

THE RISE OF "PROFESSIONAL OBJECTORS" IN CLASS ACTION SETTLEMENTS

PERSPECTIVE

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A "proposed" class settlement becomes an "actual" class settlement only after it has been judicially reviewed and approved. Trial court's are charged with two tasks during this review process: first, to ensure that the proposed settlement is in the best interest of absent class members; and second, to set the fees that the class action lawyers will receive for their work.

During this review process, absent class members are permitted to file objections to the proposed settlement and to the fees that class counsel are seeking. Objections play a vital role during the review process, assisting the trial court in fulfilling its duty to the class by sharpening the issues and debating the fairness of the settlement. Since both the defendant and class counsel - by definition - support the proposed settlement, objections are frequently the only form of adversarial testing that a proposed settlement will undergo. While objections remain an important means of protecting unnamed class members, they also provide a ready mechanism for abuse. Indeed, objecting to class action settlements has become a big business leading to the rise of "professional objectors" - attorneys who make a living by serially objecting to any class action settlement, regardless of merit.

Professional objectors do not care if the trial court overrules their objections - indeed, they almost always are - since the professional objectors' true goal is delay. When a district court overrules an objection and proceeds to approve a settlement, the objector has an immediate right to appeal. By filing an appeal, the final resolution of settlement is delayed - sometimes for years - while the appeal is briefed, argued and decided. This delay provides professional objectors with significant leverage because class counsel's fees are often contingent on the final resolution of the settlement. Faced with the possibility of not getting any fees during the year or more that it takes for an objection to wind its way through appeal, class counsel are frequently willing to pay objectors out of their own pockets to drop the appeals. In short, the delay inherent in appellate review allows professional objectors to hold class counsel's fees hostage by demanding a "fee" for the release of those fees (i.e., the voluntary dismissal of the objector's appeal). Many class counsel have resigned themselves to the reality of professional objectors, simply seeing them as a "tax" imposed on class action counsel.

It is easy to understand why professional objectors are a ready target for disdain. In fact, they are frequently labeled "professional gadflies," "holdup artists," "extortionists" and much worse by class counsel, defendants, and even courts. It is not as easy, however, to effectively deal with professional objectors. The problem is one of scope: how do we preclude "bad" objections while still allowing "good" objections to proceed. Many of the mechanisms proposed and employed by litigants and courts make little attempt to distinguish good objections from bad objections.

For example, some courts have attempted to screen out coercive objections by allowing class counsel to take the objector's deposition. The purpose of these depositions is to find out if the objector has made objections in other settlements and to request the reasons for those

objections. This method has been a successful deterrent. Recently, for example, Ohio attorney Edward Siegel immediately withdrew his objection to a Comverse Inc. class action after a deposition was requested. The proposed settlement was for \$225 million, 25 percent of which went to attorney fees. Siegel said he felt the deposition request was harassment and something objectors should not have to go through. It is in fact likely that many would rather withdraw their objection than go through this process. The problem with this technique is that it carries the potential of deterring all objections - regardless of motive.

Another approach employed to deal with professional objectors involves requiring objectors to post a bond upon filing their appeals. Some courts have demanded that bonds include settlement interest and fees that will develop during the course of the appeal. In a recent Wal-Mart class action where 43 percent of the \$65 million settlement was reserved for class counsel, the district court judge required the objectors to post \$500,000 in order to proceed with the appeal. The 9th U.S. Circuit Court of Appeals granted a stay of the appellate bond by referring to a 5th Circuit ruling that had rejected using excessive appellate bonds "as a vehicle to erect a barrier" to an appeal. *Vaughn v. American Honda Motor Co. Inc.*, 507 F. 3d 295 (6th Cir. 2007). A bond set for \$500,000 is high enough to act as a burden and prevent even meritorious objections from proceeding. A bond that is inexpensive is not the proper solution either; after all, the goal of requiring bonds is to deter illegitimate objections. The inability of an appellate bond to differentiate between legitimate and coercive objections makes it a tool that will likely have only limited application.

Lately, parties have begun employing a third approach that is ideally suited for deterring coercive objections while not affecting the ability of absent class members to bring legitimate objections: quick pay provisions. The use of quick pay provisions does not require courts to divine the motive of the objector. In fact, quick pay provisions do not even involve court intervention, they are negotiated between the parties and included directly in the proposed settlement agreement. Quick pay is a provision included in the settlement agreement whereby the parties agree that class counsel will receive whatever fees the trial court awards as soon as the court approves the settlement, regardless of whether the approval of that settlement is appealed. If the settlements or fee awards are reversed on appeal, then class counsel will refund the fees to the defendants.

The rationale behind quick pay is to do away with an objector's extortive business model. If class counsel's fee awards are secured before an objection, then the purpose behind the objection is no longer to force the attorney to weigh how much the fee award is worth and whether or not objectors should be paid. Since objectors can no longer use the threat of withholding the fee as leverage, only objections with legitimate merit will go forward. If the objector truly feels their opposition to the settlement has merit, they will agree to the provision and expect that the money will return to the defendant if the appeal is successful. A provision that secures class counsel's fee will not make a difference to a valid objector because their goal is not to force out payments from the attorney. Quick pay provisions provide a perfectly tailored solution because they do nothing to discourage legitimate objections while eliminating the factors that allow for coercive objections.

In California, it takes more than one year from the notice of an appeal to the filing of an opinion in the 9th Circuit. This is important because it means class counsel won't be able to earn a dime from a settlement agreement until the agreement is approved (assuming it is) for at least one year, or until the appeal proceedings are completed. Objectors know this all too well. They

recognize that a year is a long time for counsel to wait, which is why they make objections to force out-of-pocket payments so settlements can go forward and fees can be awarded.

As noted, meritorious objections serve a useful purpose. Without them, excessive fee requests would go unchallenged. Quick pay provisions offer an important and effective mechanism to preserve meritorious appeals, and still discourage professional objectors. Their implementation would cut out coercive objections and maintain those that test the fairness of the agreement. And that's the perfect balance.

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