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OBJECTORS**SETTLEMENTS**

The proposed changes to Federal Rule of Civil Procedure 23(e)(5)—requiring objectors to obtain court approval before any payment in exchange for withdrawing objections to class action settlements—strikes a good balance between deterring professional objectors while encouraging valuable objections, attorneys Neal Marder and Mollie McGowan Lemberg say. The authors examine the proposed new rule, and offer their perspective on its strengths and weaknesses.

**Will Professional Class Action Objectors Be Deterred
If Proposed Amendments to Rule 23 Are Adopted?**

BY NEAL MARDER AND MOLLIE MCGOWAN LEMBERG

So-called “professional” or “serial” objectors are attorneys who file objections and appeals on behalf of non-named class members to a proposed class-wide settlement in order to obtain a fee from class counsel to drop their objections. While the right of a putative class member to object to the terms of a class action settlement has its purpose, how to best deal with professional objectors who are interested solely in lining their own pockets rather than protecting absent class members is something that has plagued the courts and class counsel for decades. Recently, however, the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States introduced proposed amendments to Federal Rule of Civil Proce-

cedure 23(e)(5) that would require objectors to obtain court approval before any payment or consideration is exchanged for withdrawing objections to class action settlements. This proposal, if adopted, may finally create a workable solution to the professional objector problem.

The Settlement Approval Process

Class action settlements must be approved by the court and approval is a multi-step process. First, the court determines whether the settlement should receive preliminary approval. “Where the proposed settlement appears to be the product of serious, informed, non-collusive negotiations, has no obvious deficiencies, does not improperly grant preferential treatment to class representatives or segments of the class and falls within the range of possible approval, preliminary approval is granted.” *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. at 99, (S.D.N.Y. 1997) (citing Manual for Complex Litig. (Third) § 30.41 (1995)). If the court grants preliminary approval, notice of the settlement must be given to class members who would be bound by the settlement. In cases subject to the Class Action Fairness Act of 2005 (CAFA), defendants must also give notice of the settlement to “appropriate” state and federal officials.

Class members have the opportunity to object to settlements that are not fair, reasonable, and adequate. Government entities, such as state attorneys general, may also object by intervening in the action or seeking amicus curiae status. The court then holds a final “fairness” hearing to determine whether the proposed settlement is fair, reasonable and adequate. At the hearing, “class members and the settling parties may be heard with respect to final court approval.” *In re Nasdaq Market-Makers Antitrust Litig.*, 176 F.R.D. at 102 (citing Manual for Complex Litig. (Third) § 23.14 (1995)). If the court approves the settlement in spite of objections, any class member who filed an objection may appeal.

Overview of Professional Objectors

Common grounds for objections to class action settlements include, among others, inadequacy of the settlement amount; unreasonable attorney’s fees; improper allocation of settlement funds; defective notice to the class; an unreasonable *cy pres* provision; and conflicts of interest. The right to object to settlement agreements provides adversarial testing of those agreements and serves to both deter collusion between counsel and protect the interests of class members. In practice, however, that is not always the case.

Professional objectors often exploit the settlement objection process and file unhelpful, ill-informed objections in order to obtain fees. Objectors can collect payment as a result of their objections in two ways. First, they can extract a payment from class counsel for agreeing to withdraw an objection or appeal. Second, the court may award them a fee for improving a settlement agreement, sometimes purely cosmetically.

Frivolous appeals filed by professional objectors are especially problematic as they delay the final resolution of the settlement, which may take months or even years, force counsel to expend resources on the appeal, and often delay class counsel’s receipt of fee awards. Thus, class counsel are often incentivized to pay off professional objectors to avoid delaying the finalization of settlement and their receipt of attorney’s fees. Some scholars have even referred to this phenomenon as objector “blackmail.”

Numerous courts have taken issue with professional objectors and the “tax” they impose on class action settlements. For example, in *In re Polyurethane Foam Antitrust Litigation*, No. 1:10 MD 2196, 2016 BL 116220 (N.D. Ohio Apr. 13, 2016) the court stated that “[a] serial objector’s sole purpose is to obtain a fee by object-

ing to whatever aspects of the [s]ettlement they can latch onto.” Based on those concerns, the court ordered objectors to “post an appeal bond of \$145,463” and “seek approval from this Court if an Objector agrees to dismiss his or her appeal in exchange for payment (or anything else of value) from any source.” Similarly, in *In re Cathode Ray Tube Antitrust Litigation*, the court described a professional objector who “routinely represents objectors purporting to challenge class action settlements, and does not do so to effectuate changes to settlements, but does so for his own personal financial gain. . . .” 281 F.R.D. 531, 533 (N.D. Cal. 2012). In *Trombley v. Bank of America Corp.*, No. 08-cv-456-JD., 2011 BL 218447 (D.R.I. Aug. 24, 2011), the court stated that professional objectors are those “who assert meritless objections in large class action settlement proceedings to extort fees or other payments.”

Responses to Professional Objectors

Courts and counsel have utilized various measures to try to combat professional objectors. Some courts, for example, have required objectors to post appeal bonds under Federal Rule of Appellate Procedure 7. One problem with this approach, however, is that it may discourage legitimate appeals. Courts have also issued sanctions against professional objectors who have filed objections for an improper purpose under Federal Rule of Civil Procedure 11. Rule 11 sanctions may not be the answer, though, due to the hurdles of initiating a Rule 11 proceeding (either by counsel or *sua sponte* by the court) and the necessity of a finding of impropriety, which can be difficult, as illustrated in *Vollmer* (finding that extortion “would be an improper purpose for intervening” but overruling the district court’s imposition of sanctions based on lack of sufficient evidence of improper purpose).

