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ON THE LAWFULNESS OF AWARDS TO CLASS REPRESENTATIVES

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When class actions are settled or the class prevails on the merits, successful class representatives are often net losers: their small individual recovery isn't enough to cover the opportunity costs and other losses they have incurred in representing the class. For that reason among others, they are usually given an award in addition to the relief they receive as class members.

Until recently, the federal courts of appeals had unanimously approved these awards. The Eleventh Circuit, however, relying on two nineteenth-century cases, recently held that such awards are always unlawful. That decision is now the subject of an unopposed cert petition.

This essay argues the Eleventh Circuit got it wrong. First, class settlement agreements provide independent authority for awards to class representatives, whatever limitations nineteenth-century case law may otherwise place on federal courts' remedial authority. Second, the Eleventh Circuit's holding depended on an ill-conceived analogy between a modern class representative and a creditor in the nineteenth century's equivalent of a corporate reorganization. Worse, the court ignored an alternative, more convincing analogy suggested by the very case law on which it relied: an analogy between class representatives and trustees. Under this analogy, awards to class representatives are perfectly lawful.

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INTRODUCTION

When federal class actions are settled or the plaintiff class prevails on the merits, class representatives are often awarded a payment in addition to the relief they receive as class members. This payment is sometimes called an "incentive award," sometimes a "service award," and sometimes a "case contribution award."[1]

Until recently, all the courts of appeals to address these awards had deemed them lawful within limits.[2] In 2020, however, a panel of the Eleventh Circuit, in a case called *Johnson v. NPAS Solutions LLC*,[3] declared that class-representative awards are unlawful per se.

In striking down all awards to class representatives, the Eleventh Circuit panel relied on two nineteenth-century Supreme Court precedents: *Trustees v. Greenough*[4] and *Central Railroad & Banking Co.*

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[1] 5 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 17:2 (6th ed. June 2022 update). Because these names all take a potentially contestable position on the reason for the payment, this essay will use the neutral term "award" to refer to a discretionary payment to a class representative beyond what is owed to that representative because of his or her membership in the class. While "award," without further context, is ambiguous—it could refer to an award of damages, for example—ambiguity is both eliminated by context and justified by the term's neutrality.

[2] Murray v. Grocery Delivery E-Servs. USA Inc., 55 F.4th 340, 352–53 (1st Cir. 2022); Melito v. Experian Mktg. Solutions, Inc., 923 F.3d 85, 96 (2d Cir. 2019); Muransky v. Godiva Chocolatier, Inc., 905 F.3d 1200, 1219 (11th Cir. 2018), *vacated and superseded on other grounds*, 922 F.3d 1175 (11th Cir. 2019), *reh'g en banc granted*, 939 F.3d 1278 (11th Cir. 2019), *on reh'g en banc*, 979 F.3d 917 (11th Cir. 2020); Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P., 888 F.3d 455, 468 (10th Cir. 2017); Berry v. Schulman, 807 F.3d 600, 613 (4th Cir. 2015); In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 943 (9th Cir. 2015); Cobell v. Salazar, 679 F.3d 909, 922–23 (D.C. Cir. 2012); Sullivan v. DB Investments, Inc., 667 F.3d 273, 333 n.65 (3d Cir. 2011); In re U.S. Bancorp Litig., 291 F.3d 1035, 1038 (8th Cir. 2002); In re Cont'l Ill. Sec. Litig., 962 F.2d 566, 571 (7th Cir. 1992).

[3] 975 F.3d 1244 (11th Cir. 2020).

[4] 105 U.S. 527 (1882).

v. Pettus.[5] According to the panel, *Greenough* and *Pettus* disapproved of awards closely analogous to class-representative awards.[6]

The full Eleventh Circuit denied a request to reconsider the panel's decision.[7] Judge Jill Pryor, joined by three other judges, wrote a dissent from that denial.[8] The Eleventh Circuit's decision is now the subject of a pending cert petition.[9] Unusually, the respondent has also urged the Court to grant the petition.[10]

This essay has two main purposes. The first is to highlight a serious oversight in the Eleventh Circuit's opinion: the precedents on which it relied do not constrain class settlement agreements. Such agreements can provide independent authority for an award to the class representative, whatever limits the Supreme Court's case law may otherwise place on federal courts' remedial authority. Yet the Eleventh Circuit did not ask whether the class settlement agreement in the case authorized awards to class representatives.

The essay's second purpose is to evaluate the Eleventh Circuit's reliance on *Greenough* and *Pettus*. The Eleventh Circuit's decision, as we shall see, is grounded in a dubious historical analogy to nineteenth-century railroad creditors. And while *Greenough* itself points to a better

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[5] 113 U.S. 116 (1885).

[6] Johnson v. NPAS Solutions, LLC, 975 F.3d 1244, 1257–60 (11th Cir. 2020).

[7] Johnson v. NPAS Solutions, LLC, 43 F.4th 1138 (11th Cir. 2022).

[8] *Id.* at 1139–53 (Jill Pryor, J., dissenting from denial of rehearing en banc).

[9] Petition for Writ of Certiorari, *Johnson v. Dickenson*, No. 22-389 (U.S. Oct. 21, 2022).

[10] Brief for Respondent Jenna Dickenson in Support of Granting Writ of Certiorari, *Johnson v. Dickenson*, No. 22-389 (U.S. Dec. 21, 2022).

analogy—an analogy to trustees that would affirmatively *authorize* awards to class representatives—the Eleventh Circuit ignored it.

To provide the necessary background, I begin with a short section on the history of, and the law governing, awards to class representatives.[11] Next, I discuss how the Eleventh Circuit relied on *Greenough* and *Pettus* to strike down class-representative awards.[12] I then turn to why settlement agreements can authorize awards to class representatives[13] and why the Eleventh Circuit's analysis of *Greenough* and *Pettus* was faulty.[14]

I. Awards to class representatives: some background

To understand awards to class representatives, some background knowledge is helpful. I discuss two background subjects below. The first is the history of awards to class representatives—including the rationales courts have given for, and the limitations they have placed on, awards. The second is the body of law that governs awards to class representatives in federal court. Discussion of that issue will help explain why two nineteenth-century cases are even relevant to class-representative awards.

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[11] *See infra* Part I.
[12] *See infra* Part II.
[13] *See infra* Part III.
[14] *See infra* Part IV.

