A REAL-WORLD PERSPECTIVE ON WITHDRAWAL OF OBJECTIONS TO CLASS-ACTION SETTLEMENTS AND ATTORNEYS' FEE AWARDS: REFLECTIONS ON THE PROPOSED REVISIONS TO FEDERAL RULE OF CIVIL PROCEDURE 23(e)(5)

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* Member of the California bar; J.D., 1985, Duke University School of Law. This article is based on the author's testimony concerning proposed revisions to Federal Rule of Civil Procedure 23(e)(5), given before the Judicial Conference of the United States Advisory Committee on Civil Rules in its February 16, 2017, Public Hearing on Proposed Amendments to the Federal Rules of Civil Procedure. Isaacson's written testimony is available at https://www.regulations.gov/document?D=USC-RULES-CV-2016-0004-0076; his oral testimony is available at http://www.uscourts.gov/sites/default/files/transcript_of_2-16-17_hearing_0.pdf.

I. INTRODUCTION

The Judicial Conference of the United States Advisory Committee on Civil Rules is proposing certain amendments to Rule 23(e)(5). These proposed amendments are meant to address problems believed to surround objections to proposed class-action settlements, and their withdrawal by objectors in exchange for payments from class counsel.[1] This article seeks to address the proposed amendments in light of my practical knowledge from decades of legal practice as a member of the plaintiffs' class-action bar.[2]

It appears to me that the Advisory Committee may be operating under the impression that patently meritless objections to proposed class-action settlements often are filed solely for the purpose of noticing frivolous appeals from orders overruling those objections, and with the intention of "extorting" payments from plaintiffs' class-action counsel in return for voluntarily dismissing the appeals.[3] I do not believe that this is a serious real-world problem. In my twenty-six years of practice in the plaintiffs' class-action bar, not a single case came to my attention wherein class counsel paid objectors to withdraw frivolous objections or appeals. When class counsel pay objectors to drop an appeal it is not because they believe the

[1] *See* Memorandum from the Hon. John D. Bates, Chair of the Advisory Comm. on Civ. Rules, to the Hon. Jeffrey S. Sutton, Chair of the Comm. on Rules of Prac. & Proc., on Report of the Advisory Comm. on Civil Rules 193–232 (May 12, 2016, rev. July 1, 2016); JUDICIAL CONF. COMM. ON RULES OF PRACTICE & PROCEDURE, *Proposed Amendments to the Federal Rules of Civil Procedure*, *in* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, BANKRUPTCY, CIVIL AND CRIMINAL PROCEDURE 215–17, 228–31 (2016) [hereinafter PRELIMINARY DRAFT].

[2] *See infra* Section II.A (describing my background in the plaintiffs' class-action bar).

[3] *See* PRELIMINARY DRAFT, *supra* note 1, at 194 ("the amendments respond to widespread concern about the behavior of some objectors or objector counsel"); *see also infra* pp. 54–55 (discussing plaintiffs' offers to induce the withdrawal of objections).

appeal is frivolous, but because class counsel fear that the objection and appeal may, in fact, have substantial merit.[4]

The current requirement that district courts approve the withdrawal of an objection to a proposed settlement is extraordinarily ineffective, primarily because it does not provide a standard for district courts to apply.[5] But neither do the proposed amendments currently under consideration.[6] And they may, in certain respects, make things even worse.

I fear that the proposed revision eliminating judicial review under Rule 23(e)(5), when objections are withdrawn without the payment of any consideration, for example, will be an invitation to harassment of objectors by class counsel–who even now employ deposition subpoenas to harass and bully absent class members into withdrawing good-faith objections.[7]

Moreover, though the proposed revisions to Rule 23(e)(5) would require district-court approval whenever payments are made in exchange for the withdrawal of an objection or the voluntary dismissal of an objector's appeal, the proposed rule neither provides, nor references, any standards to guide the district court.[8] One judge may readily conclude that it is wrong to reward objectors who withdraw ostensibly meritless appeals in exchange for payments, and therefore withhold approval.[9] Another judge might, on identical facts, conclude that it is best to approve the compensated withdrawal in order to obviate whatever delays and costs extended appellate proceedings might entail.[10]

Even more problematic–what standards should govern an objector's dismissal, for payment, of appeals that may have merit? It might make sense for a district judge asked to approve the dismissal of an objector's appeal being abandoned in return for a large payment to stop and reconsider the original settlement approval in light of the proposed transaction. But the proposed revisions do not permit this.[11]

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[4] *See infra* pp. 57–62.

[5] *See infra* pp. 57–62.

[6] *See infra* pp. 67–69.

[7] *See infra* pp. 52-53, 63-67; *see also infra* note 126.

[8] *See infra* pp. 67–68.

[9] *See infra* pp. 62–63, 67–68.

[10] *See id.*

[11] *See infra* pp. 68–69.

I close with several recommendations. I believe that review of objections withdrawn without the payment of consideration should be strengthened, not abandoned, and that class counsel who bully and harass absent class members should be checked. Clear standards should be articulated to govern the withdrawal or dismissal of objections and appeals in return for consideration – recognizing that frivolous objections and appeals are not the real problem. The real problem is that class counsel pay objectors to drop objections and appeals that may have real merit and could benefit the class. Currently, court-appointed class representatives and class counsel have a duty to act as fiduciaries for the class, but objectors and their counsel do not.[12] If the Advisory Committee intends to change the rules to require that objectors and their counsel act for the benefit of the class, it should say so clearly. Moreover, the Advisory Committee should close the loophole that currently exists for objections to attorneys' fee awards under Rule 23(h)(2), withdrawals of which are not subject to any requirement of judicial review or approval.[13]

II. MY PROFESSIONAL BACKGROUND AND EXPERIENCE WITH CLASS-ACTION LITIGATION

A. My Experience as a Member of the Plaintiffs' Class-Action Bar

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[12] *See* Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 309 (6th Cir. 2016) (when evaluating a class-action settlement, "the district court 'must carefully scrutinize' whether the named plaintiffs and [class] counsel have met their fiduciary obligations to the class"); Eubank v. Pella Corp., 753 F.3d 718, 719 (7th Cir. 2014) ("named plaintiffs are the representatives of the class—fiduciaries of its members"); *In re* Dry Max Pampers Litig., 724 F.3d 713, 718 (6th Cir. 2013) ("[I]n class-action settlements the district court cannot rely on the adversarial process to protect the interests of the persons most affected by the litigation—namely, the class. Instead, the law relies upon the 'fiduciary obligation[s]' of the class representatives and, especially, class counsel, to protect those interests. . . . [C]lass counsel are no more entitled to disregard their 'fiduciary responsibilities' than class representatives are.") (citations omitted); Radcliffe v. Experian Info. Sols., Inc., 715 F.3d 1157, 1167 (9th Cir. 2013) ("class counsel has a fiduciary duty to the class as a whole"); Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 968 (9th Cir. 2009) ("class counsel's fiduciary duty is to the class as a whole"); Mirfasihi v. Fleet Mortg. Corp., 356 F.3d 781, 785 (7th Cir. 2004) ("district judges presiding over [class] actions are expected to give careful scrutiny to the terms of proposed settlements in order to make sure that class counsel are behaving as honest fiduciaries for the class as a whole"); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Litig., 55 F.3d 768, 801 (3d Cir. 1995) ("Beyond their ethical obligations to their clients, class attorneys, purporting to represent a class, also owe the entire class a fiduciary duty once the class complaint is filed.").

[13] *See* FED. R. CIV. P. 23(h)(2).

I speak from my experience of twenty-six years as a member of the plaintiffs' class action bar, first as an attorney with Milberg Weiss Bershad Hynes & Lerach LLP, from 1989 to 2004, and then as a founding partner of Lerach Coughlin Stoia Geller Rudman & Robbins LLP, known since 2010 as Robbins Geller Rudman & Dowd LLP.

Those two firms, though at times subjects of considerable controversy, rank among the major players in the securities class-action plaintiffs' bar. Before its West Coast partners departed in 2004 to form the firm now known as Robbins Geller, the Milberg Weiss firm was generally recognized as the "largest plaintiffs' firm specializing in the complex field of securities and derivative litigation," being dubbed by *Fortune Magazine* as the "king of the class action domain."[14] Robbins Geller subsequently took Milberg Weiss's place as the leading plaintiffs' securities class-action firm.[15]

I began working as an associate at Milberg Weiss in 1989, and I became a partner in 1994. In 2004, in the midst of a federal criminal investigation concerning the firm's under-the-table incentive payments to named plaintiffs, most of Milberg Weiss's West Coast partners left to form Lerach Coughlin Stoia Geller Rudman & Robbins LLP, of which I was a founding partner.[16] The new firm's name changed to Coughlin Stoia

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[14] John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 L. & CONTEMP. PROBS. 5, 20 n.49 (1985); *see also* James P. McDonald, *Milberg's Monopoly: Restoring Honesty and Competition to the Plaintiffs' Bar*, 58 DUKE L.J. 507, 508 (2008); Lonny Hoffman & Alan F. Steinberg, *The Ongoing Milberg Weiss Controversy*, 30 REV. LITIG. 183, 184 (2011) ("Milberg was . . . the top securities class action firm in the country (so far ahead of its competitors that for many years there was not a close second to speak of).").

[15] *See* Ellen M. Ryan & Laura E. Simmons, *Securities Class Action Settlements 2011 Review and Analysis*, CORNERSTONE RES. 17 (2012), https://www.cornerstone.com/Publications/Reports/Securities-Settlements-2011-Review-and-Analysis.pdf (noting that in the field of securities class actions, Robbins Geller "was the most active firm for the period from 2010 to 2011, involved in 35 percent of settled cases" and "is likely to continue to maintain the largest market share for settlements in future years"). Professor Coffee summarizes: "A 2011 Cornerstone Research study found that three plaintiff's law firms accounted for 58 percent of the securities class action settlements in that year . . . . The three firms were Robbins Geller Rudman & Dowd (which handled 35 percent of the settlements in that year), Labaton Sucharow (which handled 13 percent), and Bernstein Litowitz Berger & Grossman (which handled 10 percent)." JOHN C. COFFEE, JR., ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE 81 n.54 (2015).

[16] *See* COFFEE, *supra* note 15, at 76 (noting that "in 2003-2004, a longstanding federal criminal investigation of Milberg, Weiss and its partners intensified"); Troy Wolverton, *Securities Lawyer Lerach Departs Firm*, MERCURY NEWS (June 1, 2007, 1:25 AM), http://www.mercurynews.com/2007/06/01/securities-lawyer-lerach-departs-firm/.

Geller Rudman & Robbins LLP in 2007, when our leading partner, William S. Lerach, left the practice of law to deal with criminal charges related to the Milberg Weiss scheme of concealed payments to named plaintiffs.[17] Lerach, after pleading guilty to a federal felony charge, was barred from practicing law.[18] In addition to a two-year prison sentence, he agreed to pay a $250,000 fine and a $7.5 million forfeiture, which barely put a dent in his personal net worth. At that time, his net worth was estimated at "upward of $700 million," which was, of course, derived principally from court-approved class-action attorneys' fee awards.[19] In all, four former Milberg Weiss partners served time in prison and were disbarred for their part in their secret scheme.[20]

In 2008 Lerach's firm, whose name had changed to Coughlin Stoia upon his departure, nonetheless collected a $688 million attorneys' fee award from settlements in the *Enron* securities litigation—a substantial portion of which the firm's Executive Committee passed on to Mr. Lerach, despite his felony conviction and disbarment.[21] The firm's name thereafter

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[17] *See* Jenny Anderson, *Lawyer Quits Firm to Focus on Inquiry*, N.Y. TIMES (Aug. 29, 2007), http://www.nytimes.com/2007/08/29/business/29legal.html?mcubz=0; Molly Selvin, *Lawyer under Cloud to Retire: William Lerach Says He's Stepping Down to Focus on the Fraud Case that Implicates Him*, L.A. TIMES (Aug. 29, 2007), http://articles.latimes.com/2007/aug/29/business/fi-lerach29.

[18] *See* PATRICK DILLON & CARL M. CANNON, CIRCLE OF GREED: THE SPECTACULAR RISE AND FALL OF THE LAWYER WHO BROUGHT CORPORATE AMERICA TO ITS KNEES 164–65, 307, 393–94, 451 (2010).