In some cases, class counsel have attempted to combat professional objectors by inserting “quick pay” provisions into class action settlement agreements, with the consent of defense counsel. Quick pay provisions provide that class counsel will receive attorney’s fees awarded by district courts upon granting of approval of settlements at final fairness hearings. If the settlements or fee awards are later reversed on appeal, class counsel agree to refund defendants for the fees. Quick pay provisions reduce the leverage that objecting class members have over class counsel by removing the ability of objectors to delay class counsel’s receipt of fees. However, defendants may not agree to quick pay provisions, and even with a quick pay provision in place, class counsel may still decide to pay objectors to avoid the cost of litigating an appeal or to avoid the risk of an appeal.

Scholars have also weighed in on how best to deal with professional objectors. One suggestion is to require non-named class members to intervene in the action as a condition of filing an appeal. This would not solve the problem, though, as professional objectors could still intervene on behalf of non-named class members and go through the same process of lodging objections and extracting payments from class counsel. Another view is that courts should impose hefty appeal bonds that reflect the full expected cost of appeal, including attorney’s fees and the cost of delay on class members. The downside of this approach, however, is that it will likely stifle legitimate appeals due to the cost,

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especially by objectors without deep pockets. An inalienability rule prohibiting objectors from settling their appeals has also been proposed as a possible solution to the serial objector problem. This strategy may not fully address the issue, though, as objectors could extract fees for agreeing not to file an appeal. It may also discourage some legitimate settlements.

Another potential angle that courts could consider would be to rely on government officials to police class action settlements in cases where CAFA applies and to dismiss the claims of professional objectors in the absence of official intervention. Under CAFA, the “appropriate” state and federal officials, such as state attorneys general, must be given notice of class action settlements. These officials may then decide to object to settlements that do not adequately protect the class. If state and federal officials have the opportunity to object to a settlement, but do not, should courts take that to mean that the settlement is fair, reasonable, and adequate and should be approved over any objections of class members? Probably not. State attorneys general and other government officials likely do not have the resources to object to all potentially deficient settlement agreements. State attorneys general also appear to focus on certain types of settlement agreements, such as “coupon settlements,” as well as cases in heavily regulated industries, so other types of settlements may not get the same level of scrutiny. This approach also fails to address the issue of settlement approval appeals, which often create the most delay and cost. But, at least one federal district court has found the absence of governmental objectors to weigh in favor of settlement approval. See *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 BL 158935 (N.D. Cal. Nov. 16, 2007) (“Because numerous governmental agencies (including the FTC) were given notice of the settlement and have not objected, this factor weighs in favor of the settlement.”).

Proposed Changes to FRCP 23(e)(5)

Although courts, counsel, and commentators have been unable to find a solution to the professional objector problem thus far, the proposed amendments to Federal Rule of Civil Procedure 23(e)(5) may prove to be an effective deterrent for professional objectors. The proposed changes would force objectors to object with more specificity and would require objectors to get court approval for fees paid in exchange for withdrawal of objections or appeals. Looking at the proposed changes to Rule 23(e)(5) in more detail, the proposed changes to Rule 23(e)(5)(A) remove the requirement of court approval for withdrawal of an objection to a settlement proposal and clarify that any objections must be specific and must state which portion of the class the objections cover. New subsection 23(e)(5)(B)

requires district court approval for any payment or consideration provided to an objector for withdrawal of an objection or abandoning an appeal. The Committee Notes to Rule 23(e)(5)(B) state that the “district court is best positioned to determine whether to approve such arrangements. . .” and that “[u]ntil the appeal is docketed by the circuit clerk, the district court may dismiss the appeal on stipulation of the parties.” Rule 23(e)(5)(C), also a new subsection, states that the procedure of Federal Rule of Civil Procedure 62.1 applies if approval under proposed Rule 23(3)(5)(B) has not been obtained before the appeal is docketed. Under Rule 62.1, “Indicative Ruling,” the district court could “(1) defer considering the motion; (2) deny the motion; or (3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.”

Assessment of Proposed Changes to FRCP 23(e)(5)

Will the proposed changes crack down on professional objectors without stifling legitimate objections to class action settlements? The proposed changes appear to strike a good balance between deterring professional objectors and still encouraging valuable objections because the focus is on side payments obtained by objectors. Any objector trying to extract payment from class counsel for withdrawing objections or appeals will be forced to seek court approval of such an arrangement and face scrutiny from the district court. This would likely deter at least some professional objectors from filing frivolous objections or appeals. And, if they are not deterred, the district court would have the opportunity to deny improper side payments. It also appears that legitimate objectors would be protected by the proposed changes since they remain free to file objections and appeals, and will not face burdensome procedural or monetary hurdles in order to do so.

There are a few potential downsides to the proposed changes. It is unlikely that the new Rule 23(e)(5) will discourage those who raise objections in order to seek fees from the court under Federal Rule of Civil Procedure 23(h). But, those payment requests are already subject to review by the court and they do not hold up the settlement process like frivolous appeals. Another potential issue is that district court judges could give the green light to side payments in order to clear their dockets, or they may find it difficult to draw the line between legitimate and illegitimate payments.

Overall, however, the proposed changes to Rule 23(e)(5) seem like the most promising solution yet to the professional objector problem. But we will have to wait and see whether the proposed rule is actually implemented and proves to be a success.