A. The history of awards to class representatives

Modern federal class-action practice is generally dated from the 1966 amendments to Federal Rule of Civil Procedure 23.[15] It was not until a quarter century later, some have suggested, that awards to class representatives became common.[16] This may overstate the case. As the leading treatise on class actions has noted, the first decision to use the term "incentive award" was issued in 1987, and yet it alluded to a preexisting practice, "in this circuit and elsewhere," of making "substantial incentive payments to named plaintiffs in securities class action cases."[17] And there are, indeed, earlier reported cases that provide awards to class representatives.[18]

The perception that class-representative awards became common only around 1990 may reflect the records that are easily accessible. Since 1990, electronic databases have uploaded an ever-larger proportion of unpublished district-court orders.[19] If we assume that district courts announce most class-representative awards, like most other kinds of relief, in unpublished orders, then it may be data rather than awards that have multiplied.

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[15] RUBENSTEIN, *supra* note 1, § 1:16.

[16] Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. REV. 1303, 1310 (2006)

[17] In re Continental/Midlantic Shareholders Litig., Civ. A. No. 86-6872, 1987 WL 16678, at *4 (E.D. Pa. Sept. 1, 1987) (discussed in 5 RUBENSTEIN, *supra* note 1, § 17:2).

[18] *See* 5 RUBENSTEIN, *supra* note 1, § 17:2 n.4 (citing cases).

[19] Aaron-Andrew P. Bruhl, *Statutory Interpretation and the Rest of the Iceberg: Divergences Between the Lower Federal Courts and the Supreme Court*, 68 DUKE L.J. 1, 34–35 (2018).

But whenever class-representative awards first became common, it is true that most of the appellate decisions on the practice date to the last quarter century or so.[20] Over that time, federal courts of appeals have generally permitted the practice, while limiting what kinds of awards are appropriate.

Federal courts have approved class-representative awards on several different but not mutually exclusive grounds. They have reasoned that such awards may compensate class representatives for the time and effort they spent to represent the class's interests—time and effort that no other class member had to expend.[21] The awards would also encourage others to be class representatives in future suits, especially where, as in many class actions, the individual monetary recoveries are negligible.[22] Courts have recognized, too, that awards compensate class representatives for the reputational or financial risks they may have borne in stepping forward to represent a class.[23]

Federal courts have also been careful to set limits on class-representative awards. These limits spring from the concern that class representatives may sell out the rest of the class to get extra money for

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[20] *See supra* note 2; *see also infra* notes 21, 23–25.

[21] *E.g.*, In re Online DVD-Rental Antitrust Litig., 779 F.3d 934, 943 (9th Cir. 2015).

[22] *See, e.g.*, Allapattah Servs., Inc. v. Exxon Corp., 454 F. Supp. 2d 1185, 1222 (S.D. Fla. 2006); *see also* Eisenberg & Miller, *supra* note 16, at 1305–06 (noting that "[i]n some cases . . . a class member may even experience a net loss from acting as class champion" given opportunity losses and a small individual recovery).

[23] *See, e.g.*, Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 958–59 (9th Cir. 2009).

themselves.[24] Thus, for example, courts look askance on awards that are conditioned on the class representative's support for a class settlement; such awards give class representatives a monetary "incentive to support the settlement regardless of its fairness."[25] Class representatives are also compromised when the retainer agreement between class counsel and the class representatives obligates counsel to request a certain level of award. Such a practice may encourage settlement rather further litigation or trial, even if the latter course is in the class's best interest.[26] It also obligates class counsel to seek an award that may not fairly reflect the amount or quality of work the class representatives performed for the class or the risks they undertook.[27] Courts have also rejected awards that they have deemed excessive or disproportionate, whether in comparison to the class's recovery or in absolute terms.[28]

Up until the Eleventh Circuit's decision in 2020, however, the federal courts of appeals to address the issue had unanimously held that class-representative awards were not unlawful per se.[29]

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[24] *See, e.g.*, Staton v. Boeing Co., 327 F.3d 938, 976 (9th Cir. 2003); Hadix v. Johnson, 322 F.3d 895, 897 (6th Cir. 2003).

[25] Radcliffe v. Experian Info. Solutions Inc., 715 F.3d 1157, 1165 (9th Cir. 2013).

[26] *Rodriguez*, 563 F.3d at 959.

[27] *Id.*

[28] *See* 5 RUBENSTEIN, *supra* note 1, § 17:18 & nn. 13, 14, 15, 16 (citing cases); *see also, e.g.*, *Hadix*, 322 F.3d at 897.

[29] *See supra* note 2.

B. Awards to class representatives and the choice-of-law question, or why we are even discussing these old cases

When federal courts are asked to make awards to class representatives, does federal or state law govern? And if federal law governs, should we be looking at precedents that predated class actions under the Federal Rules of Civil Procedure? Some discussion of these choice-of-law questions is necessary here, if only to explain why this essay will be examining *Trustees v. Greenough*[30] and *Central Railroad & Banking Co. v. Pettus*,[31] two precedents that predated Rule 23 by many years.

It helps to bifurcate this choice-of-law inquiry into two categories: actions involving claims under a federal statute and actions involving state-law claims.

1. Claims under a federal statute

When a federal claim is asserted, remedial matters such as class-representative awards are governed by federal law.[32] This federal law may include federal decisions that predate the Federal Rules of Civil Procedure. Thus, in 1980, the Supreme Court applied *Greenough*'s common-fund doctrine[33] to attorneys' fees in a class action involving

[30] 105 U.S. 527 (1882).

[31] 113 U.S. 116 (1885).

[32] *See* Kamen Kemper Fin. Servs., Inc., 500 U.S. 90, 97 (1991); Burks v. Lasker, 441 U.S. 471, 476 (1979).

[33] *See infra* Part II.A.1.

federal claims.[34] The Supreme Court could rely on *Greenough*, presumably, because Rule 23 itself confers no power to award attorney fees, and thus does not speak directly to the common-fund doctrine.[35] Rule 23, in other words, did not supersede existing equitable doctrines governing attorney fees.

Similarly, Rule 23 itself appears to confer no power to make class-representative awards.[36] So the Rule does not supersede *Pettus* or *Greenough*—assuming, of course, that those decisions govern the power to make awards to class representatives. The upshot is that in class actions asserting claims under a federal statute, *Greenough* and *Pettus* are at least part of the correct body of law to consult.

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[34] Boeing Co. v. Van Gemert, 444 U.S. 472, 480–81 (1980). For the claims involved, see *Van Gemert v. Boeing Co.*, 590 F.2d 433, 435 (2d Cir. 1978) (en banc), *aff'd*, 444 U.S. 472.

[35] *See* FED. R. CIV. P. 23(h) advisory committee's note (2003); In re Volkswagen & Audi Warranty Extension Litig., 692 F.3d 4, 15–16 (1st Cir. 2012); 7B MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1803 (6th ed. Dec. 2022 update).