[19] *See id.* at 3, 451; *see also* COFFEE, *supra* note 15, at 71 (noting that by 2007, when Lerach pleaded guilty to felony obstruction of justice and was disbarred, he had "by some estimates . . . amassed a personal fortune of over $700 million"); Ann Woolner, *Convicted King of Class Actions Builds Aviary, Regrets Nothing*, BLOOMBERG BUS. (Oct. 11, 2011), https://article.wn.com/view/2011/10/12/Convicted_King_of_Class_Actions_Bill_Lerach_Builds_Aviary_Re/ ("The San Diego Business Journal estimated in 2007 that he was worth $900 million.").

[20] *See* COFFEE, *supra n*ote 15, at 76 (noting that four "partners of Milberg, Weiss – [Melvyn I.] Weiss, [William S.] Lerach, [David] Bershad, and [Steven] Schulman – went to prison"). The judge who sentenced Lerach found it "painfully evident that the paid plaintiffs were motivated to abandon their fiduciary duties to the absent class members and take actions or make decisions in [their class-action] cases in order to maximize the award of attorneys' fees, all at the expense of the absent class." DILLON & CANNON, *supra* note 18, at 450 *(*quoting Judge John F. Walter's remarks at Lerach's sentencing hearing). I should note that I was entirely ignorant of the scheme, which the firm's Executive Committee concealed from the firm's other partners. *See id.* at 164–65, 212–13, 307 (noting that knowledge of the scheme was confined to "a handful of the firm's senior partners").

[21] *See infra* pp. 45–46 and notes 46–47 (discussing *Enron* fee award).

changed again, to Robbins Geller Rudman & Dowd LLP in early 2010, following Patrick J. Coughlin's departure from active management.[22] It remains, I think, America's largest securities-fraud class-action law firm.[23]

Although I worked on some state-court proceedings,[24] my decades of practice with these firms focused primarily on federal civil appeals in securities and other class actions. In the course of 26 years I personally briefed and argued appeals before the First,[25] Second,[26] Third,[27] Fifth,[28]

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[22] *See* Zach Lowe, *Coughlin Stoia Changes Name as Coughlin Steps Down*, THE AMLAW DAILY (Feb. 24, 2010, 5:53 PM), http://amlawdaily.typepad.com/amlawdaily/2010/02/coughlinstoia.html; Petra Pasternak, *Firm Name Changing at Coughlin Stoia*, THE RECORDER (Feb. 25, 2010), http://www.therecorder.com/id=1202444506978/Firm-Name-Changing-at-Coughlin-Stoia.

[23] *See* Ryan & Simmons, *supra* note 15, at 17.

[24] *See, e.g.*, Mangini v. R.J. Reynolds Tobacco Co., 7 Cal. 4th 1057, 875 P.2d 73 (Cal. 1994); Mirkin v. Wasserman, 5 Cal. 4th 1082, 858 P.2d 568 (Cal. 1993); Kuykendall v. State Bd. of Equalization, 22 Cal. App. 4th 1194, 27 Cal. Rptr. 2d 783 (Cal. Ct. App. 1994).

[25] *See* Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp., 632 F.3d 762 (1st Cir. 2011).

[26] *See, e.g.*, Fait v. Regions Fin. Corp., 655 F.3d 105 (2d Cir. 2011), *overruled by* Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318 (2015); Staehr v. Hartford Fin. Servs. Grp., Inc., 547 F.3d 406 (2d Cir. 2008); Cal. Pub. Emps.' Ret. Sys. (CalPERS) v. N.Y. Stock Exch., Inc. (*In re* NYSE Specialists Sec. Litig.), 503 F.3d 89 (2d Cir. 2007); *In re* Elevator Antitrust Litig., 502 F.3d 47 (2d Cir. 2007); *In re* WorldCom Sec. Litig., 496 F.3d 245 (2d Cir. 2007).

[27] *See In re* Constar Int'l Inc. Sec. Litig., 585 F.3d 774 (3d Cir. 2009); Alaska Elec. Pension Fund v. Pharmacia Corp., 554 F.3d 342 (3d Cir. 2009); Cal. Pub. Emps.' Ret. Sys. (CalPERS) v. Chubb Corp., 394 F.3d 126 (3d Cir. 2004).

[28] *See* Owens v. Jastrow, 789 F.3d 529 (5th Cir. 2015); Fener v. Operating Eng'r Constr. Indus. & Miscellaneous Pension Fund, 579 F.3d 401 (5th Cir. 2009).

Sixth,[29] Seventh,[30] Eighth,[31] Ninth,[32] Eleventh,[33] and District of Columbia Circuits.[34] I took part in the merits briefing of several cases before the United States Supreme Court.[35] I wrote and filed numerous amicus curiae briefs on behalf of institutional investors, academics, and others, addressing critical issues in class-action litigation.[36] I was also responsible for

[29] *See* Ind. State Dist. Council of Laborers v. Omnicare, Inc., 719 F.3d 498 (6th Cir. 2013), *vacated sub nom.* Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund, 135 S. Ct. 1318 (2015); *In re* Vertrue Inc. Mktg. & Sales Prac. Litig., 719 F.3d 474 (6th Cir. 2013); Ind. State Dist. Council of Laborers & HOD Carriers Pension & Welfare Fund v. Omnicare, Inc., 583 F.3d 935 (6th Cir. 2009); Fidel v. Farley, 392 F.3d 220 (6th Cir. 2004), *overruled in part* Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007); New England Health Care Emps. Pension Fund v. Ernst & Young, LLP, 336 F.3d 495 (6th Cir. 2003).

[30] *See* City of Livonia Emp. Ret. Sys. v. Boeing Co., 711 F.3d 754 (7th Cir. 2013); Beck v. Dobrowksi, 559 F.3d 680 (7th Cir. 2009); Ill. Mun. Ret. Fund v. CitiGroup, Inc., 391 F.3d 844 (7th Cir. 2004); Albert v. Trans Union Corp., 346 F.3d 734 (7th Cir. 2003).

[31] *See* Romine v. Acxiom Corp., 296 F.3d 701 (8th Cir. 2002).

[32] *See* Makaeff v. Trump Univ., LLC, 715 F.3d 254 (9th Cir. 2013), *en banc rehearing denied*, 736 F.3d 1180 (9th Cir. 2013); Sanford v. MemberWorks, Inc., 625 F.3d 550 (9th Cir. 2010); Hatfield v. Halifax PLC, 564 F.3d 1177 (9th Cir. 2009); Sanford v. MemberWorks, Inc., 483 F.3d 956 (9th Cir. 2007); Sanchez v. Cty. of San Diego, 464 F.3d 916 (9th Cir. 2006), *en banc rehearing denied*, 483 F.3d 965 (9th Cir. 2007) (with eight judges dissenting); Sparling v. Daou (*In re* Daou Sys., Inc. Sec. Litig.), 411 F.3d 1006 (9th Cir. 2005); Deutsch v. Turner Corp., 324 F.3d 692 (9th Cir. 2003); Chaset v. Fleer/Skybox Int'l, 300 F.3d 1083 (9th Cir. 2002); DSAM Glob. Value Fund v. Altris Software, Inc., 288 F.3d 385 (9th Cir. 2002); Ronconi v. Larkin, 253 F.3d 423 (9th Cir. 2001); Hertzberg v. Dignity Partners, Inc., 191 F.3d 1076 (9th Cir. 1999); Yourish v. Cal. Amplifier, Inc., 191 F.3d 983 (9th Cir. 1999); Chappell v. Robbins, 73 F.3d 918 (9th Cir. 1995).

[33] *See* Local 703, I.B. of T. Grocery & Food Emps. Welfare Fund v. Regions Fin. Corp., 762 F.3d 1248 (11th Cir. 2014).

[34] *See* City of Harper Woods Emps.' Ret. Sys. v. Olver, 589 F.3d 1292 (D.C. Cir. 2009).

[35] *See* Brief for the Respondents, Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund, 135 S. Ct. 1318 (2015) (No. 13-435), 2014 WL 4253028; Brief for Respondents, Matrixx Initiatives, Inc. v. Siracusano, 563 U.S. 27 (2011) (No. 09-1156), 2010 WL 4477792; Brief for Respondents, Dura Pharm., Inc., v. Broudo, 544 U.S. 336 (005) (No. 03-932), 2004 WL 2671450.

[36] *See* Brief for NECA-IBEW Welfare Tr. Fund as Amicus Curiae Supporting Respondent, Campbell-Ewald Corp. v. Gomez, 136 S. Ct. 663 (2016) (No. 14-857), 2015 WL 5169105; Brief for Civil Procedure and Securities Law Professors as Amici Curiae Supporting Respondent, Amgen Inc. v. Conn. Ret. Plans & Tr. Funds, 568 U.S. 455 (2013) (No. 11-1085), 2012 WL 4503267; Brief for Employees' Retirement Sys. of the Gov't of the Virgin Islands as Amicus Curiae Supporting Respondent, Janus Capital Grp., Inc. v. First Derivative Traders, 564 U.S. 135 (2011) (No. 09-525), 2010 WL 4380232; Brief for MN Services Vermogensbeheer, B.V. et al. as Amici Curiae Supporting Petitioners, Morrison v. Nat'l Austl. Bank, Ltd., 561 U.S. 247 (2010) (No. 08-1191), 2010 WL 342029; Brief for Change to Win and the Change to Win Inv. Group as Amici Curiae Supporting Respondents, Merck & Co. v. Reynolds, 559 U.S. 633 (2010)

several pro bono amicus curiae briefs filed on behalf of religious organizations supporting equal rights for LGBT people and religious liberty for all.[37] In my spare time, I also authored and coauthored articles relating to

(No. 08-905), 2009 WL 3477290; Brief for Legal Scholars, et al. as Amici Curiae Supporting Respondent, Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007) (law professors' brief) (No. 05-1126), 2006 WL 2966600; Brief for Nat'l Ass'n of Sec. & Commercial Law Attorneys ("NASCAT") as Amicus Curiae Supporting Respondent, Cent. Bank v. First Interstate Bank, 511 U.S. 164 (1994) (No. 92-854), 1993 WL 13006273; Brief for National Association of Securities and Commercial Law Attorneys ("NASCAT") as Amicus Curiae Supporting Petitioners, Musick, Peeler & Garrett v. Employers Ins. of Wausau, 508 U.S. 286 (1993), 1992 U.S. Supreme Court Briefs LEXIS 739; Brief for Amalgamated Bank, as Trustee for the Longview Funds as Amicus Curiae Supporting Plaintiff-Appellee, Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190 (2d Cir. 2008) (No. 06-2902-cv), 2007 WL 5753317; Brief for The Regents of the Univ. of Cal. as Amicus Curiae Supporting Plaintiffs-Appellants, Simpson v. AOL Time Warner, Inc., 452 F.3d 1040 (9th Cir. 2006) (No. 04-55665), 2004 WL 2085335, *vacated and remanded, sub nom.* Avis Budget Grp., Inc. v. Cal. State Teachers' Ret. Sys., 552 U.S. 1162 (2008), *on remand sub nom.* Simpson v. Homestore.com, Inc., 519 F.3d 1041 (9th Cir. 2008).

