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## **What is a Fair Price for Objector Blackmail? Class Actions, Objectors, and the 2018 Amendments to Rule 23**

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WHAT IS A FAIR PRICE FOR OBJECTOR BLACKMAIL? CLASS  
ACTION OBJECTORS AND THE 2018 AMENDMENTS TO RULE 23

by  
Elizabeth J. Cabraser\* and Adam N. Steinman\*\*

*As part of a symposium addressing what the next 50 years might hold for class actions, mass torts, and MDLs, this Article examines a recent amendment to Rule 23 that offers a new solution to the persistent problem of strategic objections. Most significantly, Rule 23 now requires the district judge to approve any payments made to class members in exchange for withdrawing or forgoing challenges to a class action settlement. Although the new provision is still in its infancy, it has already been deployed to thwart improper objector behavior and to bring for-pay objection practice out of the shadows. The 2018 changes—along with other on-the-ground developments—are important steps toward improving the class action settlement process.*

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## INTRODUCTION

In 2018, the Supreme Court adopted a major amendment to Rule 23—the most significant revision in 15 years. This Article examines the provisions in the 2018 amendment that deal with objectors to class action settlements. The most notable change in this regard involves judicial approval of any payments made to class members in exchange for withdrawing or forgoing challenges to a class action settlement. Such payments have long been controversial, in the eyes of both courts<sup>1</sup> and commentators.<sup>2</sup> The 2018 amendment creates a new legal framework regarding such payments, but it also raises important questions regarding how the new requirements should be implemented going forward.

Part I of this Article lays the groundwork by summarizing the 2003 amendment to Rule 23, which was the rulemakers' first attempt to address objections to class action settlements. Part II discusses the concerns that led to the 2018 amendment and describes the new provisions. Part III addresses some of the early efforts to implement the 2018 amendment and the amendment's effect on class action practice. Finally, Part IV considers the most challenging issue posed by the 2018

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<sup>1</sup> See, e.g., *Pearson v. Target Corp.*, 893 F.3d 980, 986 (7th Cir. 2018) (“By all accounts, selfish settlements by objectors are a serious problem.”); *In re Syngenta AG MIR 162 Corn Litig.*, 357 F. Supp. 3d 1094, 1104 (D. Kan. 2018) (noting that the attorney for the objecting class members “is a serial objector to class action settlements, with a history of attempting to extract payment for the withdrawal of objections”); *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 WL 6619983, at \*11 n.12 (N.D. Cal. Dec. 18, 2018) (“The credibility of this objector’s claim is also undermined by the fact that he attempted to solicit a \$1 million payment from Class counsel to withdraw his objection.”); *Edelson PC v. Bandas Law Firm PC*, No. 16 C 11057, 2018 WL 3496085, at \*1, \*11 (N.D. Ill. July 20, 2018) (considering a civil action against objectors who “regularly involve themselves in these case [sic] by filing what Plaintiff alleges are frivolous objections in order to leverage lucrative payoffs” and noting that the objectors “have engaged in a pattern of reprehensible conduct” and that “courts nationwide have denounced [the objectors’] behavior”); *Yeagley v. Wells Fargo & Co.*, No. C 05-03403 CRB., 2008 WL 171083, at \*2 (N.D. Cal. Jan. 18, 2008), *rev’d on other grounds*, 365 F. App’x 886 (9th Cir. 2010) (“The Court finds that class counsel simply ‘bought off’ objectors’ counsel. Approving the withdrawal of the objections under such circumstances is not in the interests of justice; instead, it will encourage attorneys to interject objections for the sole purpose of extracting a payment from class counsel.”).

<sup>2</sup> See, e.g., 7B CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1797.4 (3d ed. West 2020) (“[C]oncerns have been raised that many objectors inject themselves into class-action settlement proceedings primarily to obstruct or delay those proceedings, thereby inducing other counsel to give them a special recovery in return for dropping their objections.”); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 416, 439 (2003); Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1624–25 (2009); Bruce D. Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN’S L. REV. 949, 951 (2010); John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865, 865–67 (2012).

amendment: what sort of payments *should* a court approve in connection with an objector withdrawing its challenge to a class action settlement?

## I. THE FEDERAL RULES AND OBJECTIONS TO CLASS ACTION SETTLEMENTS: THE 2003 AMENDMENT TO RULE 23

Prior to 2003, the Federal Rules of Civil Procedure did not explicitly guarantee class members the ability to object to a proposed class action settlement. Rule 23(e) provided simply that “[a] class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.”<sup>3</sup> Although district court judges typically used their discretionary authority to give class members an opportunity to object to proposed settlements,<sup>4</sup> the rules did not formally require it.

The 2003 amendment to Rule 23 added an explicit provision that “[a]ny class member may object to a proposed settlement.”<sup>5</sup> It further mandated that such an objection “may be withdrawn only with the court’s approval.”<sup>6</sup> The Advisory Com-

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<sup>3</sup> FED. R. CIV. P. 23(e) (1966).

<sup>4</sup> See, e.g., *In re Inter-Op Hip Prosthesis Liab. Litig.*, No. 1401, 2001 WL 34131990, at \*2 (N.D. Ohio Aug. 29, 2001) (noting that the court would “set forth procedures and a timeline for: (1) notice to the class; (2) discovery as to issues relating to the propriety and fairness of the settlement; and (3) the filing of objections or comments in support of the settlement”); *In re Harrah’s Entm’t*, No. 95–3925, 1997 WL 428667, at \*1 (E.D. La. July 31, 1997) (noting that the court had laid out “procedures for filing objections to the settlement”); *Swedish Hosp. Corp. v. Sullivan*, No. 89–1693(LFO), 1991 WL 154459, at \*2 (D.D.C. May 23, 1991) (providing a procedure for filing objections to the settlement); *In re Corrugated Container Antitrust Litig.*, 556 F. Supp. 1117, 1130 (S.D. Tex. 1982) (“Any class member opposing, commenting on, or supporting the settlement agreements . . . shall file a memorandum detailing any specific objections, comments or support thereof on or before November 12, 1982 with the clerk of this court.”); see also FED. R. CIV. P. 23(d) (1966) (“[T]he court *may* make appropriate orders . . . requiring . . . the opportunity of members to signify whether they consider the representation fair and adequate, . . . or otherwise to come into the action.” (emphasis added)). *But cf.* *Mungin v. Fla. E. Coast Ry. Co.*, 318 F. Supp. 720, 732 (M.D. Fla. 1970) (reasoning that Rule 23 imposed no “necessity to inform the members of the class . . . of any specific right to object to the settlement”).

<sup>5</sup> FED. R. CIV. P. 23(e)(4)(A) (2003) (“Any class member may object to a proposed settlement, voluntary dismissal, or compromise that requires court approval under Rule 23(e)(1)(A).”); see also FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment (“Subdivision (e)(4) confirms the right of class members to object to a proposed settlement, voluntary dismissal, or compromise. The right is defined in relation to a disposition that, because it would bind the class, requires court approval under subdivision (e)(1)(C).”).

