reasonable (such as the onset of illness or other development that may prevent the individual from serving adequately). Likewise, the court could grant the motion if another adequate class member steps forward to assume the representative's duties.

Requiring the individual plaintiff to seek court approval for settling their individual claim could still present a conflict for class counsel, because that settlement is presumptively antagonistic to the interests of the putative class. So the named plaintiff may require separate counsel to prosecute the motion. Even then, class counsel would have the difficulties that Professors Green and Kent identify.[31] But the undertaking

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the statute of limitations has not yet passed. But the potential adverse impact is nevertheless patent and calls for scrutiny of the class representative's behavior.

28. Green & Kent, *supra* note 1, at 1108.

29. *See id.* at 1106–10.

30. Such an undertaking would not affect a *defendant's* ability to compromise the interests of putative class members by paying to the named plaintiff, before certification, the full value of her claim, thus rendering it moot. We know that the mere offer to pay is not enough if the plaintiff rejects the offer. *See* Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 153 (2016). But the result is less clear if the money is actually tendered to the plaintiff. *See id*. at 166; *see also* Radha Geismann, M.D., P.C. v. ZocDoc, Inc., 909 F.3d 534, 543 (2d Cir. 2018) (finding that any tender would render a named plaintiff's claims moot only if it includes the amount the named plaintiff anticipates for her service as class representative). These issues present no particular ethical problem for counsel, so long as the named plaintiff resists the resolution, as the absent class members would presumably want her to do.

31. Green & Kent, *supra* note 1, at 1108–10.

requirement would emphasize to putative class representatives the importance of their fiduciary obligations and would work hand in glove with Professors Green and Kent's suggestion that counsel provide "greater disclosure of risks" to their potential clients.[32]

The undertaking this Response proposes could also preclude named representatives from negotiating any pre-settlement agreements that fall into the payout scenario[33] (and, again, requiring them to disgorge any funds delivered to them in connection with a settlement that violates that undertaking). These "incentive awards"[34] serve no purpose other than to compensate the representative, but when used improperly can harm the absent class members.[35] While compensation for class representatives can certainly be appropriate,[36] the only way to ensure that such compensation does not undermine the absent class members' interests is to negotiate the amount after the court approves a class-wide settlement.[37] In the absence of an agreement about the award, the class representative should be able to present the issue for the court's resolution following the approval of a class-wide settlement, just as attorney fees are often the subject of after-the-fact determination.[38]

The holdout scenario[39] is more difficult, however, because it is not necessarily a product of a class representative's disregard of her fiduciary duties. As Professors Green and Kent note, "[t]he class representative may simply disagree with class counsel or other class members about the

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32. *See id*. at 1133; *see also id*. at 1091 (recommending that counsel explain "how the class action will limit their ability to act and give advice for the individual's benefit, and how they will respond if a conflict of interest later precludes serving both the client and the class"). Professors Green and Kent also suggest that a client's up-front agreement not to pursue "an individual settlement" cannot be "a condition of the retention." *Id*. at 1110 (citing MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2019)). However true that may be for individual clients who owe no fiduciary duties to anyone else in the litigation, that concept runs counter to the purpose of the class-action vehicle. Furthermore, the relevant language of the rule requires a lawyer to "abide by a client's decision whether to settle a matter," and the verification this Response proposes would be a record of that decision and should be no more revocable thereafter than a consummated settlement. MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2019).

33. *See* Green & Kent, *supra* note 1, at 1110–13.

34. *Id*. at 1111.

35. *See id*. at 1111–12.

36. *See, e.g.*, Cisneros v. EP Wrap-It Insulation, LLC, No. 19-500 GBW/GJF, 2022 WL 2304146, at *10 (D.N.M. June 27, 2022) ("[I]ncentive awards to class representatives in wage and hour litigation are appropriate when they compensate those individuals for the employment-related risks they bear in bringing forward claims on behalf of a class and for their additional efforts that have benefitted the class.").

37. *See* FED. R. CIV. P. 23(e).

38. FED. R. CIV. P. 23(h). Perhaps an amendment to Rule 23 authorizing such an award would facilitate the process, particularly if the rule articulated the standards the court should apply in determining a reasonable post-settlement award.

39. *See* Green & Kent, *supra* note 1, at 1103–06.

advisability of a proposed settlement."[40] So when a class representative believes in good faith that a particular settlement offer disserves the absent class members—and counsel disagrees—the ethical conflict is harder to overcome. But the class representative's ability to serve as an adequate fiduciary for the class—if properly scrutinized at the class-certification stage and thereafter as frequently as circumstances dictate—should cloak that class representative with the power to reject a settlement offer, even over counsel's objection. Only if counsel cannot in good conscience support that rejection should she attempt to override that decision, and the ensuing conflict would then certainly implicate all the problems that Professors Green and Kent identify.

In sum, I applaud Professors Green and Kent for their excellent article drawing attention to these important issues. This Response fully endorses their recommendations and suggests that greater emphasis on the serious fiduciary duties that class representatives assume would present fewer scenarios that create problems for class counsel who also represent named plaintiffs individually.

40. *Id*. at 1103.