[37] *See* Brief for California Council of Churches et al. as Amici Curiae Supporting Petitioners, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (California religious organizations' brief supporting marriage equality) (Nos. 14-556, 14-562, 14-571, 14-574), 2015 WL 1021453; Brief for California Council of Churches et al. as Amici Curiae Supporting Respondents, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013) (No. 12-144), 2013 WL 795543; Brief for California Faith for Equality et al. as Amici Curiae Supporting Plaintiffs-Appellees, Pickup v. Brown, 740 F.3d 1204 (9th Cir. 2014) (religious organizations' brief supporting constitutionality of California statute barring healthcare professionals from subjecting minors to "Sexual Orientation Change Efforts") (Nos. 12-17681, 13-15023), 2013 WL 526228; Brief of California Faith for Equality et. al. as Amici Curiae Supporting Respondents, Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012) (No. 12-144), 2010 WL 4622578; Brief for Forum on the Military Chaplaincy et al. as Amici Curiae Supporting Plaintiff-Appellee, Log Cabin Republicans v. United States, 658 F.3d 1162 (9th Cir. 2011) (opposing "Don't Ask Don't Tell") (Nos. 10-56634, 10-56813), 2011 WL 2443730; Brief for Unitarian Universalist Association of Congregations et al. as Amici Curiae Supporting Plaintiffs-Appellees, Winkler v. Gates, 481 F.3d 977 (7th Cir. 2007) (opposing government support for the Boy Scouts of America's discriminatory program) (No. 05-3451), 2006 WL 498552; Brief for California Faith for Equality et al. as Amicus Curiae Supporting Respondents, Perry v. Brown, 265 P.3d 1002 (Cal. 2011) (California religious organizations' brief on question of standing certified by the Ninth Circuit) (No. 12-144), 2011 WL 2140962; Brief for California Council of Churches, et al. as Amici Curiae Supporting Petitioners, Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (California religious organizations' brief opposing Proposition 8) (Nos. S168047, S168066, S168078); Brief for Unitarian Universalist Association of Congregations et al. as Amici Curiae Supporting Parties Arguing in Favor of Marriage Equality, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (interfaith brief supporting marriage equality); Brief of Unitarian Universalist Legislative Ministry California et al. as Amici Curiae Supporting Plaintiffs, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (California religious organizations' brief supporting marriage equality) (No. 12-144), 2013 WL 795543.

issues in securities class actions,[38] and even a few concerning civil rights and religious liberty.[39]

In my twenty-six years as a member of the plaintiffs' class-action bar, I frequently consulted on proceedings involving class counsel's attorneys' fee applications.[40] I also frequently consulted with my colleagues concerning formal objections filed against our firms' class-action settlements and attorneys' fee applications.[41] I personally defended appeals that were filed by objectors to class-action settlements or that otherwise involved class-action attorneys' fee awards.[42] I also represented institutional

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[38] *See, e.g.*, Eric Alan Isaacson, *The Roberts Court and Securities Class Actions: Reaffirming Basic Principles*, 48 AKRON L. REV. 923 (2015); Patrick J. Coughlin, Eric Alan Isaacson & Joseph D. Daley, *What's Brewing in Dura v. Broudo? The Plaintiffs' Attorneys Review the Supreme Court's Opinion and its Import for Securities-Fraud Litigation*, 37 LOY. U. CHIC. L.J. 1 (2005); William S. Lerach & Eric Alan Isaacson, *Pleading Scienter Under Section 21D(b)(2) of the Securities Exchange Act of 1934: Motive, Opportunity, Recklessness and the Private Securities Litigation Reform Act of 1995*, 33 SAN DIEGO L. REV. 893 (1996); Patrick J. Coughlin & Eric Alan Isaacson, *Securities Class Actions in the United States*, *in* LITIGATION ISSUES IN THE DISTRIBUTION OF SECURITIES: AN INTERNATIONAL PERSPECTIVE 399–423 (William G. Horton & Gerhard Wegen, eds.; London, Kluwer International/International Bar Ass'n, 1997); Patrick J. Coughlin & Eric Alan Isaacson, *Commencing Litigation Under the Private Securities Litigation Reform Act of 1995 ("PSLRA")*, *in* SECURITIES LITIGATION 9 (Jay B. Kasner & Bruce G. Vanyo eds. Practicing Law Institute, 1996).

[39] *See, e.g.*, Eric Alan Isaacson*, Free Exercise for Whom? – Could the Religious-Liberty Principle that Catholics Established in* Perez v. Sharp *also Protect Same-Sex Couples' Right to Marry?*, 92 U. DET. MERCY L. REV. 29 (2015); Eric Alan Isaacson, *Goodridge Lights A Nation's Way to Civic Equality*, 57 BOSTON B.J. 1 (2013); Eric Alan Isaacson, *Are Same-Sex Marriages Really a Threat to Religious Liberty?*, 8 STAN. J.C.R. & C.L. 123 (2012); Eric Alan Isaacson, *Assaulting America's Mainstream Values: Hans Zeiger's Get Off My Honor: The Assault on the Boy Scouts of America*, 5 PIERCE L. REV. 433 (2007) (review essay); Eric Alan Isaacson, *Traditional Values, or a New Tradition of Prejudice? The Boy Scouts of America vs. the Unitarian Universalist Association of Congregations*, 17 GEO. MASON U. C.R.L.J. 1 (2006); Eric Alan Isaacson, *The Flag Burning Issue: A Legal Analysis and Comment*, 23 LOY. L.A. L. REV. 535 (1990).

[40] *See In re* Wash. Pub. Power Supply Sys. Litig., 19 F.3d 1291 (9th Cir. 1994) (attorneys' fee appeal).

[41] Powers v. Eichen, 229 F. 3d 1249 (9th Cir. 2000).

[42] *See, e.g.*, Fidel v. Farley, 534 F.3d 508 (6th Cir. 2008) (objector's appeal concerning class notice and attorneys' fees); Morris v. Lifescan, Inc., 54 F. App'x 663, 664 (9th Cir. 2003) (objector's appeal concerning attorneys' fees); s*ee also In re* Trans Union Corp. Privacy Litig., 664 F.3d 1081 (7th Cir. 2011) (fee dispute); *In re* Trans Union Corp. Privacy Litig., 629 F.3d 2011 (7th Cir. 2011) (earlier fee dispute).

investors who opted out of a federal securities class action with the belief that individual litigation would better serve their interests.[43]

Some of the matters involving objections to settlements and attorneys' fee awards on which I worked, or with which I was otherwise familiar, were resolved on undisclosed terms with appeals voluntarily dismissed by the objectors.[44] The *Enron* securities-fraud class action was one such matter.[45]

In 2008, my firm, by then known as Coughlin Stoia Geller Rudman & Robbins LLP, due to William S. Lerach's departure,[46] collected a $688 million attorneys' fee award from class-action settlements in *Enron*–a substantial portion of which the firm's Executive Committee passed on to Mr.

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[43] *See In re* WorldCom Sec. Litig. (Cal. Pub. Emps.' Ret. Sys. (CalPERS) v. Caboto-Gruppo Intesa, BCI), 496 F.3d 245 (2d Cir. 2007) (briefed and argued for pension funds that opted out of WorldCom class action to file individual suits; successful appeal from ruling that the pension funds' individual actions were untimely filed), *rev'g In re* WorldCom Inc. Sec. Litig. (State of Alaska Dept. of Revenue v. Ebbers), 294 F. Supp. 2d 431 (S.D.N.Y. 2003), *and In re* WorldCom Inc. Sec. Litig. (Cal. Pub. Emps.' Ret. Sys. (CalPERS) v. Ebbers), 308 F. Supp. 2d 214 (S.D.N.Y. 2004); Ill. Mun. Ret. Fund v. CitiGroup, Inc., 391 F.3d 844 (7th Cir. 2004) (briefed and argued for pension fund preferring to opt out of the *WorldCom* class action).

[44] *See, e.g.*, Stipulated Dismissal of Appeal Pursuant to Federal Rule of Civil Procedure 42(b), Newby v. Enron Corp., No. 08-20648 (5th Cir. Sept. 16, 2009) [hereinafter Dismissal Order] (stipulated dismissal of objectors' appeal from $688 million attorneys' fee award representing a multiplier of 5.2 times the lawyers' claimed reasonable hourly rates: "Pursuant to the joint stipulation of the parties this appeal is dismissed this 16th day, September, 2009, *see* FED. R. APP. P. 42(b)."); Rule 42(b) Mandate, N.Y. State Teachers' Ret. Sys. v. Alaska Elec. Pension Fund, No. 07-1197 (4th Cir. Feb. 22, 2008) (stipulated dismissal of objector's appeal from $17,625,000 attorneys' fee award representing a multiplier of six times the lawyers' claimed reasonable hourly rates); Order of Dismissal, Schwartz v. TXU Corp., Nos. 06-10040, 06-10041, 01-10042 (5th Cir. June 11, 2007) (stipulated dismissal of objectors' appeals from settlement approval and $33,244,500 attorneys' fee award: "Pursuant to the joint motion of the parties this appeal is dismissed this 11th day of June, 2007, *see* FED. R. APP. P. 42(b).").

[45] *See* Dismissal Order, *supra* note 44.

[46] *See* Jacqueline Bell, *Enron Plaintiffs Want Lerach Off the Docket*, LAW360 (Oct. 2, 2007), https://www.law360.com/texas/articles/36432/enron-plaintiffs-want-lerach-off-the-docket ("Plaintiffs in the multidistrict securities litigation over the implosion of Enron Corp. have asked a federal judge to withdraw former powerhouse plaintiff's lawyer William Lerach as attorney of record after he left his firm and pleaded guilty to conspiring to obstruct justice . . . . In pleading guilty, Lerach, a former name partner at Milberg Weiss, admitted that he and other partners at the firm secretly paid individuals to serve as lead plaintiffs in class action suits. Lerach also admitted that the plaintiffs who received the payments lied under oath about the existence of the kickback arrangement.").

Lerach despite his felony conviction and disbarment.[47] I cannot say how much of the award was given to him, as the firm's partnership agreement prohibited ordinary equity partners such as myself from reviewing the firm's financial records, or from learning how its revenues and profits are distributed.[48]

Some *Enron* class members thought that the $688 million attorneys' fee award, which represented more than five times the attorneys' claimed reasonable hourly rates, was just a bit too much, so they filed objections–which the district court ultimately rejected.[49] Eleven objectors then noticed an appeal that was resolved in September 2009 with a "Stipulated Dismissal of Appeal Pursuant to Federal Rule of Appellate Procedure 42(b)."[50] The "Stipulated Dismissal" recited that the objectors' appeal was being dismissed by agreement among the parties, "with an agreed upon amount in fees and costs to be paid to [the Objector-] Appellants as provided in a letter agreement separately entered into" on behalf of the Lead Plaintiff and Objector-Appellants,[51] but that was not attached to the "Stipulated Dismissal" or otherwise included in the public record.[52]

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[47] *In re* Enron Corp. Sec. Litig., 586 F. Supp. 2d 732, 814 n.94, 828 (S.D. Tex. 2008) (rejecting objection to "awarding fees to convicted criminal William Lerach" on the basis of "more than adequate briefing demonstrating the propriety of any fee sharing with Mr. Lerach before and after he left the firm and after his indictment, guilty plea, and sentencing," and then awarding attorneys' fees of "approximately $688 million, plus interest accrued").

[48] *See* P'ship Agreement of Lerach Coughlin Stoia & Robbins LLP 6 (May 1, 2004) ("[N]one of the books or records of the Partnership shall at any time be available for inspection by any Partner (other than members of the Executive Committee when serving as such).") (on file with author). A similar provision in the Milberg Weiss partnership agreement is, I believe, what enabled that firm's Executive Committee members to pay themselves secret bonuses and make under-the-table payments to class representatives, without disclosing the scheme to the rest of the firm's partners. *See* DILLON & CANNON, *supra* note 18, at 164–65 ("[David] Bershad and [Melvyn I.] Weiss devised the scheme. Those who were part of it, the inner circle of very senior partners (and Lerach was one of them), would award themselves annual bonuses. The bonuses would more or less match the amount the firm spent on referrals and indirectly reward the serial plaintiffs in their stable . . . . [I]t meant that in order to pay for plaintiffs, all the attorneys at Milberg Weiss would contribute, directly or indirectly, whether they knew it or not."); *see also id.* at 307 (noting that because of a federal criminal investigation, "a painstakingly meticulous federal prosecutor would soon know more about Milberg Weiss's complicated and long-standing system of kickbacks to named plaintiffs than all but a handful of the firm's senior partners.").

[49] *See Enron*, 856 F. Supp. 2d at 803–28.

[50] *See* Dismissal Order, *supra* note 44.

[51] *Id.* at 1.

[52] *See generally id.* (failing to attach letter that provided the agreed-upon amount fees and costs).