<sup>6</sup> FED. R. CIV. P. 23(e)(4)(B) (2003) (“An objection made under Rule 23(e)(4)(A) may be withdrawn only with the court’s approval.”).

mittee Notes observed that court review would “follow[] automatically if the objections are withdrawn on terms that lead to modification of the settlement with the class,” and that “[r]eview also is required if the objector formally withdraws the objections.”<sup>7</sup> In the event that an objector does not make a formal withdrawal but “simply abandons pursuit of the objection,” the Advisory Committee explained that “the court may inquire into the circumstances.”<sup>8</sup>

Although the text of the 2003 amendment did not elaborate on how a court should decide whether to approve an objection withdrawal, the Advisory Committee Notes provided some guidance. The Committee explained that approval “may be given or denied with little need for further inquiry if the objection and the disposition go only to a protest that the individual treatment afforded the objector under the proposed settlement is unfair because of factors that distinguish the objector from other class members.”<sup>9</sup> It recognized, however, that “[d]ifferent considerations may apply if the objector has protested that the proposed settlement is not fair, reasonable, or adequate on grounds that apply generally to a class or subclass.”<sup>10</sup> The Committee noted that “[s]uch objections, which purport to represent class-wide interests, may augment the opportunity for obstruction or delay.”<sup>11</sup> Nonetheless, as long as “such objections are surrendered on terms that do *not* affect the class settlement or the objector’s participation in the class settlement, the court often can approve withdrawal of the objections without elaborate inquiry.”<sup>12</sup>

Neither the 2003 amendment nor the Advisory Committee Notes indicated explicitly that the court must approve any *payments* that might be made to objectors in connection with withdrawal of their objections. Such payments raise particular concerns because they may invite what are sometimes called “strategic objections” or, less charitably, “objector blackmail” by so-called “professional objectors.”<sup>13</sup> Interestingly, an earlier draft of the 2003 Advisory Committee Notes would have placed that concern front and center: “Class-action practitioners often assert that a group of ‘professional objectors’ has emerged, appearing to present objections for strategic purposes unrelated to any desire to win significant improvements in the settlement. An objection may be ill-founded, yet exert a powerful strategic force.”<sup>14</sup>

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<sup>7</sup> FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> Courts have functionally defined “professional objectors” as those “who seek personal gain by obstructing the case.” *Dennings v. Clearwire Corp.*, 928 F. Supp. 2d 1270, 1271 (W.D. Wash. 2013). The stock judicial responses to professional objectors have included monetary sanctions, and, as in *Clearwire*, the imposition of appeals bonds to discourage obstructive appeals. *See id.* at 1272.

<sup>14</sup> Memorandum from David F. Levi, Chair, Advisory Comm. on Civil Rules, to Hon.

The draft language urged courts to “be vigilant to avoid practices that may encourage unfounded objections” and not to “reward an objection merely because it succeeds in winning some change in the settlement; cosmetic changes should not become the occasion for fee awards that represent acquiescence in coercive use of the objection process.”<sup>15</sup> The draft also deemed it problematic “if settlement of an objection provides the objector alone terms that are more favorable than the terms generally available to other class members,” explaining that “[an] objector may not seize for private advantage the strategic power of objecting.”<sup>16</sup> Accordingly, “[t]he court should approve terms more favorable than those applicable to other class members only on a showing of a reasonable relationship to facts or law that distinguish the objector’s position from the position of other class members.”<sup>17</sup>

This draft language was ultimately deleted from the final Advisory Committee Notes on the 2003 amendment.<sup>18</sup> Perhaps for that reason, federal courts were not entirely uniform on whether—and under what circumstances—their approval of an objection withdrawal required an inquiry into any payment or other benefit provided to the objector in exchange for that withdrawal.<sup>19</sup>

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Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure 54–55 (May 14, 2001).

<sup>15</sup> *Id.* at 55.

<sup>16</sup> *Id.* at 55–56.

<sup>17</sup> *Id.* at 56.

<sup>18</sup> Memorandum from David F. Levi, Chair, Advisory Comm. on Civil Rules, to Hon. Anthony J. Scirica, Chair, Comm. on Rules of Practice & Procedure 274–75, 277 (May 20, 2002).

<sup>19</sup> Compare, e.g., *Cody v. SoulCycle Inc.*, No. 15-6457 MWF (JEMx), 2017 WL 6550682, at \*5 (C.D. Cal. Oct. 3, 2017) (stating “[b]oth Objectors indicate that their reason for withdrawing their Objections is that, after mediation, they reached settlements in their separate lawsuits against SoulCycle, and that the terms of those settlements included withdrawal of their Objections in this action” and that “this explanation is likely sufficient for [the court] to approve the withdrawals” without inquiring into any details about the payments), and *Glass v. UBS Fin. Servs., Inc.*, No. C-06-4068 MMC, 2007 WL 160948, at \*2 (N.D. Cal. Jan. 17, 2007) (allowing withdrawal of an objection “on terms that [did] not affect the class settlement or [the objector’s] participation therein” where the objector “did obtain a personal benefit, forgiveness of a loan, in exchange for withdrawing” without inquiring into the appropriateness of the payment), with *Yeagley v. Wells Fargo & Co.*, No. C 05-03403 CRB, 2008 WL 171083, at \*2 (N.D. Cal. Jan. 18, 2008), *rev’d on other grounds*, 365 F. App’x 886 (9th Cir. 2010) (“The Court does not approve the purported withdrawal of the objections. . . . The Court finds that class counsel simply ‘bought off’ objectors’ counsel. Approving the withdrawal of the objections under such circumstances is not in the interests of justice; instead, it will encourage attorneys to interject objections for the sole purpose of extracting a payment from class counsel.”), and *In re Elec. Carbon Prods. Antitrust Litig.*, 447 F. Supp. 2d 389, 397 (D.N.J. 2006) (noting that the 2003 amendment “would seem to give the court discretion to control the conditions upon which an objection may be withdrawn to assure that the erstwhile objector is not afforded an undue advantage or reward for tactics that ‘augment the opportunity for obstruction or delay’” (quoting FED. R. CIV. P. 23 advisory committee’s note to 2003 amendment)).

The 2003 amendment to Rule 23 also did not address the objector's decision whether to *appeal* the district court's approval of a class action settlement despite the objection.<sup>20</sup> Under the 2003 amendment, a district court must approve the withdrawal of an objection, but no judicial approval was required for an objector's decision to forgo an appeal—or to withdraw such an appeal after it was filed. This was potentially a significant omission, because the risks and delay inherent in *appellate* review of a class action settlement gave “strategic objectors” even greater leverage.<sup>21</sup> The 2003 Advisory Committee Notes did recognize, however, that if an objector *does* appeal, “[t]he court of appeals may undertake review and approval of a settlement with the objector” or “*may* remand to the district court to take advantage of the district court's familiarity with the action and settlement.”<sup>22</sup>

The absence of explicit advice on objectors from the Rule and the Advisory Committee Notes themselves led district courts and practitioners to innovate in addressing and managing objectors. Some district courts allowed class settlement proponents to take discovery of objectors to determine whether such objectors had standing as class members to make their objection; to consider the history of certain objectors (or their lawyers) “as serial objectors” whose objections should be viewed with skepticism or rejection; and, on unusual occasions, to impose sanctions or appellate bonds as practical ways to foreclose objectors' efforts to hold settlements hostage on appeal.<sup>23</sup> The 2004 edition of the Federal Judicial Center's *Manual for Complex Litigation* dedicated a section of its Class Actions chapter to the “Role of Objectors in Settlement.”<sup>24</sup> This section highlighted the “useful role” that objectors

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<sup>20</sup> In *Devlin v. Scardelletti*, 536 U.S. 1, 14 (2002), the Supreme Court confirmed that a class member who objects to a settlement has standing to challenge the settlement on appeal if the district court approves it, regardless of whether the objector has formally intervened in the lawsuit. *Id.* at 14 (“We hold that nonnamed class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening.”).