[36] Professor Rubenstein has noted that Rule 23 requires district courts to evaluate class settlement agreements for whether they "treat[] class members equitably relative to each other." FED. R. CIV. P. 23(e)(2)(D); *see* Brief of Prof. William B. Rubenstein as *Amicus Curiae* in Support of Rehearing En Banc at 9–13, Johnson v. NPAS Solutions, LLC, 43 F.4th 1138 (11th Cir. 2022) (No. 18-12344). This provision, he has argued, directs a court to ensure that when the settlement proposes awards to class representatives, class members are still treated equitably relative to each other. This argument does not show that Rule 23(e)(2)(D) itself confers the power to make awards to class representatives. Rather, if Professor Rubenstein's argument is correct, Rule 23(e)(2)(D) may *presuppose* that courts have the power to make class-representative awards. That is different from whether the Rule itself confers such a power.

2. State-law claims

When a class action involves state-law claims, we must look to "what commonly, and somewhat loosely, is called the '*Erie* doctrine.'"[37] If a valid federal rule or statute, or a federal constitutional provision, governs class-representative awards, that is the end of the inquiry: the issue is controlled by federal law.[38] But if no federal rule, statute, or constitutional provision is on point, then the court determines whether the relevant state law is "substantive" or "procedural" as those terms have been given meaning by *Erie* and its progeny.[39] If the state law is substantive, it governs. If it is procedural, it doesn't.

No federal rule, statute, or constitutional provision appears to speak to whether federal courts have the power to make awards to class representatives in state-law cases.[40] Hence we need to make an *Erie* choice.

Oddly, only one appellate decision has addressed this issue.[41] It categorized awards to class representatives as substantive, analogizing

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[37] Arthur R. Miller, 19 FEDERAL PRACTICE AND PROCEDURE § 4501 (3d ed. Apr. 2022 update).

[38] *See* Stewart Org., Inc. v. Ricoh Corp., 487 U.S. 22, 26–27 (1988); Hanna v. Plumer, 380 U.S. 460, 472 (1965).

[39] *See, e.g.*, Walker v. Armco Steel Corp., 446 U.S. 740, 752–53 (1980).

[40] For a discussion of Rule 23, see above at note 36. While a provision of the Private Securities Litigation Reform Act may speak to certain kinds of class-representative awards, it governs only securities actions brought under federal law. *See* 15 U.S.C. § 78u-4(a)(1), (4).

[41] Chieftain Royalty Co. v. Enervest Energy Institutional Fund XIII-A, L.P., 888 F.3d 455, 468 (10th Cir. 2017).

them to attorney-fee awards,[42] which are normally substantive for *Erie* purposes.[43]

That result seems intuitively correct, but there is a potential wrinkle. The law is unclear on what body of law governs equitable remedies in diversity cases. Lower federal courts have interpreted language from *Guaranty Trust Co. v. York*[44] to suggest that state law can neither limit nor expand federal courts' equitable authority, which is governed by federal common law.[45] If that is correct, the analysis becomes more complicated.[46]

Thankfully, however, there is no need to resolve this choice-of-law conundrum here. The important point, for present purposes, is that if state law governs class-representative awards in diversity actions, nineteenth-century U.S. Supreme Court precedent remains at least relevant, if not dispositive. This is true for at least two reasons. First, the relevant state's courts may not have addressed awards to class representatives, a situation that may impel courts to consult federal case law for guidance.[47] Second, where there *is* state law, it may well be

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[42] *Id.*

[43] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 260 n.31 (1975); *see also* 5 RUBENSTEIN, *supra* note 1, § 15:2.

[44] 326 U.S. 99, 105–07 (1945).

[45] *See, e.g.*, Sonner v. Premier Nutrition Corp., 971 F.3d 834, 840–41 (9th Cir. 2020) (so holding); Fid. & Deposit Co. of Md. v. Edward E. Gillen Co., 926 F.3d 318, 326 (7th Cir. 2019) (raising but not deciding the issue).

[46] My assumption is that an award to a class representative from a common fund, like an award of attorneys' fees from a common fund, is an equitable remedy.

[47] *See Chieftain Royalty*, 888 F.3d at 468 (noting the lack of Oklahoma case law on class-representative awards and looking to federal case law for guidance).

influenced by the U.S. Supreme Court's nineteenth-century precedents.[48] Those precedents merit analysis.

II. The Eleventh Circuit's ruling that awards to class representatives are unlawful

To hold that awards to class representatives are always unlawful, the Eleventh Circuit relied on two Supreme Court decisions from the 1880s, *Trustees v. Greenough*[49] and *Central Railroad & Banking Co. v. Pettus*.[50] Because understanding those decisions is necessary to understanding the Eleventh Circuit's ruling, I will first summarize *Greenough* and *Pettus*, and then turn to how the Eleventh Circuit used them in its opinion.

A. Greenough *and* Pettus

1. *Trustees v. Greenough*

Because *Greenough* had its genesis in a railroad receivership,[51] it helps to have some understanding of these receiverships. Beginning in the 1870s and continuing in waves into the 1890s, many railroads began to fail.[52] From 1878 to 1898, however, there were no federal bankruptcy statutes of any kind, and railroads were excluded from the 1898

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[48] State courts' decisions on the common-fund doctrine, for instance, often rely on such precedents. *See, e.g.*, Edwards v. Alaska Pulp Corp., 920 P.2d 751, 754–55 (Alaska 1996); Kuhn v. State, 924 P.2d 1053, 1058 (Colo. 1996); City of Dallas v. Arnett, 762 S.W.2d 942, 954 (Tex. Ct. App. 1988).

[49] 105 U.S. 527 (1882).

[50] 113 U.S. 116 (1885).

[51] *Greenough*, 105 U.S. at 529.

[52] *See* DAVID A. SKEEL, DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA 51 (2001).

Bankruptcy Act.[53] Nor could state law solve the problem, since the railroads were interstate operations.[54]

To keep the railroads running, the federal courts stepped in with a solution derived from two kinds of established authority: "courts' equitable authority to appoint receivers to preserve the value of a debtor's property," and "the right of a mortgage holder to foreclose on mortgaged property if the debtor defaults."[55] These powers were "melded" into the "equity receivership,"[56] which was then used to restructure the railroad's debts.[57] Equity receiverships were the nineteenth-century analogue to, and the ancestor of, chapter 11 reorganizations.[58]

The receivership in *Greenough* began with a bill in equity filed by a railroad bondholder, Francis Vose, on behalf of himself and other bondholders, against trustees of the Internal Improvement Fund of Florida—a fund that was supposed to be used to pay off the railroad bonds.[59] Vose alleged wrongdoing by the fund's trustees and asked the court to appoint a receiver to oversee the fund.[60]

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[53] *Id.* at 54.
[54] *Id.* at 55.
[55] *Id.* at 57.
[56] *Id.*
[57] *Id.* at 58.
[58] *See id.* at 4, 56–57.
[59] *Greenough*, 105 U.S. at 528.
[60] *Id.* at 529.