We can only guess what its terms might have been. I had worked on some other aspects of the case.[53] But I was not privy to the terms of that letter agreement. And given the confidentiality that currently surrounds mediated settlements of federal appeals, I could not in any event say whether, or how much, the objectors might have been paid to drop their appeal from the $688 million fee award.[54]

I do, however, think I have a good idea of how and why such agreements most often are entered by class counsel in order to secure the dismissal of objectors' appeals. And it most certainly is not because class counsel believe the objections are frivolous, as some judges and commentators seem to assume.[55]

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[53] *See, e.g.*, Regents of the Univ. of Cal. v. Credit Suisse First Boston, 482 F.3d 372, 376 (5th Cir. 2007) (class-certification appeal), *cert. denied sub nom.* Regents of the Univ. of Cal. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 552 U.S. 1170 (2008) (petition for a *writ of certiorari*); Opposition to Petitions for Writs of Mandamus, *In re* Barclays PLC, Nos. 03-20178, 03-20185, 03-20187, 2003 WL 22020185 (5th Cir. Mar. 6, 2003) (consolidated opposition to defendants' three mandamus petitions); *see also* DILLON & CANNON, *supra* note 18, at 411 (regarding a motion to recuse a Fifth Circuit judge in the class-certification appeal: "Speed was essential, and Isaacson finished in two days.").

[54] *See* ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 12 (2d ed. 2006) ("All of the [federal appellate mediation] program offices operate with confidentiality . . . . Local rules usually prohibit mediators, the parties, and the parties' attorneys from disclosing the substance of a conference to any judge or non-party. Generally not considered confidential, however, are the fact that the mediation took place and the bare results of the mediation (for example, settled, not settled, or continued)."); *see also, e.g.*, 1ST CIR. R. 33.0(c); 2ND CIR. R. 33.1(e); 3RD CIR. R. 33.5(c); 4TH CIR. R. 33; General Order Governing the Appellate Conference Program (5th Cir. 2000); 6TH CIR. R. 33(b)(4)(D); 8TH CIR. R. 33A(c); 9TH CIR. R. 33-1(c); 10TH CIR. R. 33.1(d); 11TH CIR. R. 33-1(c)(3).

[55] *See, e.g.*, John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What To Do About Them?*, 39 FLA. ST. U. L. REV. 865, 866 (2012) ("Professional objectors are attorneys who, on behalf of non-named class members, file specious objections to class action settlements and threaten to file frivolous appeals of district court approvals merely to extract a payoff."). Objections to the $688 million *percent-of-fund* attorneys' fee award in *Enron,* for example, were by no means frivolous. The Fifth Circuit's leading opinion on common-fund fee awards was Longden v. Sunderman, 979 F.2d 1095 (5th Cir. 1992), which in a footnote acknowledged that "the prevailing trend in other circuits and district courts has been towards awarding fees and expenses in common fund cases based on percentage amounts," but stated that "the Fifth Circuit has yet to adopt this method." *Id.* at 1099 n.9. Under the heading "Lodestar or Percentage of Recovery" *Longden* held: "This circuit utilizes the 'lodestar method' to calculate attorneys' fees." *Id.* at 1099. The Tenth Circuit thus cited *Longden* as showing that "one circuit has explicitly adhered to the lodestar method, acknowledging that 'the prevailing trend in other circuits' was to use the percentage method.'" Gottlieb v. Barry, 43 F.3d 474, 483 (10th Cir.

B. MY RECENT EXPERIENCE ON THE OBJECTORS' SIDE OF THE TABLE

I also have some experience on the class-action objectors' side of the table.

After more than two decades in the plaintiffs' class-action bar, in March of 2016 I struck out on my own to establish an independent class-action and appellate practice. Since then I have represented objectors in several matters.[56] I also have personally appeared as an objector in one proceeding, where I challenged a proposed class-action settlement and fee award in a case alleging that Godiva Chocolatier violated the Fair and Accurate Credit Transaction Act ("FACTA") and placed its customers at risk of identity theft by printing too many digits of the customers' credit-card numbers on their receipts.[57]

Although the statutory violations were undisputed in that case, and although Godiva's potential exposure to statutory damages exceeded $300

1994). Citing the rule in several "other circuits . . . that district courts enjoy the discretion to use either the lodestar of the percentage method," the Second Circuit flagged *Longden* as a "*but see*" citation because the Fifth Circuit had apparently rejected percent-of-fund fee awards. Goldberger v. Integrated Res., Inc., 209 F.3d 43, 49 (2d Cir. 2000); *see also In re* Copley Pharmaceuticals, Inc., 1 F. Supp. 2d 1407, 1410–11 (D. Wyo. 1998) (citing *Longden*: "The Fifth Circuit alone appears to require the continued use of the lodestar method."). Subsequent Fifth Circuit precedents appeared to follow *Longden* in mandating lodestar fee awards to the exclusion of percentage fee awards. *See, e.g.*, *In re* High Sulfur Content Gasoline Prod. Liab. Litig., 517 F.3d 220, 228 (5th Cir. 2008) ("This circuit requires district courts to use the 'lodestar method' to 'assess attorneys' fees in class action suits.") (quoting Strong v. BellSouth Telecomm., Inc., 137 F.3d 844, 850 (5th Cir. 1998)). Several years after the *Enron* appeal was resolved by a voluntary dismissal and on undisclosed terms–protecting class counsel's enormous $688 million fee award from meaningful appellate review–the Fifth Circuit ruled that percent-of-fund fee awards are permissible, provided they are subject to a lodestar cross check applying factors that "may be more searching than the 'lodestar cross-check' commonly referenced in other courts." Union Asset Mgmt. Holding A.G. v. Dell, Inc., 669 F.3d 632, 664 & n.42 (5th Cir. 2012). Whether the *Enron* percent-of-fund award would have survived appellate review under this standard is open to considerable doubt.

[56] *See, e.g.*, Chieftain Royalty v. Enervest, 861 F.3d 1182 (10th Cir. 2017) (appeal successfully challenging class counsel's $17.3 million attorneys' fee award); Objection of Class Member Isaacson/Weaver Family Trust to Proposed Attorneys' Fee Award, *In re* BioScrip, Inc. Sec. Litig., No. 13-cv-6922 (AJN), 2017 U.S. Dist. LEXIS 118881 (S.D.N.Y. July 26, 2017) (objection to class counsel's attorneys' fee award).

[57] *See, e.g.*, Muransky v. Godiva Chocolatier, Inc., No. 0:15-cv-60716-WPD, 2016 U.S. Dist. LEXIS 133695 (S.D. Fla. Sept. 28, 2016), *appeal docketed*, Muransky v. Godiva Chocolatier, Inc., No. 16-16486 (11th Cir. Feb. 22, 2017).

million even excluding potential actual damages, a named plaintiff with a criminal record for fraud who alleged no concrete injury to himself entered a class-action settlement purporting to release other class members' claims for both statutory and actual damages–in return for a class-action recovery of just $6.3 million. His lawyers, who had conducted no formal discovery and who refused to say how much time they had devoted to the case, let alone what their hourly rates might be, requested a third of that sum as common-fund attorneys' fees. They asked the district court to award their class-representative client, who had himself suffered no real injury, and who had declined to sit for a deposition, an incentive award of $10,000 as compensation for his personal services in securing a class-action settlement barring other class members' ability even to seek relief for any actual damages.[58]

My objection in the *Godiva* case focused first on the failure to comply with the rule of *Mercury Interactive Corp. Securities Litigation*[59] and *Redman v. RadioShack Corp.*[60] Those decisions hold that Rule 23(h) requires class members' deadline for filing objections to attorneys' fee applications to be placed *after* rather than *before* the date when class counsel will file the fee motion that the objections challenge.[61] It seems pretty obvious: class members and their lawyers should be able to see class counsel's fee application before being required to frame whatever objections to it they might have. I further objected that the proposed $2.1 million attorneys' fee award to class counsel, who apparently had devoted little time to the case and who refused to provide any information concerning their hours or billing rates, was inadequately supported and excessive. Eleventh Circuit precedents governing common-fund fee awards mandate that even in setting a percent-of-fund attorneys' fee award, the district court shall

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[58] *See* Motion for Final Approval of Class Action Settlement, Muransky v. Godiva Chocolatier, Inc., No. 0:15-cv-60716WPD, DE No. 74, at 19 (S.D. Fla. Aug. 21, 2016); Plaintiff's Motion for Award of Attorneys' Fees and Expenses, *Muransky*, DE No. 76, at 1.

[59] *In re* Mercury Interactive Corp. Sec. Litig., 618 F.3d 988, 993 (9th Cir. 2010).

[60] Redman v. RadioShack Corp., 768 F.3d 622, 637 (7th Cir. 2014).

[61] Objection to Proposed Settlement and Notice of Intent to Appear, *Muransky*, No. 0:15-cv-60716WPD, DE No. 59 at 3–4; *see Redman*, 768 F.3d at 638–39 ("There was no excuse for permitting so irregular, indeed unlawful, a procedure."); *Mercury Interactive*, 618 F.3d at 994–95 ("[A] schedule that requires objections to be filed before the fee motion itself is filed denies the class the full and fair opportunity to examine and oppose the motion that Rule 23(h) contemplates."); *accord In re* NFL Players Concussion Injury Litig., 821 F.3d 410, 446 (3d Cir. 2016) (asserting in dictum that "[w]e have little trouble agreeing that Rule 23(h) is violated in those circumstances").

first consider "the time and labor required," starting with the "hours claimed or spent on a case" which "are a necessary ingredient to be considered" in any award of common-fund attorneys' fees.[62] As for the $10,000 incentive bonus to a class representative with a criminal record who had suffered no injury and who refused to be deposed in the case, I observed that the Supreme Court's seminal common-fund precedents appear to flatly proscribe such payments to class representatives for personal services that they rendered in securing a common fund.[63]

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[62] Johnson v. Ga. Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974); *see* Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 772 & n.3, 775 (11th Cir. 1991) (noting that application of the Johnson factors starts with an evaluation of "the time and labor required," and then holding that "the Johnson factors continue to be appropriately used in evaluating, setting, and reviewing percentage fee awards in common fund cases").

[63] The seminal common-fund decisions, allowing for payment of attorneys' fees from recoveries benefitting a class, are two late nineteenth-century class actions prosecuted for the benefit of bondholders: *Trustees v. Greenough*, 105 U.S. 527 (1882), and *Cent. R.R. & Banking Co. v. Pettus*, 113 U.S. 116 (1885). The common-fund doctrine established by these decisions permits an award of attorneys' fees to a representative plaintiff whose efforts created a common fund benefitting a larger class, but they hold that an award for the class representative's personal services was wholly unwarranted and "illegally made," as the Court explained in *Greenough*:

> But there is one class of allowances made by the court which we consider decidedly objectionable. We refer to those made for the personal services and private expenses of the complainant . . . . The reasons which apply to his expenditures incurred in carrying on the suit, and reclaiming the property subject to the trust, do not apply to his personal services and private expenses. We can find no authority whatever for any such charge by a person in his situation . . . . It would present too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interest of creditors, and that perhaps only to a small amount, if they could calculate upon the allowance of a salary for their time and of having all their private expenses paid. Such an allowance has neither reason nor authority for its support. We are of opinion, therefore, that the allowance for these purposes was illegally made, and that to this extent the orders should be reversed. We refer to the allowance in the last order, of $15,003.35 for private expenses, and of $34,625 for personal services.

Greenough, 105 U.S. at 537–38. The Court reiterated the point in *Pettus*, when Justice Harlan wrote for the Court:

> In *Trustees v. Greenough*, 105 U.S. 527, we had occasion to consider the general question as to what costs, expenses and allowances could be properly charged upon a trust fund brought under the control of court by suits instituted by one or more persons suing in behalf of themselves and of all others having a like interest touching the subject-matter of the litigation. That suit was instituted by the holder of the bonds of a railroad company, on behalf of himself and other bondholders, to save

The last time I checked, the Supreme Court's decisions on a point of law are binding on lower courts until revisited and overruled by the Supreme Court itself.[64] I was also under the impression that class counsel have a duty to call such authority to the district court's attention.[65] Moreover, I was troubled by the notion that a class representative who suffered no injury should be able to evade the burden of demonstrating his own Article III standing under *Spokeo Inc. v. Robins*,[66] when entering a class-action settlement that purports to release other class members' claims for actual damages. It seems to me that a litigant who invokes federal jurisdiction to settle and bar other people's claims should have to satisfy the standing requirements of Article III subject-matter jurisdiction. Such were my contentions as an objector in *Godiva*.[67]

> from waste and spoliation certain property in which he and they had a common interest. It resulted in bringing into court or under its control a large amount of money and property for the benefit of all entitled to come in and take the benefit of the final decree. His claim to be compensated, out of the fund or property recovered, for his personal services and private expenses was rejected as unsupported by reason or authority. "It would present," said Mr. Justice Bradley, speaking for the court, "too great a temptation to parties to intermeddle in the management of valuable property or funds in which they have only the interests of creditors, and that, perhaps, only to a small amount, if they could calculate upon the allowance of a salary for their time and having all their private expenses paid."