<sup>21</sup> See, e.g., Brunet, *supra* note 2, at 428–29; Fitzpatrick, *supra* note 2, at 1624–25.

<sup>22</sup> FED. R. CIV. P. 23 advisory committee's note to 2003 amendment (emphasis added).

<sup>23</sup> See, e.g., *Cody v. SoulCycle, Inc.*, No. 15-06457-MWF (JEMx), 2017 WL 8811115, at \*1–2 (C.D. Cal. Dec. 7, 2017) (ordering repeat *pro se* objector to post an appeal bond of \$1,000 to proceed with appeal on objection that district court determined to be “without merit”); *Garber v. Office of the Comm'r of Baseball*, No. 12-CV-03704 (VEC), 2017 WL 752183, at \*6 (S.D.N.Y. Feb. 27, 2017) (describing the objector's conduct as “gravely concerning” and ordering the objector “to provide a copy of this opinion to any local counsel he seeks to engage for any case pending in the Southern District of New York” but declining to impose Rule 11 sanctions); *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 295 F.R.D. 112, 159, n.40 (E.D. La. 2013) (rejecting a specious objection by an objector deemed “serial objector” by several courts); *In re Cathode Ray Tube (CRT) Antitrust Litig.*, 281 F.R.D. 531, 532, 534 (N.D. Cal. 2012) (requiring the objector to sit for deposition).

<sup>24</sup> FED. JUDICIAL CTR., *MANUAL FOR COMPLEX LITIGATION* (FOURTH) § 21.643 (2004) [hereinafter *MANUAL FOR COMPLEX LITIGATION*].

could play, while cautioning that “they might, however, have interests and motivations vastly different from other attorneys and parties,” and observed that some objections “are made for improper purposes, and benefit only the objectors and their attorneys (e.g., by seeking additional compensation to withdraw even ill-founded objections).”<sup>25</sup> Focusing on the practical implications of strategic objections, the *Manual* noted that objections:

even of little merit, can be costly and significantly delay implementation of a class settlement. Even a weak objection can have more influence than its merits justify in light of the inherent difficulties that surround review and approval of a class settlement. . . . A challenge for the judge is to distinguish between meritorious objections and those advanced for improper purposes.<sup>26</sup>

As the Seventh Circuit recently held, the equitable common benefit doctrine can apply to objectors who add to the class relief, justifying an “incentive award.”<sup>27</sup>

While highlighting the problem and prescribing some procedural responses, such as taking discovery, the *Manual* largely left courts to their own devices in dealing with objectors. As the Rule 23 subcommittee of the Advisory Committee began to study potential amendments to Rule 23 in the several years preceding the resulting 2018 revision to Rule 23(e), its members found that a focus on the objector problem had not only revived from the earlier pre-2003 amendment cycle but had become the single most reported problem with the current rule, as identified by plaintiff attorneys, defense attorneys, and judges alike, in the dozens of meetings and conferences in which the subcommittee participated as part of its pre-amendment fact-finding.<sup>28</sup>

## II. SETTLEMENT OBJECTIONS UNDER THE 2018 AMENDMENT

Aside from a non-substantive revision that occurred as part of the 2007 restyling of the Federal Rules of Civil Procedure,<sup>29</sup> Rule 23’s provisions on settlement objectors remained the same until 2018. The 2018 amendment made a number of changes. First, it gave more detailed instructions regarding what a class member’s

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<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *In re Sw. Airlines Voucher Litig.*, 898 F.3d 740, 746 (7th Cir. 2018).

<sup>28</sup> ADVISORY COMM. ON CIVIL RULES 67 (Nov. 3–4, 2016), [https://www.uscourts.gov/sites/default/files/2016-11-civil-agenda\\_book\\_0.pdf](https://www.uscourts.gov/sites/default/files/2016-11-civil-agenda_book_0.pdf).

<sup>29</sup> Among other things, the 2007 amendment relocated the provisions on settlement objectors from subdivision (e)(4) to subdivision (e)(5). Between 2007 and 2018, Rule 23(e)(5) provided as follows: “Any class member may object to the proposal if it requires court approval under this subdivision (e); the objection may be withdrawn only with the court’s approval.” FED. R. CIV. P. 23(e)(5) (2007).



objection must contain. Rule 23(e)(5)(A) instructs that an objection must “state with *specificity* the grounds for the objection” and indicate whether the objection “applies only to the objector, to a specific subset of the class, or to the entire class.”<sup>30</sup> The Advisory Committee Notes further explain that “objections must provide sufficient specifics to enable the parties to respond to them and the court to evaluate them,” and that “[f]ailure to provide needed specificity may be a basis for rejecting an objection.”<sup>31</sup> The Advisory Committee recognized, however, that “[c]ourts should take care . . . to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.”<sup>32</sup>

Second, Rule 23(e)(5)(B) replaced the 2003 language regarding withdrawal of objections with the following: “Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with: (i) forgoing or withdrawing an objection, or (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.”<sup>33</sup> This amendment both shifts and expands the role of the district court regarding the withdrawal of settlement objections. It omits, presumably as impractical and unenforceable, the 2003 requirement that *every* withdrawal of an objection must be approved by the court.<sup>34</sup> Instead, the rule now requires explicit approval—after a hearing—of any *payment* made in connection with the withdrawal of an objection.<sup>35</sup> Such payments must also be approved if they are made in connection with a class member *forgoing* an objection at the district court level.<sup>36</sup> And such payments must be approved if they are made in connection with an objector’s *appeal* from the district court’s approval of a settlement—either forgoing, dismissing, or abandoning such an appeal.<sup>37</sup>

Third—in light of the requirement that payments to objectors must be approved with respect to appeals—the 2018 amendment provides that “[i]f approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.”<sup>38</sup> Rule 62.1 governs a district court’s handling of motions for which it “lacks

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<sup>30</sup> FED. R. CIV. P. 23(e)(5)(A) (2018) (emphasis added).

<sup>31</sup> Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civil Rules, to Hon. David G. Campbell, Chair, Comm. on Rules of Practice & Procedure 26 (May 18, 2017).

<sup>32</sup> *Id.*

<sup>33</sup> FED. R. CIV. P. 23(e)(5)(B).

<sup>34</sup> See Memorandum from Hon. John D. Bates, *supra* note 31, at 26 (“The rule is amended to remove the requirement of court approval for every withdrawal of an objection. An objector should be free to withdraw on concluding that an objection is not justified.”).

<sup>35</sup> *Id.* (“[T]he amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved.”).

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> FED. R. CIV. P. 23(e)(5)(C).

authority to grant because of an appeal that has been docketed and is pending.”<sup>39</sup>

The 2018 provisions regarding payments made to objectors dealt with some of the concerns that had not been squarely addressed by the 2003 amendment. As an initial matter, the 2018 Advisory Committee Notes highlighted the concerns regarding strategic, self-interested settlement objections that had been raised in the earlier Rule 23 amendment cycle but ultimately omitted from the 2003 note.<sup>40</sup> These concerns had continued to trouble practitioners and courts and were raised repeatedly during the Advisory Committee hearings on what became the 2018 amendments.<sup>41</sup> Although the Advisory Committee recognized that “[g]ood-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2)” and that “[i]t is legitimate for an objector to seek payment for providing such assistance under Rule 23(h),” it also observed that “some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process.”<sup>42</sup> The Advisory Committee went on to describe precisely the dynamics that incentivize what is often called “objector blackmail”:

At least in some instances, it seems that objectors—or their counsel—have sought to obtain consideration for withdrawing their objections or dismissing appeals from judgments approving class settlements. And class counsel sometimes may feel that avoiding the delay produced by an appeal justifies providing payment or other consideration to these objectors. Although the payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.<sup>43</sup>

Thus, the Committee explained that the 2018 amendment shifted the focus to the payment of *consideration* in exchange for withdrawing or forgoing an objection to a class action settlement.<sup>44</sup> And it emphasized the importance of requiring approval, unlike under the 2003 amendment, for payments made in connection with

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<sup>39</sup> FED. R. CIV. P. 62.1(a) (allowing the district court either to “(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”).