Thereafter, Vose, according to the *Greenough* Court, carried on the litigation "with great vigor and at much expense," and "secured and saved" much of the trust fund, to the benefit of the other bondholders.[61] Vose had advanced most of the litigation expenses himself and so eventually asked for "an allowance out of the fund for his expenses and services."[62]

The Supreme Court allowed Vose to recover his attorneys' fees and court costs. Vose, the Court reasoned, had spent a great deal of time and effort on a case that benefited all bondholders.[63] Forcing him to bear his own fees and costs "would not only be unjust to him," but would also confer "an unfair advantage" on all the bondholders who had reaped benefits from Vose's outlays.[64]

This holding is primarily what *Greenough* is remembered for, because in allowing the fees and costs, the Court established what is now called the "common-fund doctrine." In most cases, it is this doctrine that is invoked when class counsel seek fees from a settlement or judgment.[65]

For present purposes, however, the most relevant part of *Greenough* is its holding that Vose could not be paid for his "personal

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[61] *Id.*

[62] *Id.*

[63] *Id.* at 532.

[64] *Id.*

[65] 2 MCLAUGHLIN ON CLASS ACTIONS § 6:24 (19th ed. Nov. 2022 update) ("In the class action context, the most frequently employed equitable exception to the American Rule is the 'common fund' doctrine . . . .").

services and private expenses."[66] Vose, the Court decided, could not be compensated for his ten years of work or reimbursed for his railroad fares and hotel bills.

In discussing why Vose could not be compensated, the Court was careful to distinguish Vose from a trustee. In at least some states, the Court noted, trustees were entitled to payment for personal services and private expenses.[67] Vose, however, "was not a trustee."[68] Rather, he was a creditor "suing on behalf of himself and other creditors, for his and their own benefit and advantage."[69]

The Court also argued that the reason that trustees are compensated did not apply to Vose. "Where an allowance is made to trustees for their personal services," the Court said, "it is made 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."[70] Such considerations had "no application" to Vose.[71] In fact, there was a good reason *not* to pay him, as payment would encourage intermeddling in similar cases:

> It would present too great a temptation to parties to intermeddle in the management of valuable property or

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[66] *Greenough*, 105 U.S. at 537.

[67] "In England and some of the States, no such allowance is made even to trustees *eo nomine*. In other States it is." *Id.* The Court may have understated the American consensus on compensating trustees. *See infra* note 111.

[68] *Id.*

[69] *Id.*

[70] *Id.* at 537–38.

[71] *Id.* at 538.

> 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.[72]

2. *Central Railroad & Banking Co. v. Pettus*

Central Railroad & Banking Co. v. Pettus was decided three years after *Greenough*.[73] Like *Greenough*, *Pettus* arose from the corporate reorganization of a railroad—in *Pettus*, from the purchase of one railroad by another.[74] Creditors of the old railroad sued, requesting that their debts be satisfied out of the sale of old railroad's transferred assets, and they were successful.[75] The attorneys for the creditors asked for an award of fees and costs out of the funds recovered, a request that *Pettus* approved on the authority of *Greenough*.[76] As with *Greenough*, this holding, another application of the common-fund doctrine,[77] is typically what *Pettus* is cited for.

Pettus also prominently quoted *Greenough*'s other holding: that creditors could not be compensated out of a common fund for their personal services and private expenses.[78] Note, however, that this

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[72] *Id.*

[73] 113 U.S. 116 (1885).

[74] *See id.* at 117–18; *see also* Montgomery & W. Point R.R. Co., 59 Ala. 139 (1877) (related state-court litigation).

[75] *Pettus*, 113 U.S. at 118–19.

[76] *Id.* at 124–25.

[77] The difference from *Greenough* was that the attorneys in *Pettus* were paid directly. *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656, 671, 694 (1991).

[78] *Pettus*, 113 U.S. at 122.

portion of *Pettus* was dicta, since no litigant in *Pettus* seems to have been paid for personal services or expenses.

B. Analogizing Greenough *and* Pettus *to modern class actions*

It was in *Johnson v. NPAS Solutions, LLC*[79] that the Eleventh Circuit invoked *Greenough* and *Pettus* to prohibit awards to class representatives. *Johnson* was a class action under the Telephone Consumer Protection Act—a federal law that, roughly speaking, makes it illegal to use an autodialer to call persons without their prior express consent.[80] The plaintiff alleged that the defendant, a debt-collection company, had done exactly this, and on a large scale.[81]

The parties reached a proposed classwide settlement at a relatively early stage of the case.[82] The district court granted preliminary approval of the settlement, ordered that notice be disseminated to the class, and allowed the class representative to petition for an award of up to $6,000.[83] An objector appeared, arguing, among other things, that the class-representative award was unlawful under *Greenough* and *Pettus*. The district court summarily overruled the objection and approved the classwide settlement, including a $6,000 award to the class representative.[84]

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[79] 975 F.3d 1244 (11th Cir. 2020).
[80] *See* 47 U.S.C. § 227(b)(1)(A).
[81] *See* 975 F.3d at 1249 & n.1.
[82] *Id.* at 1249.
[83] *Id.*
[84] *Id.* at 1250–51.