Pettus, 113 U.S. at 122 (quoting *Greenough*, 505 U.S. at 538).

[64] *See, e.g.*, Bosse v. Oklahoma, 137 S. Ct. 1, 2 (2016) (reiterating the rule that it is the Supreme Court's "prerogative alone to overrule one of its precedents") (quoting United States v. Hatter, 532 U.S. 557, 567 (2001) (quoting State Oil Co. v. Khan, 522 U.S. 3, 20 (1997))); Hohn v. United States, 524 U.S. 236, 252–53 (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality."); Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989) (even if a Supreme Court precedent "appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions"). *See generally* BRYAN A. GARNER ET AL., THE LAW OF JUDICIAL PRECEDENT 28–33 (2016) (examining the process of binding lower courts by the decisions of higher courts in their jurisdiction).

[65] *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(2) (AM. BAR ASS'N 2014) ("A lawyer shall not knowingly: . . . (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel"). *See generally* Elaine Bucklo, *The Temptation Not to Disclose Adverse Authority*, 40 LITIG. 26 (2014) (examining the duty to disclose under Rule 3.3(a)(2)).

[66] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1553 (2016).

[67] *See* Objection to Proposed Settlement and Notice of Intent to Appear, *Muransky*, No. 0:15-cv-60716WPD , DE No. 59; Class Member Eric Alan Isaacson's Supplemental Brief, *Muransky*, No. 0:15-cv-60716WPD, DE No. 88; Objection to Magistrate's Report and Recommendation

To my surprise class counsel, who had obtained no merits discovery in the case, responded to my objection with a deposition subpoena, making me the first and only person deposed in the litigation. Although my membership in the class was not contested, and although my objections related to questions of law and the existing record in the case, class counsel insisted that, because I was an absent class member who had filed an objection, I was obligated to produce documents from other cases and to sit for a deposition. Mind you, my personal stake in the *Godiva* class action was rather small–I had as yet suffered no actual damages (beyond the annoyance associated with cancellation and replacement of a credit card), the statutory damages sought came to at most $1,000 per class member, and although the class notice falsely informed class members that we could expect to receive $235 apiece from the proposed settlement, class counsel's subsequent filings admitted that the real recovery per class member would be far less–maybe forty dollars, if I was lucky.[68] Though it was a waste of everyone's time, I in fact sat for the first and only deposition that class counsel bothered to take in the case.

When I later filed a notice of appeal from the district court's order rejecting my objections and granting settlement approval and attorneys' fees, class counsel naturally filed a motion asking the court to require the posting of "an appeal bond totaling $115,934.00" should I desire the Eleventh Circuit to consider my objections.[69] The district court thought that was excessive. But even though an appellee's taxable costs seldom exceed a few hundred dollars,[70] the district court ultimately required a $2,500

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on Attorneys' Fees, *Muransky*, No. 0:15-cv-60716WPD, DE No. 92, at 22; Transcript of Fairness Hearing, *Muransky*, No. 0:15-cv-60716WPD, DE No. 115, at 30–56.

[68] *Compare* Postcard Notice of Class Action Lawsuit and Proposed Settlement, *Muransky*, No. 0:15-cv-60716WPD, DE No. 59-1 ("Class Counsel estimate that a Settlement Class Member who submits a valid claim form . . . may receive a payment of around $235 subject to pro rata distribution."), *with* Motion for Final Approval of Class Action Settlement, *Muransky*, No. 0:15-cv-60716WPD, DE No. 74, at 7 (stating that class members "will receive approximately $60," before deducting a third for attorneys' fees).

[69] Amended Motion to Require Posting of Appeal Bond and Inc. Memorandum of Law, *Muransky*, No. 0:15-cv-60716WPD, DE No. 107, at 2.

[70] *See* MARIE LEARY, THE COMPARATIVE STUDY OF THE TAXATION OF COSTS IN THE FEDERAL CIRCUIT COURTS OF APPEALS UNDER RULE 39 OF THE FEDERAL RULES OF APPELLATE PROCEDURE 3–4 (Federal Judicial Center, Apr. 2011) ("Leaving out the larger awards that were identified as outliers in several circuits, the data show that across all circuits average costs awarded to appellees under subsection 39(a)(1) ranged from $84.15 to $198.08 ($153.68 median average award); under subsection 39(a)(2) average costs awarded to appellees ranged from $18.20 to $345.04 ($219.06 median average costs) . . . ."); *see also In re* MagSafe

bond to appeal–which was itself far more than my personal stake in the case as an absent class member.[71]

This, I have learned, is how things are done in many consumer class actions. Class counsel far too often put more effort into harassing objectors, and into seeking exorbitant bonds as a condition for appeal, than they do into actually litigating claims on behalf of the class.

III. THE PROBLEM POSED BY "PROFESSIONAL OBJECTORS" AND BY OFFERS TO PAY OBJECTORS TO DROP OBJECTIONS OR TO FOREGO APPEALS

Based on my experience as a longtime plaintiffs' class-action lawyer, I wish first to address concerns that "professional objectors" present a serious problem by filing frivolous objections and appeals, and then "extorting" money from class counsel in return for withdrawing the objections and dismissing the appeals. In my twenty-six years in the plaintiffs' class-action bar, I never saw that happen. Not once did I witness payments made in return for the withdrawal of a frivolous objection or appeal. My own experience as a member of the plaintiffs' class-action bar strongly corroborates the Public Citizen Litigation Group's similar conclusion: "Our experience leads us to believe that objectively frivolous objections are not a serious problem."[72]

Thus, to the extent that proposed revisions of Rule 23 are designed to deal with the problem of "professional objectors" who file frivolous objections in order extort money from class counsel,[73] they are apt to be seriously misdirected.

The view seems, however, to be fairly widespread that frivolous objections and appeals currently present a serious challenge to efficient class-

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Apple Power Adapter Litig., 571 F. App'x 560, 563 (9th Cir. 2014) (unpublished) (in appeal of class-action settlement, vacating bond of $15,000 because appeal costs "rarely exceed more than a few hundred dollars when taxed against an appellant").

[71] *See* Order Adopting Report of Magistrate Judge; Overruling Objections; Requiring Posting of Appeal Bond, *Muransky,* No. 0:15-cv-60716WPD, DE No. 121, at 4.

[72] Scott L. Nelson & Allison M. Zieve, *Comment to the Rule 23 Subcommittee of the Civil Rules Advisory Committee on Behalf of Public Citizen Litigation Group*, at 3 (Apr. 9, 2015).

[73] *See generally id.* at 4 (discussing that objections are subject to court approval under the current language of Rule 23 and its proposed changes).

action litigation.[74] Professor Brian T. Fitzpatrick paints the picture of lawyers working as "professional objectors," who induce "class members to file wholly frivolous objections and appeals for no other reason than to induce . . . payments from class counsel . . . ."[75] He writes that "[c]ourts and commentators believe that [such] objector blackmail is a serious problem."[76] As Professor John E. Lopatka and Chief Judge D. Brooks Smith of the United States Court of Appeals for the Third Circuit describe the problem: "Professional objectors are attorneys who, on behalf of nonnamed class members, file specious objections to class action settlements and threaten to file frivolous appeals of district court approvals merely to extract a payoff. Their behavior amounts to a kind of lawful extortion."[77]

Professor William Rubenstein suggests that this view of "professional objectors" was behind the 2003 addition to Rule 23 of subdivision (e)(4)(A)'s current mandate that "an objection may be withdrawn only with the court's approval."[78] It appears to be motivating the currently proposed further revisions, requiring court approval for whenever payments are made for an objector either to withdraw an objection or to voluntarily dismiss or otherwise forego an appeal.[79]

Strange as it may seem, however, in my twenty-six years of practice in the plaintiffs' class-action bar, no instance ever came to my attention of a payment made in return for the withdrawal of a clearly meritless objection, or the voluntary dismissal of a frivolous appeal. I have to agree with the conclusion of the Public Citizen Litigation Group: "Truly frivolous objections are unlikely to impede settlement approval or to be appealed."[80]

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[74] *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1624, 1624 (2009) (discussing frivolous objections and appeals being used to generate fees and are creating a problem in class-action litigation).

[75] *Id.* at 1624–25.

[76] *Id.*

[77] Lopatka & Smith, *supra* note 55, at 865.

[78] 4 WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS 415 (5th ed. 2014).

[79] *See Report of the Advisory Committee on Civil Rules*, *supra* note 1, at 228; *see also* PRELIMINARY DRAFT *supra* note 1, at 194 ("[the] [a]mendments to Rule 23(e)(2) seek to focus the court and the parties on the core considerations that should inform the court's review of a proposed settlement").

[80] Nelson & Zieve, *supra* note 72, at 3.

Frivolous objections, by definition, have little prospect of success, whether before the district court or before the court of appeals.[81] After a genuinely frivolous objection is rejected by a district court, a resulting appeal can typically be resolved without expenditure of much time or effort. "This is so because appellate courts may on motion dismiss frivolous claims at the outset (that is, before substantial fees are incurred)."[82] Indeed, "[t]he traditional countermeasure for an appeal thought to be frivolous is a motion in the appellate court to dismiss, which is available at the outset of the appeal and before expenses thereon begin to mount."[83] "Moreover, upon sustaining such a challenge, an award of fees and double costs would be warranted,"[84] since Federal Rule of Appellate Procedure 28 provides: "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."[85]

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[81] *Id.*; *see* Neitzke v. Williams, 490 U.S. 319, 325 (1989) ("[A]n appeal on a matter of law is frivolous where '[none] of the legal points [are] arguable on their merits.'") (quoting Anders v. California, 386 U.S. 738, 744 (1967)); Chevron U.S.A. Inc. v. M&M Petrol. Servs., 658 F.3d 948, 952 (9th Cir. 2011) ("A frivolous case is one that is groundless . . . with little prospect of success . . . .") (quoting Rodriguez v. United States, 542 F.3d 704, 709 (9th Cir. 2008)); Orr v. Bank of Am., 285 F.3d 764, 784 n.34 (9th Cir. 2002) ("An appeal is frivolous 'if the result is obvious or the appellant's arguments are wholly without merit.'") (citation omitted); Cash v. United States, 261 F.2d 731, 735 (D.C. Cir. 1958) ("'Frivolous' has a colloquial meaning of trifling or silly. It also has an established meaning in law, when applied to appeals, of 'manifestly insufficient or futile,' 'without merit and futile.'") (citation omitted); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519, 533 (1997) ("A suit is frivolous (1) when a plaintiff files knowing facts that establish complete (or virtually complete) absence of merit as an objective matter on the legal theories alleged, or (2) when a plaintiff files without conducting a reasonable investigation which, if conducted, would place the suit in prong (1).").

[82] Pedraza v. United Guar. Corp., 313 F.3d 1323, 1333 n.14 (11th Cir. 2002); *see also* United States v. Mason, 343 F. 3d 893, 894 (7th Cir. 2003) ("appellees are urged to move to dismiss frivolous appeals before briefing in order to save the parties' money and the court's time").

[83] *In re* Am. President Lines, Inc., 779 F.2d 714, 717 (D.C. Cir. 1985).

[84] *Pedraza*, 313 F.3d at 1333 n.14 (citing Geaneas v. Willets, 911 F.2d 579, 582 (11th Cir. 1990)).

