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Combating Objectionable Objections

By Jonathan Uslaner and Brandon Marsh

Courts and class action practitioners have struggled for years with the role of objectors to class action settlements. Under Rule 23, class members have the right to file with the district court an objection to a proposed settlement that they believe is "not fair, reasonable, or adequate." If the settlement is approved over a class member's objection, the objector has the right to appeal that approval. Allowing class members to file objections and to appeal approved settlements promotes fairer and more adequate recoveries for the class—at least in theory.

Unfortunately, there are certain objectors—colloquially referred to by courts as "professional objectors"—who file objections, or threaten to file objections, to class action settlements without the aim of improving the settlement at all. Rather, these objectors aim for something far different: to achieve a cash payoff from the litigants in exchange for dropping the frivolous objections or threat of appeal. These professional objectors, many of whom turn out not to be class members once proof of class membership is required, know that litigating the objections can impose substantial costs on the parties and their counsel and lead to years of delay, even if the objections are unreasonable or meritless.

Professional objectors' conduct has negative impacts on all involved, except perhaps the objectors and their counsel. While the objections to the settlement are litigated and appealed, plaintiffs and class counsel are prevented from distributing the settlement funds to the class and recouping attorney fees and costs. (Class action settlements often do not permit benefits to be distributed until after the settlement is final.) Meanwhile, defendants and their attorneys lack the closure and certainty sought through the settlement, and the court is subjected to motion practice and associated hearings that waste judicial resources.

Over the years, courts have devised mechanisms to try to stop professional objectors. Though somewhat effective, these efforts have not ended professional objectors' misconduct. Both sides of the bar—plaintiff and defense—have advocated for reform, and the federal rules committee recently proposed an amendment to Rule 23 aimed at curbing meritless objections. The proposed amendment takes a helpful step toward discouraging frivolous objections meant to extract extortionate payments, but it remains to be seen whether the new reforms will put a final stop to professional objectors.

Judicial Efforts to Combat Professional Objectors

The current Rule 23 does not provide courts with much of a role in deterring meritless objections, or threats of objections, to class settlements. Rule 23(e)(5) states that "[a]ny class member may object to the proposal if it requires court approval" and that an "objection may be withdrawn only with the court's approval." The rule thus does not expressly provide the court much of a role in, among other things, punishing professional objectors or curbing their misconduct. Because of these gaps in Rule 23, courts have looked to other federal rules to address professional objectors. These efforts have included the following:

> **Rule 11 sanctions.** Some courts have applied Rule 11 to address professional objectors and their counsel. Rule 11 sanctions, however, have been handed down only in a limited number of instances, and only then for extremely egregious objections. As Judge Robert Sweet cautioned in sanctioning one professional objector, "where, as here, an objector to a class action settlement pursues an unmeritorious appeal in order to pursue a 'strategy of tactical disruption and delay,' he 'should be aware of Rule 11.'" *In re NASDAQ Mkt.-Makers Antitrust Litig.*, 187 F.R.D. 124, 131 (S.D.N.Y. 1999) (quoting *In re Ivan F. Boesky Sec. Litig.*, 948 F.2d 1358, 1368 (2d Cir. 1991)).

Appeal bonds. Courts also have required objectors to post bonds as a condition to any frivolous appeal of an approved settlement. In ordering the bonds, courts typically have turned to Rule 7 of the Federal Rules of Appellate Procedure, under which district courts may "require an appellant to file a bond or provide other security in such form and amount as it finds necessary to ensure payment of costs on appeal in a civil case."

Requiring professional objectors to post appellate bonds may have limited effectiveness in stopping their misconduct in some jurisdictions. Some courts have taken a narrow view of the permissible scope of appellate bonds and limited them to the relatively minor appellate costs enumerated in Federal Rule of Appellate Procedure 39, such as photocopying, filing, and service costs. *See, e.g.*, *Hirschensohn v. Lawyers Title Ins. Corp.*, No. 96-7312, 1997 WL 307777, at *1 (3d Cir. June 10, 1997). These courts have refused to allow parties to secure bonds for more significant appellate costs, such as attorney fees, because they are not included in the lists of costs set forth in Rule 39. Other courts, however, have not limited appellate bonds to the costs itemized in that rule; instead, they have authorized appellate bonds that cover attorney fees and delay costs resulting from the professional objectors' appeal. *See e.g.*, *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, MDL No. 1361, 2003 WL 22417252, at *1 (D. Me. Oct. 7, 2003) ("[D]amages resulting from delay or disruption of settlement administration caused by a frivolous appeal may be included in a Rule 7 bond.").