On appeal, the Eleventh Circuit agreed with the objector's argument that *Greenough* and *Pettus* forbade the class representative's award. (The Eleventh Circuit spoke in terms of what was prohibited by *both* cases; it seemed not to realize that *Pettus*'s discussion of *Greenough* was dicta.[85]) *Greenough* and *Pettus*, the Eleventh Circuit held, prohibited awards to class representatives because such awards are "roughly analogous to a salary—in *Greenough*'s terms, payment for 'personal services.'"[86] In fact, according to the Eleventh Circuit, class-representative awards "present even more pronounced risks than the salary and expense reimbursements disapproved in *Greenough*," since class-representative awards not only provide compensation, but also "promote litigation by providing a prize to be won" as "a bounty."[87]

The Eleventh Circuit then turned to the class representative's defenses of the award, all of which it rejected. It was no defense that *Greenough* and *Pettus* long preceded class actions certified under Rule 23. *Greenough* and *Pettus* still involved "an analogous litigation actor—*i.e.*, a 'creditor seeking his rights in a judicial proceeding' on behalf of both himself and other similarly situated bondholders."[88] Nor was Rule 23 relevant, since Rule 23 is silent about class-representative awards.[89] And while Johnson appealed to the "ubiquity" of class-representative

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[85] *See supra* Part II.A.2.
[86] *Johnson*, 975 F.3d at 1257.
[87] *Id.* at 1258.
[88] *Id.* at 1259 (quoting *Greenough*, 105 U.S. at 538).
[89] *Id.*

awards, "that state of affairs is a product of inertia and inattention, not adherence to law."[90] Such awards were a judicial invention, created out of whole cloth, and were "foreclosed by Supreme Court precedent."[91]

III. Settlement agreements as independent authority for awards to class representatives

Greenough did not involve a settlement agreement.[92] And the simplest argument against the Eleventh Circuit's reliance on *Greenough* is that it ignored the settlement agreement that the district court had approved. That agreement could be read to authorize the district court to make an award to the class representative.[93] If it did so, then it provided the district court with independent authority to make the award, whatever *Greenough* may prohibit. Here I will explain why the case law dictates that conclusion, and then address a possible counterargument.

A. The case law on settlements

Generally, parties settling an action may include whatever they wish in a settlement agreement. The Supreme Court made this clear nearly a century and a half ago in an appeal challenging a consent

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[90] *Id.*

[91] *Id.* at 1259–60.

[92] From here on, I will be referring to "*Greenough*" rather than "*Greenough* and *Pettus*" because the latter has no holding that is relevant here. *See supra* Part II.A.2.

[93] *See* Class Action Settlement Agreement and Release § 6.2, *Johnson v. NPAS Solutions, LLC*, No. 9:17-cv-80393-RLR (S.D. Fla. Nov. 29, 2017) (ECF No. 37-1), *available at* http://www.johnsonnpassolutionssettlement.com/media/1214431/declaration_of_m_greenwald_with_settlement_agreement.pdf#page=18.

decree: "Parties to a suit have the right to agree to any thing they please in reference to the subject-matter of their litigation, and the court, when applied to, will ordinarily give effect to their agreement, if it comes within the general scope of the case made by the pleadings."[94]

More recently, the Court has held that a consent decree gets its legal force from "the parties' consent."[95] For that reason, consent decrees may "provide[] broader relief than [a] court could have awarded after a trial."[96] More generally, "limits . . . on the remedial authority of a federal court" are "not implicated by voluntary agreements."[97]

While the Court was addressing a consent decree, its reasoning applies equally, and perhaps more, to class-action settlement agreements.[98] In fact, it was in a class action that the Court stated that limits on the federal courts' remedial powers are not implicated by voluntary agreements.[99] More fundamentally, it would seem to follow from background freedom-of-contract principles that settlement agreements are not constrained by the remedial authority of courts.[100]

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94 *See* Pac. R.R. v. Ketchum, 101 U.S. 289, 297 (1879)

95 Loc. No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland, 478 U.S. 501, 525 (1986).

96 *Id.*

97 *Id.* at 526; *see also* Rufo v. Inmates of Suffolk Cnty. Jail, 502 U.S. 367, 389 (1992) (noting that parties to a consent decree may agree to remedies beyond what are required by the law or what a court would have ordered absent a settlement).

98 *See* Berry v. Schulman, 807 F.3d 600, 610 (4th Cir. 2015); In re Agent Orange Prod. Liab. Litig., 818 F.2d 179, 185 (2d Cir. 1987).

99 *See Firefighters*, 478 U.S. at 504, 510.

100 *See* The Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 11 (1972) (adverting to "ancient concepts of freedom of contract").

For settlement agreements are simply a contract between parties to resolve litigation, and it is the parties, not the court, that are responsible for negotiating and drafting class settlement agreements.[101]

Of course, a settlement agreement cannot bind absent class members without judicial approval.[102] But if that fact makes class-action settlement agreements a hybrid of contracts and judicial decrees, that does not distinguish them from consent decrees, which share that hybrid character.[103]

True, there *are* restrictions on what class-action settlement agreements may do. Such an agreement may not require the parties to take action that conflicts with or violates a statute on which the complaint was based.[104] And, of course, class-action settlement agreements must be "fair, reasonable, and adequate" under Rule 23.[105] But the Supreme Court has also been clear about what does *not* restrict settlement agreements: the otherwise applicable limits on a federal court's remedial powers. Those limits do not constrain the relief that class-action settlement agreements may provide.

The application of that principle to the Eleventh Circuit's decision in *Johnson* is straightforward. Even if *Greenough* restricted courts from

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[101] 4 RUBENSTEIN, *supra* note 1, § 13:46.

[102] *See* FED. R. CIV. P. 23(e).

[103] *See, e.g.*, Frew ex rel. Frew v. Hawkins, 540 U.S. 431, 437 (2004) ("Consent decrees have elements of both contracts and judicial decrees.").

[104] *See Firefighters*, 478 U.S. at 526; *see also* Evans v. Jeff D., 475 U.S. 717 (1986).

[105] FED. R. CIV. P. 23(e)(2).

making awards to class representatives after a decision on the merits, that restriction would not apply to a settlement agreement that authorized such awards. For at most, *Greenough* restricted how a federal court may exercise its remedial powers on its own—i.e., in the absence of a settlement agreement. Nowhere, though, did the Eleventh Circuit examine the class settlement agreement before it.

It is important that settlement agreements provide courts with independent remedial power. That source of power, if exercised, will be enough to authorize nearly all class-representative awards, since nearly all class actions settle.[106]

B. Addressing a possible counterargument

To what has just been said, there is a possible, if unconvincing, counterargument: Courts still rely on *Greenough*'s common-fund doctrine when awarding fees to class counsel, so class-settlement agreements don't really vest courts with independent remedial authority. If they did, courts wouldn't need to rely on the common-fund doctrine, since settlement agreements already provide for attorneys' fees.[107]

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[106] *See* 4 RUBENSTEIN, *supra* note 1, § 13:1 ("Like all American litigation, class action lawsuits are likely to settle.").

[107] *See* Fed. R. Civ. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees and nontaxable costs that are authorized by law *or by the parties' agreement*." (emphasis added)).

The problem with this argument is its last premise. In fact, class-settlement agreements typically do *not* provide for attorneys' fees.[108] They contemplate that class counsel may *seek* an award of attorneys' fees, subject to the district court's approval, and they often provide a ceiling on the award that can be sought (e.g., "up to 25% of the settlement fund"). But settlements normally do not state that they are conferring authority on the court to award fees.