<sup>40</sup> See ADVISORY COMM. ON CIVIL RULES 35 (Apr. 14–15, 2016), [https://www.uscourts.gov/sites/default/files/2016-04-civil-agenda\\_book\\_0.pdf](https://www.uscourts.gov/sites/default/files/2016-04-civil-agenda_book_0.pdf).

<sup>41</sup> *Id.*; see also ADVISORY COMM. ON CIVIL RULES 151, 157 (Apr. 25–26, 2017), [https://www.uscourts.gov/sites/default/files/2017-04-civil-agenda\\_book.pdf](https://www.uscourts.gov/sites/default/files/2017-04-civil-agenda_book.pdf); ADVISORY COMM. ON CIVIL RULES, *supra* note 28, at 67.

<sup>42</sup> Memorandum from Hon. John D. Bates, *supra* note 31, at 26.

<sup>43</sup> *Id.* at 35.

<sup>44</sup> *Id.* at 26 (“Because the concern only applies when consideration is given in connection with withdrawal of an objection, however, the amendment requires approval under Rule 23(e)(5)(B)(i) only when consideration is involved.”).

an objector forgoing *appellate* review of a district court's decision to approve a class action settlement: "Because an appeal by a class-action objector may produce much longer delay than an objection before the district court, it is important to extend the court-approval requirement to apply in the appellate context."<sup>45</sup> This need to address objector appeals was a driving force behind the 2018 amendment.<sup>46</sup> Justice Brandeis's vivid image of sunlight as the best disinfectant apparently informed the emphasis on a visible process for evaluating the actual value an objection adds to a class settlement or the settlement approval process.<sup>47</sup>

### III. ADDRESSING IMPROPER OBJECTOR BEHAVIOR UNDER THE 2018 AMENDMENT

This Part discusses how improper objector behavior can be addressed under the 2018 amendment. Section A analyzes the 2018 amendment's most direct response to the problem of objector blackmail—the requirement of judicial approval for any payments to objectors in connection with withdrawing or forgoing their challenges to class action settlements. Section B highlights other practices that can deter or mitigate improper objector behavior.

#### A. *Approving Payments to Settlement Objectors*

Given the 2018 amendment's recent vintage, there are few judicial decisions (at the time of this writing) applying the new provision requiring judicial approval of payments to objectors.<sup>48</sup> One recent decision, by Judge Lorna Schofield of the

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<sup>45</sup> *Id.* at 26–27.

<sup>46</sup> See Memorandum from Hon. John D. Bates, Chair, Advisory Comm. on Civil Rules, to Hon. Jeffrey S. Sutton, Chair, Comm. on Rules of Practice & Procedure 11 (Dec. 11, 2015), [https://www.uscourts.gov/sites/default/files/2015-12-11-cv\\_rules\\_committee\\_report\\_0.pdf](https://www.uscourts.gov/sites/default/files/2015-12-11-cv_rules_committee_report_0.pdf) ("Since the delay that can result from an appeal is much greater than the delay that would result from an ill-founded objection, the omission from the 2003 amendment of any ongoing approval requirement has—in at least some cases—produced unfortunate pressures on class counsel to accede to objector counsel's demands.").

<sup>47</sup> LOUIS BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 62 (1914) ("Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.").

<sup>48</sup> Several opinions, however, have recognized the significance of this part of the 2018 amendment without applying it, either because it had not yet come into effect or was not directly relevant to the particular issue being decided. See *Pearson v. Target Corp.*, 893 F.3d 980, 987 (7th Cir. 2018) ("The pending amendments to Rule 23 may solve the problem prospectively, but that does nothing for the case before us."); *Hefler v. Wells Fargo & Co.*, No. 16-cv-05479-JST, 2018 WL 6619983, at \*11 n.12 (N.D. Cal. Dec. 18, 2018) ("The Advisory Committee specifically remarked on this predatory practice and amended Rule 23 to provide additional safeguards."); *Edelson PC v. Bandas Law Firm PC*, No. 16 C 11057, 2018 WL 3496085, at \*11 (N.D. Ill. July 20, 2018) ("If allowed to go into effect, the new Rule would require district court

Southern District of New York, will likely be an influential guide as courts apply that provision going forward. The decision involved objectors in *In re Foreign Exchange Benchmark Rates Antitrust Litigation (Forex)*.<sup>49</sup> They had appealed Judge Schofield's award of attorneys' fees to class counsel to the Second Circuit, arguing that the award was too high.<sup>50</sup> With oral argument imminent, the objectors reached an agreement with class counsel under which they would dismiss their appeal in exchange for a payment of \$300,000 to objectors' counsel.<sup>51</sup> The payment would come from class counsel's fee award rather than the settlement fund.<sup>52</sup>

Under the new language in Rule 23(e)(5)(B), such a payment required approval by the district court. Because the case was already on appeal, however, the parties used Rule 62.1 to obtain an indicative ruling from Judge Schofield.<sup>53</sup> In a brief but forceful opinion, she denied approval. Judge Schofield recognized that this sort of agreement to pay off an objector was "precisely what the court-approval provision in Rule 23(e)(5)(B) is meant to address,"<sup>54</sup> emphasizing the 2018 Advisory Committee Notes' concern that "some objectors may be seeking only personal gain" and that paying such objectors "perpetuates a system that can encourage objections advanced for improper purposes."<sup>55</sup> Somewhat more pointedly, Judge Schofield observed: "The Objector has appealed the settlement on the basis that the Class Counsel fee award was too great. However, the Objector is willing to withdraw his appeal and voluntarily dismiss it with prejudice, so long as Objector's counsel shares in the supposedly excessive funds awarded to Class Counsel."<sup>56</sup>

Judge Schofield also found that the objectors had provided no benefit to the class that would justify payment: "The only benefit to class members is to avoid further delay in the distribution of the settlement fund that the Objector already has

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approval before any objector can withdraw an objection or appeal in exchange for money or other consideration."); see also *Rougvie v. Ascena Retail Grp., Inc.*, No. 15-724, 2019 WL 944811, at \*17 & n.37 (E.D. Pa. Feb. 21, 2019) (recognizing that the 2018 amendment "require[s] the trial court to have a hearing before someone can payoff [sic] the objector-appellant to forego or withdraw an objection or dismiss an appeal" but concluding that the amendment did not apply to payments that had been made prior to its December 1, 2018 effective date).

<sup>49</sup> *In re Foreign Exch. Benchmark Rates Antitrust Litig. (Forex)*, No. 13 Civ. 7789 (LGS), 2019 WL 5256957, at \*1 (S.D.N.Y. Oct. 11, 2019).

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* \$5,000 of this amount would go directly to one of the objectors as an incentive award. See *id.*

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* (citing FED. R. CIV. P. 23(e)(5)(C)); see also FED. R. CIV. P. 62.1(a) (authorizing the district court, among other things, to "deny the motion" or "grant the motion if the court of appeals remands for that purpose").