[85] FED. R. APP. P. 38. *See, e.g.*, Wachovia Sec., LLC v. Loop Corp., 726 F.3d 899, 910 (7th Cir. 2013) (stating that the court will determine the appropriate amount of fees once the appellees submit their costs associated with the appeal and allow the appellant to have a reasonable time to respond); Gallop v. Cheney, 642 F.3d 364, 370 (2d Cir. 2011) (ordering Gallop to show cause in writing as to why she and her counsel should not have to pay double the costs and damages); Horoshko v. Citibank, N.A., 373 F.3d 248, 250 n.1 (2d Cir. 2004) (awarding the appellees reasonable attorneys' fees and instructing the court clerk to assess double the costs against the Horoshkos, because they did not respond after being notified during oral arguments of the

In the Ninth Circuit frivolous appeals from orders approving settlements may also be dealt with by means of motions for summary affirmance, which are regularly granted when objectors' appeals fail to present genuinely substantial issues.[86] Although orders dismissing such appeals are typically unpublished, their existence is well publicized and widely known to members of the plaintiffs' class-action bar.[87] *The National Law Review,* for example, reports that class counsel employing motions for summary affirmance have been "able to effectively dispose of" appeals asserting insubstantial objections "without expending significant resources or incurring substantial delay."[88]

In truth, however, relatively few objections are genuinely frivolous. Class members' objections typically raise legitimate concerns—even if the abuse-of-discretion standard of review means that orders approving settlements or attorneys' fee awards will more often be affirmed than reversed. Class counsel have little to gain by paying objectors off to drop really weak appeals, and are quite willing to defend them through oral argument and

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possibility of sanctions); Grove Fresh Distrib., Inc. v. John Labatt, Ltd., 299 F.3d 635, 642 (7th Cir. 2002) (requiring the appellant to pay costs, plus damages, for abusing the litigation process and the frivolous nature of the claim).

[86] *See, e.g.*, Order from Ninth Circuit Court of Appeals, Klee v. Nissan N. Am., No. 2:12-cv-08238-AWT-PJW (9th Cir. Dec. 9, 2015), DE No. 176 (order for summary affirmance in objectors' appeal in the Nissan Leaf class-action litigation: "A review of the record and the opposition to the motion for summary affirmance indicates that the questions raised in this appeal are so insubstantial as not to require further argument."); Dennings v. Clearwire Corp., No. 2:10-cv-01859-JLR, 2013 WL 12233931 (9th Cir. Apr. 22, 2013) (summary affirmance in objector's appeal from settlement approval in Clearwire Internet-service class action); *In re* Wal-Mart Wage & Hour Emp't Practices Litig., No. 2:06-cv-0225-PMP-PAL, 2010 WL 11545542 (9th Cir. Aug. 25, 2010) (summary affirmance in three consolidated objectors' appeals from settlement of employment-practices class action).

[87] *See, e.g.*, Anna C. Haac, *Ninth Circuit Grants Summary Affirmance In Objectors' Appeal from Class Action Settlement: A Case Study in Dealing with Serial Objectors*, NAT'L L. REV. (Dec. 12, 2013), https://www.natlawreview.com/article/ninth-circuit-grants-summary-affirmance-objectors-appeal-class-action-settlement-cas ("One tool that can be used against such serial objectors on appeal is the motion for summary affirmance, which asks the appellate court to affirm the final approval of the settlement quickly, without the delay that normally accompanies full appellate briefing and argument. Proceedings following a recent settlement of three class actions against Clearwire, which was approved by the United States District Court for the Western District of Washington, demonstrate the effectiveness of the summary affirmance procedure.").

[88] *Id.*

judgment–as I indeed have.[89] The prospect of defending such appeals is a cost of doing business, and of honoring due process that allows class members to present objections to judgments that will bind them.

Any notion that weak appeals somehow engender systematic "extortion" by objectors and their counsel of payments from class counsel is simply contrary to my experience. Class counsel have little incentive to pay for the voluntary withdrawal of objections, or the dismissal of objectors' appeals, that they believe are obviously meritless. Well-capitalized class counsel–that is to say, any counsel who are equipped to adequately represent a class–generally will have the financial wherewithal to negotiate "so-called 'quick-pay' provisions in their settlement agreements so that counsel receive their fees at final judgment, not after all appeals, taking the sting out of counsel's having to defend objector appeals."[90] "With the consent of the defendants, class counsel insert provisions into class action settlements that permit counsel to receive whatever fees district courts award them as soon as those courts approve the settlements, regardless of whether the settlements are appealed," with class counsel to refund the fees if the settlement or fee award is reversed on appeal.[91] Thus, as Professor Brian T. Fitzpatrick explains, "objectors who bring meritless appeals can no longer delay the point at which class counsel receive their fees" and "class counsel have little incentive to pay objectors a premium to avoid this delay."[92] "Quick-pay provisions are not only already in use," Professor Fitzpatrick adds, "they are already in wide use."[93]

For class counsel who choose to pay nuisance value to obtain the dismissal of weak appeals, moreover, the payments are just that–a mere nuisance, rather than a serious problem requiring much attention. Focusing on such payments misses the greater problem: class counsel who pay objectors to drop meritorious objections and to abandon appeals having a strong chance of success. In my twenty-six years in the plaintiffs' class-action bar, I never became aware of a case in which class counsel paid

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[89] *See* Fidel v. Farley, 534 F.3d 508, 510 (6th Cir. 2008) (objector's appeal concerning class notice and attorneys' fees); Morris v. Lifescan, Inc., 54 F. App'x 663, 664 (9th Cir. 2003) (objector's appeal concerning attorneys' fees).

[90] RUBENSTEIN, *supra* note 78 § 13:34; *see* Fitzpatrick, *supra* note 74, at 1623 (discussing quick-pay provisions); *see also* RUBENSTEIN, supra note 78 § 13:8 (discussing "terms of art" in class action settlement agreements).

[91] Fitzpatrick, *supra* note 74, at 1625.

[92] *Id.*

[93] *Id.* at 1626.

objectors to dismiss appeals that they believed to be frivolous or of insubstantial merit. The payments I knew of all were made to induce objectors to abandon appeals that class counsel feared the objectors were apt to win.

When class counsel make substantial payments to induce objectors to withdraw appeals they do so, in truth, not because the objections were frivolous, but because class counsel fear that the objections have genuine merit and may well be sustained on appeal. In so doing, class counsel place their own interests over those of the class whose interests they supposedly represent, paying objectors to drop appeals that threaten to benefit the class but that could thereby reduce class counsel's fee awards, or even eliminate them altogether–as in cases where class counsel labors under an irresolvable conflict of interest, or has obtained class certification in violation of fundamental principles of due process, or in violation of Article III standing requirements. The fault when such payments are made lies not with objectors who owe no duty to the class, or with objectors' counsel whose ethical obligations run to their own clients (the objectors), but with class counsel who do in fact have fiduciary duties running to the class whose interests they are supposed to advance.[94]

Class counsel place the objectors' lawyers in a box by offering payments far beyond the value of the objecting class members' individual claims. When a class member whose individual claim in a class action might be worth a few dollars is offered thousands, or tens of thousands, or even hundreds of thousands of dollars to drop her objection, she may well be tempted to do so. Her counsel can advise against it, and urge her to pursue her objection through appeal in order to benefit the class–but the decision whether to press the objection or withdraw it is the client's, not the lawyer's. Rules of professional conduct command: "A lawyer shall abide by a client's decision whether to settle a matter."[95] And the objector, in all likelihood, has bills to pay. She may have a mortgage or educational debt; her parents may have medical bills; she may hope to finance her own children's college education so that they may avoid the specter of crushing educational debt. Such considerations are apt to weigh heavily when an objecting class member is told that class counsel has offered to pay her a

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[94] *See generally* Katherine Ikeda, *Silencing the Objectors*, 15 GEO. J. LEGAL ETHICS 177, 196–200 (2001) (arguing that class counsel who pay objectors to drop substantial objections or appeals thereby breach their fiduciary duties to the class they were appointed to represent).

[95] MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2014); *accord, e.g.*, Attorney Grievance Comm'n v. Thaxton, 415 Md. 341, 343, 353, 358–59, 1 A.3d 470, 471 n.1, 477, 480–81 n.12 (2010); Rizzo v. Haines, 520 Pa. 484, 500–02, 555 A.2d 58, 66–67 n.9 (1989).

large sum to abandon her objection in a case where her personal stake, as a member of the class, is by comparison quite modest.[96] And there is little that the objector's lawyer can do to stop her.

If class counsel offers cash in return for withdrawing an objection or dismissing an appeal, the objector's counsel must of course communicate class counsel's offer to his or her client, the objector.[97] If the client decides to accept the payment, then class counsel who made it can be expected to revile the objector's counsel–who perhaps advised his client against accepting the payment–for filing the objection in order to "extort" the payment. This has given objectors' counsel a very bad name in some circles.[98] But any fault lies, in truth, with class counsel who offer objectors large sums to drop objections and appeals that could benefit the class at the expense of maximizing class counsel's fees.

As things currently stand, such payments are for the most part invisible and undocumented–most often made under the auspices of appellate-court mediation programs whose rules typically prohibit public disclosures concerning the substance of any communications or agreements entered in the course of mediation.[99] This gives class counsel the opportunity to offer, and objectors the opportunity to accept, substantial payments without

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[96] *See generally* Robert B. Gerard & Scott A. Johnson, *The Role of the Objector in Class Action Settlements: A Case Study of the General Motors Truck "Side Saddle" Fuel Tank Litigation*, 31 LOY. L.A. L. REV. 409 (1998) (discussing the objector's temptation to settle).

[97] *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 cmt. 2 (AM. BAR ASS'N 2014) ("[A] lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . must promptly inform the client of its substance . . . ."); *accord, e.g.*, Attorney Grievance Comm'n, 415 Md. at 341, 343, 354–55, 358, 1 A.3d at 470, 471 n.4, 478, 481 n.14 (2010); Rizzo v. Haines, 520 Pa. 484, 500–01, 555 A.2d 58, 66 (1989).

[98] Professor Edward Brunet notes that some in the plaintiffs' bar revile objectors and their counsel as "warts on the class action process" and "bottom feeders." Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 411.

[99] *See, e.g.*, 1ST CIR. R. 33.0(c); 2ND CIR. R. 33.1(e); 3RD CIR. R. 33.5(c); 4th Cir. R. 33; General Order Governing the Appellate Conference Program (5th Cir. 2000); 6TH CIR. R. 33(b)(4)(D); 8TH CIR. R. 33A(c) (repealed 2016); 9TH CIR. R. 33-1(c); 10TH CIR. R. 33.1(D); 11TH CIR. R. 33-1(c)(3). *See also* ROBERT J. NIEMIC, MEDIATION & CONFERENCE PROGRAMS IN THE FEDERAL COURTS OF APPEALS: A SOURCEBOOK FOR JUDGES AND LAWYERS 12 (2d ed. 2006) ("All of the [mediation] program offices operate with confidentiality . . . . Local rules usually prohibit mediators, the parties, and the parties' attorneys from disclosing the substance of a conference to any judge or non-party. Generally not considered confidential, however, are the fact that the mediation took place and the bare results of the mediation (for example, settled, not settled, or continued).").

fear of public disclosure. But a declaration that Theodore ("Ted") Frank and his nonprofit Center for Class Action Fairness filed in the Seventh Circuit *Capital One* appeal provides a glimpse of how class counsel too often operate.[100] Even Frank and the Center have had to abandon objectors' appeals that they earnestly desired to press, but that their clients directed them to drop when class counsel offered large sums of money.[101]

Frank's *Capital One* declaration explains that the Center is a nonprofit public-interest group organized to provide legal representation for objectors, so that it "cannot and does not settle its objections for *quid pro quo* cash payment to withdraw."[102] That is a fine aspiration. But the rules of professional ethics say that it is up to the client, not the attorney, to decide whether to accept a settlement offer.[103] The result is that class counsel, who wish to dispose of a strong appeal based on a meritorious objection, often can induce the objecting class member to abandon the appeal against his or her lawyer's wishes. Frank's declaration in *Capital One* explains:

> In a 2010 case, I represented a client with a meritorious Ninth Circuit appeal of approval of a settlement where the attorneys received $4 million and the class received zero. The appeals court ordered mediation, though I indicated to the mediator that my clients did not want to settle. After we filed our opening brief, class counsel offered an extraordinary sum to my clients to dismiss their appeals. (Unfortunately, the offer was confidential, and I cannot disclose it absent a court order.) One of my clients, an attorney friend, apologetically indicated that the offer was too good to refuse. I withdrew as attorney for the

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[100] *See* Declaration of Theodore H. Frank in Support of Motion to Intervene, *In re* Capital One Tel. Consumer Prot. Act Litig., Appeal of: Jeffrey Collins et al., No. 15-1400, 2015 WL 2156680 (7th Cir. May 5, 2015) (No. 15-1400), DE No. 60-2, ¶¶ 17–18, 80–81 [hereinafter Frank].