Class-settlement agreements do not include such provisions for a reason. Ethical class counsel do not negotiate their fees when they negotiate the rest of the settlement agreement. That would make entitlement to fees a term of the settlement agreement that class counsel may have bargained for at the expense of more relief for the class, in violation of their fiduciary obligations.[109]

In addition, precisely because the common-fund doctrine is so well established, class-action settlement agreements often do not *need* to provide for attorneys' fees. Rather, if the class action creates a common fund, the common-fund doctrine will permit an award of fees.

IV. Evaluating the Eleventh Circuit's analogy

What has been said so far assumes for the sake of argument that the Eleventh Circuit was right to analogize the railroad creditor in *Greenough* to the modern class representative. But, as I will now

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[108] Where this paragraph and the next contain observations about class-action practice, they come from first-hand experience.

[109] *See* 4 RUBENSTEIN, *supra* note 1, § 13.9 (discussing so-called "clear sailing" provisions regarding attorneys' fees).

explain, that analogy is mistaken. What is more, *Greenough* itself suggests that the better analogy is between class representatives and trustees. And the Supreme Court traditionally held that, in equity, trustees should be compensated for their services.

Even if the reader does not affirmatively embrace the analogy between class representatives and trustees, the discussion that follows still accomplishes an important purpose. It shows that under *Greenough*, the analogy between class representatives and trustees is *at least* as apt as the analogy between class representatives and railroad creditors. And since those analogies point in opposite directions, with one forbidding compensation and the other authorizing it, *Greenough* neither rejects nor endorses awards to class representatives. Logically, therefore—and contrary to the Eleventh Circuit's view—*Greenough* does not tip the scales either for or against such awards.

Below, I begin by introducing the competing analogies. I then explain the reasons to reject the analogy to creditors, canvas the reasons to embrace the analogy to trustees, and end with an argument that, while invoked by the Eleventh Circuit, favors neither analogy over the other.

A. The two competing analogies—and their consequences for awards to class representatives

When *Greenough* denied compensation of personal services and expenses to the railroad creditor, the Court mostly gave a negative reason: because the creditor was *not* a trustee. In fact, it devoted most

of its discussion to distinguishing compensation of trustees from compensation of the creditor.[110]

Under *Greenough*'s own reasoning, then, the prohibition against personal expenses and compensation does not extend to trustees. *Greenough*, in other words, does not prohibit federal courts from compensating trustees for their personal services and reimbursing them for their personal expenses.

But we can go further: at the time of *Greenough*, the federal courts held that diligent trustees *should* be compensated for their personal services. This is made clear by a Supreme Court case decided several decades before *Greenough*, as well as by other precedents.[111] Likewise, receivers—who, of course, are also fiduciaries[112]—were also compensated by the federal courts for their personal services.[113] It appears, in short, that fiduciaries appointed either by a settlor or the court itself were entitled to compensation.

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[110] *Greenough*, 105 U.S. at 537–38; *see supra* notes 67–72 and accompanying text.

[111] *See* Barney v. Saunders, 57 U.S. (16 How.) 535, 542 (1853) (considering it "just and reasonable that a trustee should receive a fair compensation for his services"); *see also* Magruder v. Drury, 235 U.S. 106, 113 (1914) (affirming allowance of commission to trustees); Jenkins v. Eldredge, 13 F. Cas. 513, 517 (C.C.D. Mass. 1845) (Story, J.) ("In America, and especially in Massachusetts, it has been the general practice to allow commissions to trustees, in cases of open and admitted express trusts, where the trustee has not forfeited them by gross misconduct."). For representative state cases and a treatise suggesting that the strong American consensus in the nineteenth century was to compensate trustees for their services, see *Muscogee Lumber Co. v. Hyer*, 18 Fla. 698, 704 (1882); *Phillips' Adm'r v. Bustard*, 40 Ky. 348, 349–50 (1841); *Barrell v. Joy*, 16 Mass. 221, 228–29 (1819); and 2 JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 1268a at 499 (Isaac F. Redfield ed., 9th ed. 1866).

[112] *See* United States ex rel. Willoughby v. Howard, 302 U.S. 445, 450 (1938).

[113] Cake v. Mohun, 164 U.S. 311, 317–18 (1896); Stuart v. Boulware, 133 U.S. 78, 82 (1890).

So, if modern class representatives are more like trustees than like the creditor in *Greenough*, then *Greenough*, when seen in historical context, points in the opposite direction from what the Eleventh Circuit concluded. *Greenough* doesn't only *fail to prohibit* awards to class representatives—it indicates that those awards are *affirmatively authorized* by traditional equitable principles.

B. Reasons to reject the analogy to railroad creditors

1. The class representative is not the railroad creditor's modern descendant

The creditor has a descendant in contemporary litigation, and that descendant is *not* the class representative. This fact, though perhaps not decisive in itself, should make us skeptical of an analogy between the creditor in *Greenough* and the modern class representative.

Recall that *Greenough* was an equity receivership, the nineteenth century's equivalent of a corporate reorganization.[114] This means that the modern descendant of the creditor in *Greenough* is not the class representative, but the creditor in a Chapter 11 bankruptcy case. And significantly, even under the present Bankruptcy Code, while individual creditors may be entitled to attorneys' fees if they make a substantial contribution,[115] they cannot receive a payment for their personal services.[116]

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[114] *See* SKEEL, *supra* note 52, at 17.

[115] 11 U.S.C. § 503(b)(4).

[116] *See id.* § 503(b)(3)(D) (if creditor makes a substantial contribution, it is entitled to "actual, necessary *expenses* . . . *incurred*" (emphasis added)).

This consideration by itself may not defeat the analogy between the *Greenough* creditor and class representatives. It does show, however, that the analogy expands *Greenough*'s holding into a new and different context. This should at least make us pause before we accept the analogy.

2. Inapplicable concerns about intermeddling

Besides the fact that the creditor wasn't a trustee, the reason that the *Greenough* Court gave for denying compensation to the creditor was a concern about "intermeddl[ing]."[117] Compensation, the Court said, would encourage "intermeddl[ing] in the management of valuable property or funds in which [the intermeddling party has] only the interest of creditors, and that perhaps only to a small amount."[118] This concern cannot apply to modern class representatives.