<sup>54</sup> *Forex*, 2019 WL 5256957, at \*1.

<sup>55</sup> *Id.* (quoting FED. R. CIV. P. 23 advisory committee's note to 2018 amendment).

<sup>56</sup> *Id.*

caused by filing the appeal.”<sup>57</sup> And Judge Schofield rejected the objectors’ argument that she had adopted their objection “in part” by awarding attorneys’ fees amounting to 13% of the settlement fund rather than the 16.5% proposed by class counsel.<sup>58</sup> As she explained, it was “evident from the fee award decision” that “the amount of the award had nothing to do with the Objector’s objection. That the Court’s fee award minimally correlates with the premise of the objection should not be construed as helpful assistance from the Objector.”<sup>59</sup>

In conclusion, Judge Schofield emphasized “the precedential concern associated with granting the instant motion.”<sup>60</sup> Even though class counsel had “expressed its belief that the Agreement would be in the best interest of the Settlement Classes,” to give the agreement judicial approval “would serve only to encourage objectors or their attorneys to extract this type of payment, and make a living as serial objectors simply by filing frivolous appeals and thereby slowing down the execution of settlements.”<sup>61</sup> It would “make this Court complicit in a practice that undermines the integrity of class action procedure, and needlessly provide putative objectors with potentially dubious claims precedential support for a practice of fee extraction.”<sup>62</sup> Other district courts have now had reason to utilize the indicative ruling procedure to effectuate remand for the purpose of considering objectors’ arguments.<sup>63</sup>

Judge Schofield’s approach is consistent with another source of guidance—a set of guidelines and best practices regarding the 2018 amendment that has been published by the Bolch Judicial Institute at Duke Law School.<sup>64</sup> The Bolch guidelines urge that “[a] court should interpret the language of Rule 23(e)(5) broadly and liberally to accomplish its stated intent to avoid perpetuating a system that facilitates objections advanced for improper purposes.”<sup>65</sup> They also state that “[t]he parties

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<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at \*2.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* (quoting *In re Polyurethane Foam Antitrust Litig.*, 178 F. Supp. 3d 635, 639 (N.D. Ohio 2016) (brackets and internal quotation marks omitted)).

<sup>62</sup> *Id.* Because Judge Schofield refused to approve the payment, the Second Circuit appeal proceeded as scheduled; just two and a half weeks after oral argument, the Second Circuit issued a summary order rejecting the objectors’ challenge to the award of attorneys’ fees to class counsel. See *Kornell v. Haverhill Ret. Sys.*, No. 18-3673-cv, 2019 WL 5681336, at \*1–2 (2d Cir. Nov. 1, 2019).

<sup>63</sup> See, e.g., Order Granting in Part Motion for Indicative Ruling, *In re Lithium Ion Batteries Antitrust Litig.*, No. 4:13-md-02420-YGR (DMR) (N.D. Cal. 2019) (No. 2567).

<sup>64</sup> BOLCH JUDICIAL INST., DUKE LAW SCH., GUIDELINES AND BEST PRACTICES IMPLEMENTING 2018 AMENDMENTS TO RULE 23 CLASS ACTION SETTLEMENT PROVISIONS ii (2018), <https://judicialstudies.duke.edu/wp-content/uploads/2018/09/Class-Actions-Best-Practices-Final-Version.pdf> [hereinafter BOLCH GUIDELINES].

<sup>65</sup> *Id.* at 21.

must disclose the terms of all agreements between objector and the parties”<sup>66</sup> and that “[a] court should inquire into communications that class counsel may have had with individuals who decided not to pursue (forgo) objections.”<sup>67</sup>

As for the scope of Rule 23(e)(5), the Bolch guidelines assert that “[w]hat constitutes payment or other consideration to an objector . . . should be broadly construed.”<sup>68</sup> Such consideration would include “immediate and deferred or future benefits,” “[n]onmonetary consideration, like preferred future business relationships or other financial commitments,” and “[p]ayments made to organizations affiliated with the objector.”<sup>69</sup>

Perhaps the hardest question prompted by the 2018 amendments is how to decide whether to approve a particular payment that is made in connection with an objector forgoing or withdrawing a challenge to a class action settlement. On that issue, the Bolch guidelines state that payments should be “based on the value that the objection provides to the class.”<sup>70</sup> A court may not, however, “consider as a benefit to the class members the time that would otherwise be spent addressing the withdrawn objection or appeal.”<sup>71</sup> Likewise, “[t]he sole fact that the withdrawal of an objection or dismissal of an appeal will expedite distribution of the settlement funds does not justify payment to withdraw an improper objection or dismiss an improper appeal.”<sup>72</sup>

When the payment takes the form of attorneys’ fees to the objector’s counsel, the Bolch guidelines state that “[t]he court should evaluate whether the objection added value to the class and therefore justifies the proposed payment.”<sup>73</sup> The court “need not award a fee to an objector merely because the objection assisted the court in understanding or evaluating the settlement.”<sup>74</sup> But an award “may be justified” when “the objection actually enhanced the class recovery by improving the settlement or otherwise conferring a benefit to the class.”<sup>75</sup> Such a benefit could include objections that illuminate correctible flaws or issues with a settlement or that otherwise assist the court in its independent evaluation of the settlement.<sup>76</sup>

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<sup>66</sup> *Id.* at 25.

<sup>67</sup> *Id.* at 26.

<sup>68</sup> *Id.* at 25.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*; see also *Rougvie v. Ascena Retail Group, Inc.*, 2019 WL 944811, \*17 & n.36 (E.D. Pa. Feb. 21, 2019) (quoting this language).

<sup>73</sup> BOLCH GUIDELINES, *supra* note 64, at 26.

<sup>74</sup> *Id.* at 27.

<sup>75</sup> *Id.*

<sup>76</sup> See, e.g., *In re Nat’l Collegiate Athletic Ass’n Student-Athlete Concussion Injury Litig.*, 332 F.R.D. 202, 229 (N.D. Ill. 2019) (incentive award of \$2,500 granted to lead settlement objector for critiques of settlement that “meaningfully assisted the Court in its analysis”) (appeal

Accordingly, the Bolch guidelines indicate that a payment should never be approved in connection with a class member's decision to forgo an objection or appeal—a simple “no *quid pro quo*” principle.<sup>77</sup> The text of Rule 23 requires court approval for such a payment,<sup>78</sup> and thereby “anticipates situations in which a professional objector informally or otherwise threatens to object unless the objector receives payment in return for assurances not to file the objection.”<sup>79</sup> The Bolch guidelines state that such a payment “would clearly be inconsistent with the rule’s stated purpose to avoid perpetuating a system that encourages objections advanced for an improper purpose.”<sup>80</sup> This view follows from the general principle—summarized above—that payments should be approved only to the extent that the objector provided some value or benefit to the class.<sup>81</sup>

*B. Other Ways to Address Improper Objector Behavior and to Improve Class Settlements*

The 2018 amendment’s requirement that the district court approve any payment made to an objector in connection with withdrawing or forgoing an objection or appeal is not the only way to deter or mitigate improper objections. Some recent major class settlements feature a term, colloquially called “quick-pay,” under which the claims payment process occurs despite appeals. Such provisions require individual releases to be signed by class members in return for their payments. This feature allows defendants to gain the benefit of such releases notwithstanding the prospect—usually remote—of the settlement being overturned. It also frees the class from the hostage situation that can be created by opportunistic objectors, enabling class members to receive their payments upon approval by the district court, and sometimes during the approval period itself. In the \$10+ billion class action settlement of the Volkswagen “Clean Diesels” multidistrict litigation, for example, approximately 90% of class members had made, and been paid, claims by the time the court of appeals affirmed the settlement.<sup>82</sup> In the multi-billion dollar class action settlement of economic loss and property damage claims arising from the Deepwater Horizon drilling rig fire, explosion, and oil spill, class members could make claims

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pending).