[101] *See id.*

[102] *Id.* ¶ 15. The Seventh Circuit describes Frank as a "professional objector to hollow class-action settlements." *In re* Subway Footlong Sandwich Mktg. & Sales Practices Litig., 869 F.3d 551, 552 (7th Cir. 2017). He has secured the reversal of numerous class-action settlements and attorneys' fee awards. *See, e.g., id.*; *In re* Walgreen Co. Stockholder Litig., 832 F.3d 718, 721, 726–27 (7th Cir. 2016); *In re* BankAmerica Corp. Sec. Litig., 775 F.3d 1060, 1062–63 (8th Cir. 2014); Pearson v. NBTY, Inc., 772 F.3d 778, 787 (7th Cir. 2014); Redman v. RadioShack Corp., 768 F.3d 622, 626 (7th Cir. 2014); Eubank v. Pella Corp., 753 F.3d 718, 719 (7th Cir. 2014); *In re* Dry Max Pampers Litig., 724 F.3d 713, 715–16 (6th Cir. 2013); *In re* HP Inkjet Printer Litig., 716 F.3d 1173, 1175–76 (9th Cir. 2013); *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 168–70 (3d Cir. 2013); Robert F. Booth Trust v. Crowley, 687 F.3d 314, 318–20 (7th Cir. 2012); Dewey v. Volkswagen Aktiengesellschaft, 681 F. 3d 170, 173 (3d Cir. 2012); *In re* Bluetooth Headset Prods Liab. Litig., 654 F.3d 935, 938, 941–50 (9th Cir. 2011).

[103] MODEL RULES OF PROF'L CONDUCT r. 1.2(a) (AM. BAR ASS'N 2014).

> two appellants, and they settled and dismissed the appeal. Neither the Center nor I received any compensation as part of that settlement.[104]

As a consequence of that experience, Frank's declaration recounts, the Center now insists on retainer agreements in which objecting class members pledge not to take payments in return for abandoning objections.[105] Even with these provisions in its retainer agreements, however, the Center cannot control clients who decide to accept payments from class counsel–as demonstrated by what happened in *Capital One* itself, where an objector who retained the Center to represent him and who agreed *not* to abandon his objections in return for an individual payment, nonetheless ultimately accepted a class counsel's offer of $25,000 to dismiss his appeal.[106]

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[104] Frank, *supra* note 100, ¶ 17.

[105] *See id.* ¶ 18. Frank's *Capital One* declaration explains:

> Since that time, the Center's retainer agreements contain multiple clauses relating to the motivations of the Center's clients and the possibility of settling objections for money. Among other provisions, the Center discloses that retaining the Center might deprive clients of the most financially advantageous outcome; clients promise that they are not seeking to settle their objections for money; and clients authorize the Center to move for an injunction prohibiting them from doing so. The Center also very carefully screens its clients to ensure their good faith in objecting and, when possible, uses Center attorneys or board members who are class members to object. We do not represent clients who do not agree to these terms.

Id.

[106] *See* Frank, *supra* note 100, ¶¶ 34–82. Frank's declaration explains that in *Capital One* a class member and objector (Jeffrey Collins) who had initially appeared pro se retained the Center to represent him in objection to class counsel's attorneys' fee application. "The objection was partially successful, and the district court reduced the $22.6 million attorney-fee request of class counsel by about $7 million." *Id.* ¶ 43; *see also In re* Capital One Tel. Consumer Prot. Act Litig., 80 F. Supp. 3d 781, 794–809 (N.D. Ill. 2015). Believing the attorneys' fee award should be further reduced, the Center filed a notice of appeal on behalf of Mr. Collins. With the matter on appeal, class counsel communicated an offer: "Mr. Collins must dismiss his appeal by close of business June 8, 2015, with $25,000 payable to Mr. Collins upon the appeal's dismissal." Frank, *supra* note 100, ¶ 74. Under the settlement offer from Lieff Cabraser Partner Jonathan D. Selbin, class counsel would pay Collins $25,000 in return for dismissing his appeal and withdrawing his pending fee petition in the district court. *Id.* ¶ 80. Frank was in a pickle, for when the offer was communicated to his client, an objector who had agreed not to accept such payments in return for withdrawing his objection:

> Mr. Collins indicated to me that he now wished to accept the offer notwithstanding his earlier agreement and statements. Research indicated that legal ethics rules required me to accept an unethical settlement offer, notwithstanding the retainer

When class counsel offer a substantial sum to an objecting class member whose individual claim is worth only a few dollars, or even several hundred dollars, the objector's lawyer is at his or her client's mercy. Though the plaintiffs' class-action bar may rant about "extortion" by "professional objectors,"[107] the truth is that class counsel can and do buy off objectors when the objector's counsel would much rather press objections for the benefit of the class.

The lawyers whose objector clients accept such payments, though denigrated as so-called "professional objectors" and "extortionists," are not at fault in these transactions. Their duty runs to their client, not to the class, however much they may wish to press an objection for the benefit of the class.[108] It is court-appointed class counsel who have a fiduciary duty to the class–a duty they breach by making self-interested payments in order to do away with objections and appeals that, if successful, stand to benefit the class.[109]

IV. DEALING WITH CLASS COUNSEL'S PAYMENTS TO OBJECTORS– THE CURRENT FRAMEWORK AND PROPOSED REVISIONS TO RULE 23(E)(5)

As currently framed Rule 23 is, without doubt, extremely ineffective in dealing with payments to objectors in exchange for their withdrawal of objections. Rule 23(e)(5) currently states that when a class-action settlement is proposed "[a]ny 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."[110] Yet no standard is stated in

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> agreement and my reliance upon it . . . and I wrote Mr. Selbin to indicate that Mr. Collins accepted the offer.

Id. ¶ 81.

[107] *See* Brunet, *supra* note 98, at 409 (noting that some in the plaintiffs' class-action bar revile objectors and their counsel as "warts on the class action process" and "bottom feeders"); Bruce D. Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action* Settlements, 84 ST. JOHN'S L. REV. 949, 986 n.150, 994 (2010) (complaining of "groundless objections" and objectors' "motives of extortion," and denouncing "the scourge of extortionate and dilatory objections").

[108] *See* MODEL RULES OF PROF'L CONDUCT r. 1.2 (AM. BAR ASS'N 2014) ("A lawyer shall abide by a client's decision whether to settle a matter."); *see supra* note 95.

[109] *See generally* Katherine Iketa, *Silencing the Objectors*, 15 GEO. J. LEGAL ETHICS 177, 196–200 (2001) (arguing that class counsel who do this breach fiduciary duties to the class that they were appointed to represent).

[110] FED. R. CIV. P. 23(e).

the rule, or anywhere else for that matter, to guide the district court's determination. And, as things currently stand, "[o]nce an objector appeals, control of the proceeding lies in the court of appeals," placing it beyond the district court's power to monitor.[111]

The current rule's greatest shortcoming is that it establishes no standard at all for approving the withdrawal of an objection–a shortcoming that the revision currently under consideration does nothing to correct.[112]

Should a district judge approve the withdrawal, in return for payment, of an objection that he or she believes is meritless in order to avoid the delay that the objection's full prosecution might otherwise cause? Or should the court refuse to approve withdrawal of an apparently meritless objection in return for a payment from class counsel–thereby inducing the objector to file and prosecute a presumptively meritless appeal? It is easy to imagine different judges reaching different conclusions on identical facts. What is the standard for withdrawal of an objection that the district court is inclined to reject, but that an appellate court may find has substantial merit? Should withdrawal of such an objection ever be approved? Under what circumstances?

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[111] FED. R. CIV. P. 23(e) (discussing the details regarding the advisory committee's note to 2003 amendment). The Advisory Committee Note adds: "[t]he court of appeals may undertake review and approval of a settlement with the objector, perhaps as part of appeal settlement procedures, or may remand to the district court to take advantage of the district court's familiarity with the action and settlement." *Id.* In practice, however, the appellate courts have not done this.

[112] The proposed amendment now under consideration would strike Rule 23(e)(5)'s current requirement that an objection to settlement approval "may be withdrawn only with the court's approval," to instead provide, with respect to objections to settlement approval:

> (A) In General. Any class member may object to the proposal if it requires court approval under this subdivision (e).
>
> (B) Court Approval Required For Payment to an Objector or Objector' s Counsel. Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector's counsel in connection with:
>
> (i) forgoing or withdrawing an objection, or
>
> (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.
>
> (C) Procedure for Approval After an Appeal. If 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.

See PRELIMINARY DRAFT, *supra* note 1, at 215–17.

Rule 23(e)(5) currently provides no answers to any of these questions.[113] Neither do the Advisory Committee Notes to the 2003 Amendments that created it. The leading treatise on class actions advises: "'The Rule itself does not set forth the circumstances under which such approval may be given, nor is there any controlling authority on the issue.'"[114] Perhaps that is why, in practice, the requirement of court approval for withdrawal of objections to settlements generally is ignored–although many objections are withdrawn, one seldom sees district courts actually passing on the propriety of the withdrawals. The paucity of meaningful precedent, given the significant number of objections that are withdrawn, is truly remarkable.

Rule 23's loophole for objections to attorneys' fees is even more remarkable. Rule 23(h) authorizes class members to object to an attorneys' fee application, just as Rule 23(e)(5) authorizes objections to settlement approval.[115] But where Rule 23(e)(5) requires court approval for withdrawal of an objection to a settlement, Rule 23(h) contains no parallel requirement of court approval for withdrawal of an objection to class counsel's attorneys' fee application.[116] Thus, it appears that class counsel may freely pay objectors to drop objections to attorneys' fee awards without disclosure to, let alone approval from, the district court.

The proposed amendment to Rule 23(e)(5) does little, if anything, to help. Rule 23(e)(5)'s current requirement that an objection to approval of a settlement "may be withdrawn only with the court's approval," would be stricken and replaced with a new requirement of approval only when an objector or objector's counsel receives payment in return for the withdrawal of an objection to approval of a settlement.[117] It would further provide that if such an objection is withdrawn after an objector's appeal has

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[113] *See* FED. R. CIV. P. 23(e)(5).

[114] RUBENSTEIN, *supra* note 78, § 13:34, at 417 (quoting Glass v. UBS Fin. Servs. Inc., No. C-06-4068 MMC, 2007 WL 160948, at *2 (N.D. Cal. Jan. 17, 2007) (allowing objector to withdraw when other objectors were pressing the same points anyway)).

[115] FED. R. CIV. P. 23.

[116] Rule 23(e)(5) currently provides: "[a]ny 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). In contrast, Rule 23(h)(2) currently authorizes objections to attorneys' fee awards without requiring court approval for withdrawal of such objections. It simply states: "[a] class member, or a party from whom payment is sought, may object to the motion." FED. R. CIV. P. 23(h)(2).

[117] *See supra* note 112; PRELIMINARY DRAFT, *supra* note 1, at 215–17, 228–29.

been docketed, the required approval can be sought pursuant to the provisions of Rule 62.1, allowing for limited remands for district courts to entertain a motion over which a pending appeal would otherwise deprive it of jurisdiction.[118] Applying only to Rule 23(e) objections to settlement approval, the amendments still would not require court approval for the withdrawal of Rule 23(h)(2) objections to attorneys' fees.

I see at least two fundamental problems with this proposal. First, by striking the requirement that district courts approve all withdrawals of objections, it invites class counsel's harassment of objectors.[119] Second, it provides no guidance at all as to what standards a district court should apply in determining whether or not to approve the withdrawal of an objection or appeal in return for a payment.[120]

A. Dispensing With Court Approval When No Consideration Is Paid for an Objection's Withdrawal May Encourage Harassment of Objectors by Class Counsel

The proposed amendment under consideration would strike Rule 23(e)(5)'s current requirement that "the objection may be withdrawn only with the court's approval," while adding new text requiring judicial approval only if payment or consideration is provided to the objector or its counsel.[121] The Committee Note explains that with respect to objections to settlement approval:

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[118] FED. R. CIV. P. 62.1 provides:

> (a) Relief Pending Appeal. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> (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.
>
> (b) Notice to the Court of Appeals. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.
>
> (c) Remand. The district court may decide the motion if the court of appeals remands for that purpose.