To repeat: The equity receivership in *Greenough* was the nineteenth-century equivalent of a corporate reorganization. In that context, it makes sense to be concerned about empowering an individual creditor with a small claim. Such a creditor is under no duty to look out for others' interests. Rather, the interests of all concerned are typically best aligned when reorganization is led by those with the largest financial stake in the outcome.[119] This, presumably, is why votes on a

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[117] *Greenough*, 105 U.S. at 538.

[118] *Id.*

[119] *See* W. HOMER DRAKE JR. & KAREN VISSER, CHAPTER 11 REORGANIZATIONS § 7:17 (2d ed. Feb. 2022 update) ("Without question, the beneficiaries of the reorganization process are best suited to negotiate and oversee all financial aspects of the case . . . .").

reorganization plan under Chapter 11 are not democratic, but instead are measured by the size of a claim.[120] Plus, centralizing negotiations with the debtor in a single committee streamlines the process and may reduce administrative costs.[121]

These considerations do not apply to a modern class representative. Modern class representatives, unlike the creditor in *Greenough*, are fiduciaries bound by the duty to protect the interests of the class. They can litigate on behalf of the class only after the district court has approved them after a thorough vetting, so they cannot be said to be "intermeddl[ing]."[122] Nor, finally, should there be any legitimate concern about the small size of the class representative's claim. A class representative's claim is expected to be small: "The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."[123] As the First Circuit recently put it, "whereas in *Greenough* the Court wished to prevent 'intermeddl[ing]' with fund management, Rule 23 is designed to encourage claimants with

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[120] *See* 11 U.S.C. § 1126(c), (d).

[121] *See* SKEEL, *supra* note 52, at 65; *see also* In re Flight Transp. Corp. Sec. Litig., 874 F.2d 576, 581 (8th Cir. 1989) (distinguishing between creditors and creditors' committees); In re Buttes Gas & Oil Co., 112 B.R. 191, 196 (Bankr. S.D. Tex. 1989) ("[T]he stimulation and encouragement of meaningful creditor participation in reorganization proceedings . . . must be balanced by the requirement of keeping administrative expenses to a minimum.").

[122] Trustees v. Greenough, 105 U.S. 527, 538 (1882).

[123] Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997)).

small claims to vindicate their rights and hold unlawful behavior to account."[124]

The difference between the modern class representative and a creditor in a nineteenth-century equity receivership went completely ignored by the Eleventh Circuit. In fact, that court seems to have misinterpreted the *Greenough* Court's concern about "intermeddl[ing]"[125] not as a concern specific to equity receiverships, but as a desire to discourage litigation *in general*. For to support its assertion that "modern-day incentive awards present even more pronounced risks" than the personal reimbursement in *Greenough*, the Eleventh Circuit explained that awards are intended, among other things, "to promote litigation by providing a prize to be won."[126] In other words: Promotion of litigation is one of the "pronounced risks" of awards to class representatives. This analysis takes contemporary hostility to litigation in general[127] and wrongly reads it into *Greenough*'s specific concern about individual creditors in nineteenth-century railroad reorganizations.

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[124] Murray v. Grocery Delivery E-Servs. USA Inc., 55 F.4th 340, 353 (1st Cir. 2022).

[125] *Greenough*, 105 U.S. at 538.

[126] Johnson v. NPAS Solutions, LLC, 975 F.3d 1244, 1258 (11th Cir. 2020).

[127] *See, e.g.*, Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1551–68 (2014).

C. Reasons to embrace the analogy to trustees

1. Shared fiduciary status

Unlike the creditor in *Greenough*, but like a trustee, modern class representatives are fiduciaries. Arguably, this fiduciary status is entailed simply by the requirement that class representatives "fairly and adequately protect the interests of the class,"[128] or even more fundamentally, by the requirements of due process.[129] But in any event, the case law recognizes that class representatives are fiduciaries of the class. The Supreme Court has told us that the position of class representative under the Rules has "a fiduciary character."[130] All the courts of appeals to address the issue agree that class representatives appointed under Rule 23 are fiduciaries of the classes they represent.[131] At a deeper level, the justification for trustees and class representatives being bound by fiduciary duties is the same: they cannot realistically be

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[128] FED. R. CIV. P. 23(a)(4).

[129] *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 812 (1985) (for absent class members to be bound by a class-action judgment, they must have been adequately represented).

[130] Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 549 (1949). The Court was discussing a derivative action by a shareholder, but at that time such an action was treated as just one more type of class action. *See* FED. R. CIV. P. 23 note to subdivision (a) (1937) (noting that "a suit by stockholders to enforce a corporate right" was a class action covered by then-Rule 23(a)(1)).

[131] Koby v. ARS Nat'l Servs., Inc., 846 F.3d 1071, 1079 (9th Cir. 2017); In re Dry Max Pampers Litig., 724 F.3d 713, 718 (6th Cir. 2013); In re Cendant Corp. Sec. Litig., 404 F.3d 173, 198 (3d Cir. 2005); Martens v. Thomann, 273 F.3d 159, 173 n.10 (2d Cir. 2001); Crawford v. Equifax Payment Servs., Inc., 201 F.3d 877, 880 (7th Cir. 2000); Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1, 7 (1st Cir. 1999); Sondel v. Nw. Airlines, Inc., 56 F.3d 934, 938 (8th Cir. 1995); Kirkpatrick v. J.C. Bradford & Co., 827 F.2d 718, 726 (11th Cir. 1987); Shelton v. Pargo, Inc., 582 F.2d 1298, 1305 (4th Cir. 1978).

monitored by those whom they are supposed by benefit.[132] Finally, just as a settlor or court appoints a trustee,[133] or a court appoints a receiver, so a modern class representative must be appointed by the district court.[134]

The creditor in *Greenough*, by contrast, seems to have held no court-appointed role and was not a fiduciary. The *Greenough* Court did acknowledge that while the creditor was "not a trustee, he has at least acted the part of a trustee in relation to the common interest."[135] This acknowledgment, however, simply strengthens the analogy between a trustee and a class representative, for when *Greenough* denied compensation to the creditor, it stressed that he was not *formally* a trustee.[136] And this, in turn, suggests that *Greenough* would compensate appointed class representatives, since they both act the part of a trustee as a practical matter and are obliged to act like one as a formal matter.

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[132] *Compare, e.g.*, Melanie B. Leslie, *Trusting Trustees: Fiduciary Duties and the Limits of Default Rules*, 94 GEO. L.J. 67, 70 (2005), *with, e.g.*, *Mars Steel v. Continental Illinois National Bank & Trust*, 834 F.2d 677, 681 (7th Cir. 1987).

[133] *See* RESTATEMENT (THIRD) OF TRUSTS § 34(2) (2003) ("If the appointment of a trustee is not provided for or made pursuant to the terms of the trust, the trustee will be appointed by a proper court.").

