Front-End Duties to the Class

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Nick Landsman-Roos, Front-End Fiduciaries: Precertification Duties and Class Conflict, 65 **Stan. L. Rev**. 817 (2013).

As some may remember, Dallas attorney Fred Baron created an uproar in the legal community in 1993 when he mounted a full-bore attack against the infamous Georgine nationwide asbestos settlement class. In 1997, Laurence Tribe — arguing an array of substantive and procedural objections — ultimately convinced the Supreme Court in *Amchem v. Windsor* to disapprove that settlement. Fred Baron, then, largely was responsible for helping to establish that settlement classes are legitimate, but that they must include structural assurances of due process fairness to absent class members.

Less well-known and long-forgotten in *Amchem's* wake, Baron also lobbed an array of ethical objections at the settling parties, although the Supreme Court ultimately deflected these challenges. The Georgine settling parties had simultaneously presented the federal district court with a class complaint and a settlement. Baron raised the question of the duties that plaintiffs' attorneys owed to class members in the absence of a formal class certification at the outset of the litigation. On this, he held two somewhat discordant views. On one hand, he opined that absent a formal class certification at the front-end of class litigation, no class was created and therefore the plaintiffs' attorneys could not negotiate a settlement on behalf of the class. There was no attorney-client relationship until the class came into existence. Thus, he argued, the entire Georgine settlement was illegitimate and the class could not be bound by a back-end class certification. On the other hand, he argued that an attorney-client relationship existed throughout and class counsel owed fiduciary duties to the class members, even without a filed class complaint. In this regard, class counsel had violated their fiduciary duties to the Georgine class.

It is somewhat surprising that nearly twenty years after Fred Baron first called attention to the issue in Georgine, the problem of attorney fiduciary duties during pre-certification class proceedings remains largely unresolved. This problem is extremely important given the prevalence of settlement classes in our post-*Amchem* era. In an excellent piece in the Stanford Law Review, Nick Landsman-Roos has stepped into this doctrinal breach. Front-End Fiduciaries: Precertification Duties and Conflict traverses the landscape of pre-certification professional responsibilities as they intersect with class action jurisprudence.

Landsman-Roos first explicates the problem of class counsel's pre-certification duties, noting that courts have largely ignored this issue because judges evaluate the adequacy of class counsel at the back end, during the settlement fairness hearing. Such back-end evaluations typically are ex post facto, focusing on what the attorneys already have done, and not on what they may do. In addition, back-end inquiries focus on the requirements of Rule 23 adequacy, rather than on broader ethical obligations. Thus, Landsman-Roos suggests that the problem of pre-certification duties has been given short-shrift because no Federal Rules framework exists for addressing pre-certification attorney conduct. Moreover, pre-certification duties have special salience for addressing conflicts of interest at the outset of class litigation, rather than at the back end of a settlement.

Courts have been confounded, Landsman-Roos notes, by questions relating to the scope of fiduciary

duties, professional ethics, and conflicts at the outset of litigation. Consequently, courts have applied varying standards for dealing with such disputes. But the problem of pre-certification conflicts and fiduciary obligations remains largely undertheorized, and Landsman-Roos's project is to identify a framework to resolve loyalty problems at the front end of class action litigation.

Landsman-Roos focuses initially on the crucial question of how to define the client in class litigation. Surveying the academic debate, he discusses whether class counsel and absent class members have (or do not have) a constructive attorney-client relationship for the purpose of professional ethics rules. During pre-certification proceedings, he argues, the view that a court adopts is crucial for understanding how class litigation will be regulated. Thus, if a court takes a narrow view of the attorney-client relationship, it "strips professional ethics rules of much force and limits the fiduciary obligations of class counsel to absent class members at the beginning of litigation." A more robust conception, by contrast, "creates a fiduciary relationship and implies ethical requirements between an attorney and all class members and reduces the discretion class counsel." Landsman-Roos stakes his position, "contrary to conventional wisdom," that a fiduciary duty among counsel, the named class plaintiff, and each individual class member ought to attach when a class action complaint is filed. Thus, a precertification duty attaches and is owed not just to the named plaintiffs or the class as an entity, but to each potential unnamed class member.

Finally, Landsman-Roos addresses the scope of precertification duties. An attorney breaches fiduciary duties to class members when she makes a decision that prejudices the substantive legal rights of absent class members without notice and an opportunity for objections. When an attorney's action potentially or actually prejudices an absent class member's rights, the attorney should have a good faith defense: If the conduct was undertaken in a good faith belief that it would maximize the class's recovery, she should not be found to have breached her precertification duties.

Landsman-Roos's piece is well worth reading. It addresses an important question of class action doctrine that courts and commentators have largely — and surprisingly — ignored for more than twenty years. He is thoughtful in his analysis of pre-certification duties, innovative in his quest for an analytical framework, and provocative in his conclusions and recommendations.

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