[119] *See infra* p. 65–67.

[120] *See infra* pp. 67–69.

[121] *See supra* note 112; PRELIMINARY DRAFT, *supra* note 1, at 215–17, 228–29.

> 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. But Rule 23(e)(5)(B)(i) requires court approval of any payment or other consideration in connection with withdrawing the objection.[122]

Striking the general requirement of judicial approval for the withdrawal of any objection to the approval of a settlement is apt to encourage abuse. While it is true that an objector should be free to withdraw on concluding an objection is in fact not justified, a district court still should inquire to ensure that this really is the reason the objector seeks to withdraw the objection.[123]

Far too often, objections are withdrawn not because objectors believe they lack merit, but on account of bullying and harassment by unscrupulous class counsel.[124] In most class-action cases the great majority of class members have rather small stakes. Yet objectors with small claims who take the trouble to inform the court of concerns about a proposed settlement or fee award may find themselves swiftly subpoenaed to produce documents and be deposed–as I was when I had the audacity to object to the proposed settlement and attorneys' fee award in the *Godiva* FACTA litigation.[125] The costs of complying with such subpoenas are apt in many instances to greatly exceed objectors' stake in a class action, inducing them to drop even sincere and likely meritorious objections.

The practice of bullying objectors with subpoenas and discovery has become widespread in consumer class-action litigation.[126] As things

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[122] PRELIMINARY DRAFT, *supra* note 1, at 228.

[123] Lopatka & Smith, *supra* note 55, at 889–90.

[124] *See infra* note 125.

[125] *See supra* p. 53 (As noted above, my deposition as an objector turned out to be the *only* deposition that was taken in the case.).

[126] Consider, for example, the withdrawal of an objection to the proposed settlement and attorneys' fee award in *Home Depot Breach Litigation*, in which the *pro se* objector informed Judge Thomas Thrash:

> I withdraw my objection to the proposed settlement of Case No. 14-md-02583-TWT (The Home Depot, Inc. Customer Security Breach Litigation). I still believe that my objection has merit, but wish to avoid the cost and inconvenience of a deposition (including travel and missing work). As discussed with Mr. Theodore Maya of Ahdoot & Wolfson, PC, (1) I am notifying him by e-mail and the court by U.S. mail, (2) he will withdraw the subpoena that was delivered to me, and (3) he will cancel the deposition that had been scheduled for August 5, 2016. I am receiving no money or other consideration for withdrawing my objection.

currently stand, district courts are asking *too few* questions, rather than too many, about objections withdrawn without the payment of any consideration. They should be required to review *every* withdrawal of an objection–though under the current rule, they seldom really do so; very likely because no standards currently exist to guide their review.

B. Requiring District-Court Approval for Payments While Providing No Standards for Approval, and Without Permitting Reconsideration of a Settlement Previously Approved, Likely Will Not Do Much Good

The proposed revision to Rule 23(e)(5) would require district-court approval not only when payments are made in return for the withdrawal of an objection to a settlement, but also when payments are made for the withdrawal of any appeal from the denial of such an objection.[127] But, much like the current Rule 23(e)(5), the proposed revision provides no guidance at all concerning what the appropriate standard for approval might be.

Should the court approve the withdrawal of a relatively weak appeal in return for a modest payment? Should it approve withdrawal of the weak appeal in return for a large payment? Or should it withhold approval, and insist that the objector proceed with what the court believes is weak

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Letter from Stephen Weinstein re: Withdrawal of Objection, *In* re Home Depot, Inc. Customer Data Sec. Breach Litig., No. 1:14-md-02583-TWT, 2016 WL 6902351, at *4, DE No. 255 (N.D. Ga. Aug. 2, 2016); *see also* Declaration of John R. Bevis in Support of Final Approval, Home Depot, Inc. Customer Data Sec. Breach Litig., 2016 WL 6902351, DE No. 254-3, ¶ 4 ("On July 28, 2016, Mr. Weinstein represented to Consumer Counsel that he is withdrawing his objection and is sending a copy of his withdrawal to the Court.").

Mr. Weinstein probably was not the only objector harassed by class counsel into withdrawing his objection. The case drew multiple objections from class members who complained that notice was inadequate, because they received it only after the time for filing objections had run – but who then withdrew their objections without explanation:

> At the final approval hearing, the parties informed the Court that the following untimely objectors wished to withdraw their objections and opt-out of the Settlement; and pursuant to the parties' stipulation they will be included in the opt-out list and not bound by the terms of the Settlement: Michael Dwyer, Timothy Haley, and Peter Scoolidge.

Order Granting Final Approval of Class Action Settlement and Final Judgment, *In re* Home Depot, Inc., Customer Data Sec. Breach Litig., 2016 WL 6902351, at *5, DE No. 260, at 12.

[127] PRELIMINARY DRAFT, *supra* note 1, at 228–29.

appeal? The Advisory Committee Note provides mixed messages on what a court should do.

On the one hand, the Advisory Committee Note to the proposed revision of Rule 23(e)(5) seems to suggest that district courts should approve payments made for the dismissal of weak appeals simply in order to avoid the delay that appellate proceedings may cause: "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."[128] On the other hand, the Advisory Committee Note also appears to say that the amendments are motivated by the view that such payments should be condemned: "At least in some instances, it seems that objectors–or their counsel–have sought to extract tribute to withdraw their objections or dismiss appeals from judgments approving class settlements."[129] So what is a district judge to do? Approve a payment for dismissal of a really weak appeal in order to avoid the delay occasioned by full appellate proceedings? Or deny approval because the payment is some taboo "tribute"? Neither the proposed revisions nor their Advisory Committee Notes provide clear guidance. And different judges might reach very different conclusions on fundamentally similar facts.

What if class counsel has offered an objector a *very large* payment in return for abandoning a supposedly "meritless" appeal? Should the district court perhaps reconsider whether the objection has merit, so that it should be sustained rather than withdrawn? That might make sense, if the interest of the class were what mattered–but the proposed amendments do not appear to permit such reconsideration.

With the proposed revisions, a new Rule 23(e)(5)(C) would require judicial approval of payments made to induce the dismissal of a pending appeal by providing: "If 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."[130] But Rule 62.1 provides that "[i]f a timely motion is made for relief that the [district] court lacks authority to grant because of an appeal that has been docketed and is

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[128] PRELIMINARY DRAFT, *supra* note 1, at 230.

[129] *Id.* at 229.

[130] *Id.* at 216–17. The Advisory Committee Note to this revision adds: "Because the court of appeals has jurisdiction over an objector's appeal from the time that it is docketed in the court of appeals, the procedure of Rule 62.1 applies." *Id.* at 231.

pending, the [district] court may: (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." And then: "The district court may decide the motion if the court of appeals remands for that purpose."[131]

Thus, it appears that the district court receives jurisdiction to decide only "the motion" in question–concerning whether to approve voluntary dismissal of an objector's appeal in return for payment. The proposed revision does not authorize the district court to consider anything more than this.[132] While a large payment might signal that the appeal has merit, and that the district court should perhaps reconsider the objection to settlement approval itself, the court would lack authority to do so.

Of course, the district court that originally rejected an objection probably is not the best judge of whether an appeal from its own order has merit. Responsibility for approving such transactions would be better vested in the appellate court or another district judge, who can evaluate the matter more objectively, than remanded to the judge who personally rejected the objection in the first instance.

V. RECOMMENDATIONS

I think it makes sense to require searching judicial inquiry and approval before any class members' objection is withdrawn or compromised. Thus, the current requirement of judicial approval for any withdrawal of an objection should be retained and strengthened, rather than abandoned whenever no consideration is paid.

District courts should be wary when good-faith objections are withdrawn without the payment of consideration, and they should be swift to punish class counsel who serve subpoenas on objectors for purposes of harassment and intimidation.[133] Class counsel who engage in such programs of harassment clearly do not have the class's best interests at heart.

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[131] FED. R. CIV. P. 62.1(c).

[132] *See generally* PRELIMINARY DRAFT, *supra* note 1, at 211–18 (discussing the proposed revision to FED. R. CIV. P. 23).

[133] *See, e.g.*, *In re* Classmates.com Consol. Litig., No. C09-45RAJ, 2012 WL 3854501, at *9–11 (W.D. Wash. June 15, 2012) (reducing class counsel's attorneys' fee award by $100,000 on account of aggressive behavior towards an objector and his counsel, which included serving

Unfortunately, district courts cannot be expected to engage in productive inquiries concerning withdrawals of objections when there are no clear standards to be applied.[134] Currently there are none.[135] Top priority should be given to study of how the system currently works, in order to frame standards that will operate to benefit class members by facilitating potentially meritorious objections and appeals while barring class counsel from paying objectors to terminate them. The real problem is not that objectors secure payments from class counsel in order to abandon frivolous objections and appeals. It is that class counsel pay objectors to drop objections and appeals that have merit and could benefit the class.

Expanding the requirement of district-court approval to encompass voluntary dismissal of appeals without first providing clear standards is not likely to help much. Disclosure and transparency are surely are to be desired, and class counsel who seek to pay objectors to withdraw appeals should not be able to hide behind letter agreements and appellate-mediation confidentiality rules. But clear standards should be developed before the requirement of judicial approval is expanded.[136]

Rhetoric condemning objectors, and their counsel, for pursuing their own interests rather than those of the class, raises serious questions about whether objectors and their lawyers have duties running to the class. The Advisory Committee Note to the proposed revisions to Rule 23(e)(5)(B) say that "[g]ood-faith objections can assist the court in evaluating a proposal under Rule 23(e)(2) . . . . But some objectors may be seeking only personal gain, and using objections to obtain benefits for themselves rather than assisting in the settlement-review process."[137]

As things currently stand class representatives, and their lawyers, are supposed to act as fiduciaries to the class they represent.[138] An objector, as an absent class member, currently owes no such duty. And an objector's

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subpoenas on the objector's counsel, and was "conduct that was plainly not in the interests of the class").

[134] *See supra* Part IV.

[135] *Id.*

[136] *See generally id.* (discussing the lack of standards currently available).

[137] PRELIMINARY DRAFT, *supra* note 1, at 229.

[138] *See supra* note 12; *see also* Howard M. Downs, *Federal Class Actions: Diminished Protection for the Class and the Case for Reform*, 73 NEB. L. REV. 646, 652 (1994) ("[t]he named representatives functions as a fiduciary to the class with a duty to protect the absent class members in key decisions throughout the course of the lawsuit.").

counsel is obligated to represent its objector client's interests rather than those of the class.[139] If the Advisory Committee wishes to change the rules, and to impose fiduciary duties running to the class on objectors' and their counsel, it should say so clearly.

Once clear standards have been promulgated, transparency and full disclosure of class counsel's payments to secure the withdrawal of objections should be expanded to encompass objections to attorneys' fees authorized by Rule 23(h)(2), as well as objections to settlement approval authorized by Rule 23(e)(5). The existing loophole for objections to attorneys' fee awards should be closed.

Finally, recognizing that objectors' counsel may be influenced by financial self-interest, it would be helpful to promulgate rules under which objectors' counsel can expect to be paid at least as much for successfully prosecuting an objection benefitting the class as they can expect when an objection is instead abandoned or an appeal dismissed. Financial incentives should be structured to encourage assertion of objections for the benefit of the class, rather than their abandonment in return for a payment by class counsel that benefits only the individual objectors and their counsel.

VI. CONCLUSION

The proposed amendments to Rule 23(e)(5) fail to take account of the practical realities of class-action practice. In my twenty-six years in the plaintiffs' class-action bar, I have never seen class counsel make a payment in return for the withdrawal of a frivolous objection. But class counsel will pay large sums to induce objectors to drop potentially meritorious objections that could well benefit the class. Any fault in such transactions rests with class counsel, who owe a fiduciary duty to the class as such, rather than to the objector's counsel who owes no such duty but is, to the contrary, obligated to represent the objector's interest as an individual should he or she decide to accept a settlement offer.

Judicial review of the withdrawal or compromise of an objection should be strengthened, whether or not consideration is paid to the objector. But most of all, clear standards are needed to guide district courts' review when consideration is offered. The currently proposed amendments provide none.

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[139] *See supra* Part III; Frank, *supra* note 100.