[134] *See* Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 572 (2014).

[135] Trustees v. Greenough, 105 U.S. 527, 532 (1882).

[136] *Id.* at 537–38.

2. A shared justification for compensation

The *Greenough* Court also offered some justifications for compensating trustees. The very same justifications favor compensation for class representatives.

Compensating trustees, *Greenough* said, is done "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."[137] These goals, *mutatis mutandis*, would also be furthered by properly crafted awards to class representatives.

Awards to class representatives can certainly "secure greater activity and diligence" in representing the class.[138] If putative class representatives know that their receipt of an award will turn on the district court's assessment of their "activity and diligence," particularly in monitoring class counsel,[139] class representatives are more likely to be active and diligent. This incentive, not incidentally, would both assuage a commonly expressed worry about class actions, that the class representative is a mere pawn of class counsel, and create an additional safeguard for the class.[140]

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[137] *Id.*

[138] *Id.*

[139] Like class representatives, class counsel are fiduciaries of the class. *See, e.g.*, Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 968 (9th Cir. 2009); Culver v. City of Milwaukee, 277 F.3d 908, 913 (7th Cir. 2002). Co-fiduciaries have a duty to monitor each other's performance. *See* RESTATEMENT (THIRD) OF TRUSTS § 81(2) (2003).

[140] *See* Richard A. Nagareda, *Restitution, Rent Extraction, and Class Representatives: Implications of Incentive Awards*, 53 UCLA L. REV. 1483, 1488–90 (2006) (arguing that ideally, awards to class representatives should be crafted so as to reward high-quality monitoring of class counsel).

Awards are also essential to "induce persons of reliable character and business capacity" to serve as class representatives.[141] All things being equal, the greater the class representative's expertise and ability to competently monitor class counsel and meaningfully contribute to the litigation, the likelier it is that the class representative is well compensated in her day job because of her skills. And the greater the class representative's regular income, the greater the opportunity costs she will incur in the role of a class representative, and the less probable her participation in that role—let alone her *diligent* participation in that role.[142] As things now stand, those opportunity costs can be recognized and reimbursed only through properly crafted class-representative awards.

D. A reason that favors neither analogy over the other

In the course of distinguishing the railroad creditor from a trustee, *Greenough* remarked that the creditor was "suing on behalf of himself and other creditors, for his and their own benefit and advantage."[143] The Eleventh Circuit seized on this remark to justify the analogy it drew. *Greenough*, it said, "involved an analogous litigation actor" because both the creditor in *Greenough* and class representatives

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[141] *Greenough*, 105 U.S. at 537–38.

[142] *See* Eisenberg & Miller, *supra* note 16, at 1348 (noting that sophisticated investors may be the ones "most sensitive to recovering their opportunity and other costs" if they serve as class representatives); *see also* Charles R. Korsmo & Minor Myers, *Lead Plaintiff Incentives in Aggregate Litigation*, 72 VAND. L. REV. 1923, 1958–60, 1962–63 (2019) (arguing that expert class representatives would create benefits for classes).

[143] *Greenough*, 105 U.S. at 537.

pursue their legal rights on behalf of themselves and similarly situated others.[144]

Logically, though, this similarity cannot favor the Eleventh Circuit's analogy if precisely the same similarity can be drawn between class representatives and trustees. And the same similarity *can* be drawn, because both now and at the time of *Greenough*, a trustee may also be one of the trust's beneficiaries.[145] When this kind of a trustee sues on behalf of the trust, therefore, the suit is on behalf of herself and similarly situated others—i.e., the other beneficiaries. The fact that the creditor in *Greenough* also sued on behalf of himself and similarly situated others, therefore, gives us no reason to prefer the creditor analogy.

Obviously, not all trustees are also beneficiaries, and hence not all trustees sue on behalf of themselves and other beneficiaries. But it is equally true that not all creditors in an equity receivership litigated (either formally or practically) on behalf of themselves and other creditors.[146] Indeed, that is what prompted the *Greenough* Court's worries about intermeddling by small creditors.[147] So, again, the fact

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[144] *Johnson*, 975 F.3d at 1259 (quoting *Greenough*, 105 U.S. at 538).

[145] *See* Summers v. Higley, 60 N.E. 969, 970 (Ill. 1901); Tyler v. Mayre, 27 P. 160, 161 (Cal. 1891), *aff'd*, 30 P. 196 (Cal. 1892); Story v. Palmer, 18 A. 363, 367 (N.J. Ch. 1889); ELIZABETH DELEERY ET AL., BOGERT'S THE LAW OF TRUSTS AND TRUSTEES § 129 (June 2022 update).

[146] *See* Sage v. Cent. R.R. Co., 99 U.S. 334, 340 (1878) (discussing the "evil" of "a small minority" of bondholders opposing a reorganization plan and demanding that they be "paid in full, or superior advantages . . . conceded to them, at the expense of their fellows"); *supra* Part IV.C.

[147] *See supra* Part IV.C.

that the creditor in *Greenough* was suing on behalf of himself and other creditors does not swing the balance in favor of one analogy or the other. And because that balance otherwise decisively favors the analogy to the trustee, our ultimate conclusion must remain the same: Modern class representatives resemble trustees much more than they resemble creditors from a nineteenth-century equity receivership.

CONCLUSION

Greenough is best known as the source of the common-fund doctrine, which entitles attorneys to a reasonable fee from any fund recovered on behalf of persons other than their client.[148] The federal courts still apply that doctrine to class actions.[149] But the continued application of *Greenough*'s common-fund holding to class actions hardly means that the Eleventh Circuit was right to extend *Greenough*'s rule against creditor compensation to class representatives.

To the contrary, *Greenough* does not forbid awards to modern class representatives. A class settlement makes *Greenough* irrelevant, no matter what restrictions the case may put on the federal courts' authority to make class-representative awards. Plus, the modern class representative resembles not *Greenough*'s uncompensated creditor but the compensated trustee that *Greenough* distinguished.

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[148] Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980).
[149] *See, e.g.*, *id.* at 480–81.

Although the Eleventh Circuit appealed to history, it paid insufficient attention to both the past and the present. In reviewing the past, it overlooked *Greenough*'s reasoning and context. In surveying the present, it overlooked the power conferred by class settlements and the duties that bind class representatives. When the Eleventh Circuit declared that awards to class representatives were the product of judicial "inattention,"[150] it was ignoring the beam in its own eye.

[150] Johnson v. NPAS Solutions, LLC, 975 F.3d 1244, 1249 (11th Cir. 2020).