<sup>77</sup> BOLCH GUIDELINES, *supra* note 64, at 25.

<sup>78</sup> FED. R. CIV. P. 23(e)(5)(B).

<sup>79</sup> BOLCH GUIDELINES, *supra* note 64, at 26.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 21; *see supra* notes 72–75 and accompanying text.

<sup>82</sup> *In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 605, 610, 619 (9th Cir. 2018), *cert. denied sub nom. Fleshman v. Volkswagen, AG*, 139 S. Ct. 2645 (2019).

and be paid during the pendency of the approval process itself.<sup>83</sup> Hundreds of thousands did so.<sup>84</sup>

The use of “quick-pay” provisions addresses another persistent judicial and policy concern: promoting meaningful levels of participation in class actions so that they may achieve their compensatory and societal purposes. The “take rate,” or claims level, has become all-important in class action settlement administration, with courts imposing ever-more-specific reporting and accounting requirements to police and ensure that the funds made available to the class in a class action settlement are actually delivered to the class members themselves. Experience has demonstrated that participation levels improve when class members are motivated to make claims, and the immediacy of payment, without a wait of months or years for the exhaustion of appeals by a few discontented class members, is a prime motivator.<sup>85</sup>

Greater care at the preliminary stage of the settlement approval process can also mitigate improper objector behavior. Even before the 2018 amendment, judges had typically conducted a preliminary inquiry into the fairness of a proposed settlement in order to decide whether notice to the class members and a full approval hearing were warranted.<sup>86</sup> The 2018 amendment codifies this “front-loading” practice by requiring settling parties to “provide the court with information sufficient to enable it to determine whether to give notice of the proposal to the class”<sup>87</sup> and to make a preliminary “showing that the court will likely be able to . . . approve the proposal” before the class is notified about the settlement and approval hearing.<sup>88</sup> This newly-articulated Rule 23(e)(1)(B)(i) standard is higher than that previously suggested by the *Manual for Complex Litigation*, under which a proposed settlement must simply be “within the range” of possible final approval.<sup>89</sup> The “formal fairness hearing” at the end of the process, after notice had gone out and any objections had been raised, was the main event.

Taking a page from the amended Rules’ enhanced scrutiny of class settlements,

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<sup>83</sup> *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 910 F. Supp. 2d 891, 903 (E.D. La. 2012) (“An unusual feature of the Settlement Agreement . . . is that class members have been able to submit claims and receive payments prior to the Court’s grant of final approval, provided that they sign an individual release.”), *aff’d*, 739 F.3d 790 (5th Cir. 2014).

<sup>84</sup> Matt Sledge, *A Near-Decade After BP Oil Spill, Now-Public Payout Claims Run Gamut — Including an Ex-NBA Star*, NOLA.COM (July 2, 2019), [https://www.nola.com/news/business/article\\_872a7ed6-9cf3-11e9-9055-7b30798f21b4.html](https://www.nola.com/news/business/article_872a7ed6-9cf3-11e9-9055-7b30798f21b4.html).

<sup>85</sup> For an account of contemporary class actions achieving high participation levels and the procedures devised by courts in such cases, including Volkswagen “Clean Diesels,” *Deepwater Horizon* and the *NFL Concussion* litigation, see Elizabeth J. Cabraser & Samuel Issacharoff, *The Participatory Class Action*, 92 N.Y.U. L. REV. 846, 865 (2017).

<sup>86</sup> See MANUAL FOR COMPLEX LITIGATION, *supra* note 24, § 21.632.

<sup>87</sup> FED. R. CIV. P. 23(e)(1)(A).

<sup>88</sup> FED. R. CIV. P. 23(e)(1)(B)(i).

<sup>89</sup> MANUAL FOR COMPLEX LITIGATION, *supra* note 24, § 21.632 n.976.



especially at the preliminary stage, the Northern District of California has issued an extensively updated version of its “Procedural Guidance for Class Action Settlements.”<sup>90</sup> The current version of this guide was issued on December 5, 2018, essentially contemporaneously with the effective date of the 2018 amendments. Notably, it now prescribes that information about the settlement provisions and terms—that formerly had provided fodder for objections—must be detailed and explained to the court at the preliminary stage so that the court may address and consider them.<sup>91</sup> These include differences between the definition and scope of the settlement class and the class proposed in the underlying litigation, differences in the scope of the claims asserted and the class release, the proposed allocation plan for the settlement fund and:

in light of Ninth Circuit case law disfavoring reversions, whether and under what circumstances money originally designated for class recovery will revert to any defendant, the potential amount or range of amounts of any such reversion, and an explanation as to why a reversion is appropriate in the instance case.<sup>92</sup>

The Northern District’s procedural guidance additionally provides a recommended procedure for judicial control of the objection process itself:

**OBJECTIONS** – Objections must comply with Federal Rule of Civil Procedure 23(e)(5). The notice should instruct class members who wish to object to the settlement to send their written objections only to the court. All objections will be scanned into the electronic case docket and the parties will receive electronic notices of filings. The notice should make clear that the court can only approve or deny the settlement and cannot change the terms of the settlement. The notice should clearly advise class members of the deadline for submission of any objections.<sup>93</sup>

The guidance goes so far as to suggest specific language for inclusion in class action settlement notices. The recommended language provides:

You can ask the Court to deny approval by filing an objection. You can’t ask the Court to order a different settlement; the Court can only approve or reject the settlement. If the Court denies approval, no settlement payments will be sent out and the lawsuit will continue. If that is what you want to happen, you must object.

Any objection to the proposed settlement must be in writing. If you file a

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<sup>90</sup> See *Procedural Guidance for Class Action Settlements*, U.S. DIST. CT. N.D. CAL. (Dec. 5, 2018), <https://cand.uscourts.gov/forms/procedural-guidance-for-class-action-settlements/>.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

timely written objection, you may, but are not required to, appear at the Final Approval Hearing, either in person or through your own attorney. If you appear through your own attorney, you are responsible for hiring and paying that attorney. All written objections and supporting papers must (a) clearly identify the case name and number . . . (b) be submitted to the Court either by mailing them to the Class Action Clerk, United States District Court for the Northern District of California . . . or by filing them in person at any location of the United States District Court for the Northern District of California, and (c) be filed or postmarked on or before \_\_\_\_\_.<sup>94</sup>

The Northern District of California's guidance, which has gained the attention of other courts and practitioners across the country, aims to clarify and make the objection process public and transparent, both to bring it more directly under court control and to reduce objections that are strategically made, ill-founded, or simply uninformed.

Early experience with settlements approved under amended Rule 23(e)'s "front-loading" procedure indicates a reduction in inappropriate objector practices. This has been observed even in widely publicized, high stakes class actions in which, historically, widespread public attention has elicited attacks by serial objectors. For example, in the 2016 Volkswagen "*Clean Diesels*" litigation, a \$10 billion class settlement for owners and lessees of 2.0 liter diesel Volkswagen cars—a settlement that provided essentially 100% recovery for class members—sparked hundreds of objections, with appeals by a handful of objectors.<sup>95</sup> Because of the settlement's "quick-pay" provisions, these appeals did not disrupt the process of vehicle buy-back and class member compensation, and the settlement was affirmed by the Ninth Circuit.<sup>96</sup> The "*Clean Diesels*" settlement approval cycle preceded the enactment of the 2018 amendments.