Quick-pay provisions. Courts also have allowed the settling parties to protect themselves against professional objectors by including "quick-pay" provisions in settlement agreements. *See Pelzer v. Vassalle*, No. 14-4156, 2016 WL 3626825, at *10 (6th Cir. July 7, 2016) (explaining that a quick-pay provision is "common" and "does not harm the class members in any discernible way"). Under a quick-pay provision, class counsel receive immediate payment of their attorney fees and reimbursement of expenses upon settlement approval, notwithstanding a professional objector's pending appeal. These provisions benefit the class: Class counsel are promptly paid and reimbursed for their work and expenses, and the professional objectors' attempt to gain leverage by interfering with payment of the settlement proceeds is thwarted.

The Proposed Amendments to Rule 23

Each of the three methods described above is helpful in limiting professional objectors, but none has ended their extortionate practices. For example, some professional objectors seek a payout by threatening to file, but not filing, their objections. These tactics can evade the courts' review because Rule 23 focuses on the "withdrawal" of filed objections, stating that objections "may be withdrawn only with the court's approval." Likewise, none of the methods discussed above provides the courts with the power to adjudicate the nature and extent of any compensation provided to professional objectors. While courts continue to employ these methods in dealing with professional objectors on a case-by-case basis, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States has recently proposed revisions to Rule 23. The committee's revisions would enhance judicial oversight by imposing two principal requirements on objectors:

1. an objector must seek court approval for any "payment or other consideration" to the objector in connection with "forgoing or withdrawing an objection" or "forgoing, dismissing, or abandoning an appeal from a judgment" approving the proposed settlement; and

2. in order to aid the court's evaluation of an objection, an objector must specify whether the objection "applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection."

These revisions are intended to help courts understand the breadth of any objections and to cabin professional objectors' use of informal means to extract side payments and other compensation for frivolous objections that risk delaying the case and adding expense and uncertainty for the parties. As the rules committee emphasized in the notes to the proposed amendments, "some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process." By specifying that "no payment or other consideration may be provided to an objector" for not "withdrawing" an objection, but also "forgoing" an objection, unless the consideration is "approved by the court after a hearing," the proposed amendments seek to have the courts oversee not only those objections that are filed with the courts but also the current out-of-court "attempts to extract tribute" that evade review under the current text of Rule 23. *See* Comm. Preliminary Draft of Proposed Amendments to the Federal Rules of Bankruptcy, Appellate, Civil, and Criminal Procedure 229 (Aug. 2016) (committee note to proposed Rule 23(e)(5)(B)).

These proposed amendments do not appear intended to replace the current mechanisms that courts have been devised for protecting class members' interests while allowing for meritorious objections; appeal bonds, Rule 11 sanctions, and quick-pay provisions, for instance, may continue to be appropriate. In fact, the proposed amendments may strengthen the courts' ability to use these existing methods to deter professional objectors. In particular, the proposed requirement that an objector specify whether the objection affects only certain class members may aid courts in identifying frivolous objections and determining whether to impose Rule 11 sanctions or require objectors to post appeal bonds.

The proposed amendments also contain some encouragement for class action objectors with legitimate gripes about a settlement. The notes to the proposed amendments recognize that "[o]bjecting class members can play a critical role in the settlement-approval process," including by providing "important information to decisions whether to object or opt out" and "important information bearing on [the court's] determination" whether to approve the class settlement. Perhaps for this reason, the notes to the proposed amendments encourage courts to focus on substance over form and recognize that some objectors who do not have the benefit of counsel may "present objections that do not adhere to technical legal standards." Ultimately, under the proposed rules, as under the current rules, courts retain the power to decide the merits of any objections and to determine the extent to which the objections do or do not provide value to the court and to class members.

Conclusion

The committee's proposed amendments to Rule 23 stand to provide important structural safeguards for class action parties and litigators to combat the recurring problem of meritless objections and professional objectors. Whether they are sufficient to completely stop professional objectors and their extortionist practices is likely to be an issue of debate over the coming months. Practitioners and the public have until February 15, 2017, to submit comments on the proposed amendments.

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Jonathan Uslaner is a partner and Brandon Marsh is an associate at Bernstein Litowitz Berger & Grossmann LLP in San Diego, California.