A subsequent and similar settlement, likewise involving allegations of undisclosed emissions "cheating," was settled after the Rule 23(e) 2018 amendments, in the same district, in similarly highly publicized litigation. In *In re Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, and Products Liability Litigation*, the settlement approval process was conducted in compliance with the new Rule 23(e) and the Northern District's procedural guide; there were virtually no objections, and no appeals were taken.<sup>97</sup> While it is too early to tell whether the perceived and dramatic

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<sup>94</sup> *Id.*

<sup>95</sup> *In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig.*, 895 F.3d 597, 605, 610 (9th Cir. 2018), *cert. denied sub nom. Fleshman v. Volkswagen*, AG, 139 S. Ct. 2645 (2019).

<sup>96</sup> *Id.* at 605.

<sup>97</sup> *In re Chrysler-Dodge-Jeep Ecodiesel Mktg., Sales Practices, & Prods. Liab. Litig.*, No. 17-md-02777-EMC, 2019 WL 2554232, at \*1–2 (N.D. Cal. May 3, 2019).

downturn in the level of objections to class action settlements will continue, it is apparent that the Rule's prohibition on quiet objector buy-offs and judicial attention to enforcing transparency in the objection process will discourage and reduce objections made for purposes of payoff.

There is an additional and important side effect of the Rule 23(e) amendments and of the guidelines that have sprung up to elaborate upon them for the benefit of courts and practitioners. They have highlighted common kinds of objections to class settlements, both as made by "serial" objectors and (more importantly) as raised by the courts themselves, such as insistence upon meaningful and comprehensive notice and the avoidance, where possible, of "reversions" of the settlement fund to the defendant.<sup>98</sup> These insights have given class settlement proponents additional leverage in insisting upon terms that protect and promote the interests of the class. Formerly, the details of the class notice programs were sometimes an afterthought, and the notice budget was sometimes minimized if it was deducted from the class fund instead of being paid for separately by the defendant. In extreme cases, notice programs were built to a price, not a purpose, and claims levels suffered as a consequence. Now, for example, settlement proponents must report in detail to the court, at the preliminary stage, how and why they selected a particular notice provider, precisely what media will be used to publicize the settlement, and how they have designed any claims process to be simple, efficient, and as claimant-friendly as possible.<sup>99</sup>

District courts have taken the amendment's invitation to "front-load" the settlement approval process seriously. The Rule 23(e)(1)(B) requirement that giving notice of a proposed class settlement "is justified by the parties' showing that the court will likely be able" to approve the settlement and certify the class for settlement purposes imposes a higher burden on the preliminary approval/class notice decision

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<sup>98</sup> The Ninth Circuit, for example, considers reversion clauses, under which any unclaimed residue of a class action settlement fund reverts to the defendant, to constitute a "red flag" requiring additional judicial scrutiny. *Cy pres* clauses, under which such residue, or sometimes essentially the entirety of the settlement itself, is directed to charitable or public interest foundations benefitting the class indirectly, will also subject a settlement to heightened scrutiny. See *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 947–48 (9th Cir. 2011).

<sup>99</sup> For example, at the preliminary stage, the Northern District of California's procedural guide aims to provide the district court with everything it will need or want to know with respect to how settlement administration would proceed. *Procedural Guidance for Class Action Settlements*, supra note 90 ("In the motion for preliminary approval, the parties should identify the proposed settlement administrator, the settlement administrator selection process, how many settlement administrators submitted proposals, what methods of notice and claims payment were proposed, and the lead class counsel's firms' history of engagements with the settlement administrator over the last two years. The parties should also address the anticipated administrative costs, the reasonableness of those costs in relation to the value of the settlement, and who will pay the costs. The court may not approve the amount of the cost award to the settlement administrator until the final approval hearing.").

than did pre-amendment practice.<sup>100</sup> A typical pre-amendment articulation of the preliminary approval standard was that preliminary approval, “in contrast to final approval, ‘is at most a determination that there is . . . “probable cause” to submit the proposal to class members and [thereafter] hold a full-scale hearing as to its fairness.’”<sup>101</sup> Under the new Rule 23(e) regime, this “full-scale hearing,” or at least full-scale judicial inquiry, occurs up front at the preliminary stage.<sup>102</sup>

In the past year, there have been several examples of district courts *denying* preliminary approval, sending the parties back to the drawing board to correct perceived omissions or differences in the terms, the notice program provisions, and/or the claims or distribution process.<sup>103</sup> Such instances of early, proactive judicial investment signal that a role traditionally played by legitimate objectors is now being played by the courts themselves.

As serial objectors recede, others interested in the reasonableness and efficacy of class settlements have stepped to the fore. One recent and notable trend is the more active role of state attorneys general in the settlement approval process. The Class Action Fairness Act of 2005 (CAFA) provides that notice must be given to state attorneys general and others of most proposed class action settlements.<sup>104</sup> Indeed, this CAFA notice requirement has had an impact on the timing of the class action settlement approval cycle itself, since at least 90 days’ notice of a proposed class settlement must be given before a final approval order can be entered.<sup>105</sup> This

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<sup>100</sup> FED. R. CIV. P. 23(e)(1)(B).

<sup>101</sup> *Davis v. J.P. Morgan Chase & Co.*, 775 F. Supp. 2d 601, 607 (W.D.N.Y. 2011) (quoting *Menkes v. Stolt-Nielsen S.A.*, 270 F.R.D. 80, 101 (D. Conn. 2010)).

<sup>102</sup> BOLCH GUIDELINES, *supra* note 64, at 1; *see supra* notes 86–88 and accompanying text.

<sup>103</sup> *See, e.g.*, *Bronson v. Samsung Elec. Am., Inc.*, No. C 18-02300 WHA, 2019 WL 4738232, at \*5 (N.D. Cal. Sept. 29, 2019) (denying preliminary approval for, *inter alia*, insufficient relief to the class and “onerous objection procedures” and directing the parties to submit a new class settlement to the court by October 4, 2019 for hearing on October 10, 2019); *Haralson v. U.S. Aviation Servs. Corp.*, 383 F. Supp. 3d 959, 971–74 (N.D. Cal. 2019) (evaluating settlement under amended Rule 23(e)’s factors and denying preliminary approval for, *inter alia*, failure to provide information on the range of recovery at the preliminary stage, for the parties’ failure to comply with the Northern District of California’s *Procedural Guidance for Class Action Settlements*, and for notice plan deficiencies).

<sup>104</sup> 28 U.S.C. § 1715(b) (2012).

<sup>105</sup> 28 U.S.C. § 1715 requires parties to notify state attorneys general of proposed settlements and mandates that final approval of settlements “may not be issued earlier than 90 days after the later of the dates on which the appropriate Federal official and the appropriate State official are served with the notice.” *Id.* § 1715(d). Notably, § 1715 also states that “[n]othing in this section shall be construed to expand the authority of, or impose any obligations, duties, or responsibilities upon, Federal or State officials.” *Id.* § 1715(f). As the Sixth Circuit held in *Chapman v. Tristar Products, Inc.*, this provision forecloses, rather than grants, attorneys general’s standing as formal objectors with appellate rights. *See infra* notes 106–14 and accompanying text.

statutory requirement of notice, and express statutory permission for attorneys general to be heard on proposed class settlements, has in turn given rise to litigation over whether this statutory role also confers standing on attorneys general as objectors for purposes of appeal. Thus far, the appellate response has been that attorneys general do not possess standing for purposes of appeal from class action settlement orders.

This issue was most recently and comprehensively addressed by the Sixth Circuit in *Chapman v. Tristar Products, Inc.*<sup>106</sup> In *Tristar*, the Arizona Attorney General lodged an objection in the District Court to the terms of the settlement involving allegedly defective pressure cookers.<sup>107</sup> The settlement agreement, entered after the first day of trial, which the Sixth Circuit characterized as “not going well for plaintiffs,” provided for approximately \$2 million in attorneys’ fees and costs and “substantially less than that—primarily in the form of coupons—for the class members.”<sup>108</sup> Arizona made its first appearance in the case at the fairness hearing arguing as an amicus (along with the United States Department of Justice) that the settlement was unfair to the class.<sup>109</sup> “None of the class, however, ever joined in either Arizona or DOJ’s objection to the settlement.”<sup>110</sup>

Arizona sought to intervene for purposes of appeal under either Rule 24(a) (intervention is a right) or 24(b) (permissive intervention), and, in the alternative, asked the court to recognize it as an objector to the settlement.<sup>111</sup> The district court rejected these requests, and on appeal, the Sixth Circuit affirmed this rejection after a thorough review of standing under Rule 24, under CAFA, and under the theories advanced by Arizona that it had Article III standing under the doctrine of *parens patriae* and as a “repeat player” in class action settlements.<sup>112</sup> As the Sixth Circuit held, “Arizona’s regular participation in class action lawsuits establishes at most a ‘mere interest in [the] problem’ of unfair class action settlements, which ‘is not . . . sufficient to confer standing.’”<sup>113</sup> In addressing and rejecting standing under the panoply of doctrines advanced by Arizona, *Tristar* has seemingly foreclosed the various avenues under which a creative non-class member could seek to interpose itself as an objector in class action settlement proceedings. For now, the matter of the fairness, adequacy, and reasonableness of a class action settlement under Rule 23(e) remains a matter for the independent determination of the court informed by the

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<sup>106</sup> *Chapman v. Tristar Prods., Inc.*, 940 F.3d 299, 307 (6th Cir. 2019).

<sup>107</sup> *Id.* at 302.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 303.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.* at 304–07.

<sup>113</sup> *Id.* at 307 (citing *Greater Cincinnati Coal. for the Homeless v. City of Cincinnati*, 56 F.3d 710, 716 (6th Cir. 1995)).

submissions (pro and con) of the class action settlement proponents and the class members themselves under an amended Rule 23(e) procedure designed to eliminate gamesmanship and self-dealing from the process.

#### IV. A FAIR PRICE FOR OBJECTOR BLACKMAIL?

One of the most intriguing questions courts will face going forward is whether to approve payments to objectors under Rule 23(e)(5)(B). What exactly *is* a proper payment for dropping an objection? Framed less sympathetically: what is a fair price for objector blackmail?

The latter may seem like a loaded question, but it reflects an important truth. Because the objector is forgoing or withdrawing its objection—or forgoing or abandoning an appellate challenge to the district court’s approval of a class settlement—that objection is providing no substantive benefit for the class. The only value to the class is that the hostage-taker is releasing the hostage. Withdrawal or appellate rejection of appeals is typically necessary to enable the settlement proceeds to be delivered to the class.<sup>114</sup> Yet that is precisely the sort of “benefit” for which objectors are not to be rewarded.<sup>115</sup>

There may be some exceptions, however. A payment to an objector (or objector’s counsel) *can* be justified where the objection leads to an improvement to the settlement. In that situation, however, compensation to the objector stems not from the benefit of *withdrawing* the objection, but rather in recognition of the benefit that is conferred from the improvement to the settlement or the settlement process. That is exactly how things should work, and the 2018 amendment—properly implemented—would permit courts to do just that.

Sometimes an outside observer can perceive a concrete and practicable improvement to the settlement that the parties did not—one that is capable of being integrated into the settlement as approved and administered.<sup>116</sup> If so, a payment provided in connection with the withdrawal of an objection is, in essence, a “settlement” of a claim for an award of fees that an objector might otherwise make in

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<sup>114</sup> Not all class settlements will include “quick-pay” provisions like *Deep Water Horizon*, *Clean Diesels*, or *Chrysler-Dodge-Jeep*. Some defendants may continue to insist on the exhaustion of appeals before payments are made. In such instances, protection of the class from objector blackmail remains key.

<sup>115</sup> See *supra* notes 42–44 and accompanying text (discussing the 2018 Advisory Committee Notes); see also *supra* notes 70–72 and accompanying text (describing the Bolch guidelines’ position on this issue).

<sup>116</sup> See, for example, *In re Domestic Air Transportation Antitrust Litigation*, 148 F.R.D. 297, 359 (N.D. Ga. 1993), in which objectors pointed out that certain provisions of the antitrust settlement could themselves give rise to follow-on antitrust litigation if not revised. The parties agreed to do so, final approval was granted, and the court awarded fees to these and other objectors whose contributions benefitted the class and improved the settlement and its administration. *Id.*

court. This is a possibility that Judge Schofield considers in her *Forex* decision—although she ultimately rejected it on the facts of that case.<sup>117</sup> Recall that the objectors in *Forex* argued that their objection was responsible for her decision to reduce the attorneys’ fee award to class counsel from 16.5% of the settlement fund to 13%.<sup>118</sup> Judge Schofield was not persuaded by this narrative, finding that “the amount of the award had nothing to do with the Objector’s objection.”<sup>119</sup>

Imagine, however, a case where an objection *did* lead to an improvement for class members. An objector might (1) withdraw the objection going forward—that is, decide not to press for further changes on appeal—and (2) seek a payment from class counsel on the theory that the objector would be entitled to ask the court to award her fees based on the objection’s initial benefit to the class. In that situation, an objector might reasonably accept an agreed-upon payment from class counsel rather than litigate her claim for an award of fees, and the court might legitimately approve the payment under Rule 23(e)(5)(B).

### CONCLUSION

The problem of “strategic objections” or “objector blackmail” has been a persistently vexing aspect of class action practice and procedure. The 2018 amendment to Rule 23 provides a new way to solve it. By requiring the district court to approve any payment made in connection with an objector withdrawing an objection or appeal, the amendment takes away objectors’ ability to name their own price and addresses the hostage-taking dynamic that had enabled for-profit objectors to delay the delivery of settlement benefits to class members by interposing objections and appeals until a toll for passage was paid. The new provision is still in its infancy, but it has already been deployed to thwart improper objector behavior and to bring for-pay objection practice out of the shadows. The 2018 amendment and other on-the-ground developments show great potential to improve the process of settling class actions and to enhance their ability to resolve disputes and provide meaningful remedies on an aggregate basis.

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<sup>117</sup> *In re Foreign Exch. Benchmark Rates Antitrust Litig. (Forex)*, No. 13 Civ. 7789 (LGS), 2019 WL 5256957, at \*1 (S.D.N.Y. Oct. 11, 2019).

<sup>118</sup> *Id.* at \*2.

<sup>119</sup> *Id.* at \*2; see *supra* notes 58–59 and accompanying text.