

October 2011

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Recommended Citation

Greenberg, Bruce D. (2011) "Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements," *St. John's Law Review*: Vol. 84: Iss. 3, Article 4.

Available at: <http://scholarship.law.stjohns.edu/lawreview/vol84/iss3/4>

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KEEPING THE FLIES OUT OF THE OINTMENT: RESTRICTING OBJECTORS TO CLASS ACTION SETTLEMENTS

BRUCE D. GREENBERG[†]

It is not the critic who counts, not the man who points out how the strong man stumbled, or where the doers of deed could have done better. The credit belongs to the man who is actually in the arena: whose face is marred by the dust and sweat and blood; who strives valiantly; who errs and comes short again and again . . . who knows the great enthusiasms, the great devotions, and spends himself in a worthy cause; who, at the best, knows in the end the triumph of high achievement; and who, at the worst if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who know neither victory nor defeat.¹

INTRODUCTION

Most class actions are resolved by settlement. By rule, class action settlements must be approved by the court.² When the parties to a class action and their respective counsel agree to settle the case, they join forces in presenting their settlement to the court and seeking approval of that settlement.

The settlement is agreed to, however, without direct involvement by members of the class that will be bound by the

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¹ *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 961 (E.D. Tex. 2000) (quoting Theodore Roosevelt).

² FED. R. CIV. P. 23(e). Many state court class action rules are largely similar in this and other respects discussed in this Article and will not be separately discussed or cited. *See, e.g.*, N.J. CT. R. 4:32-2(e)(1)(A) (2010).

settlement. As a result, such “absent class members” are permitted to object that a proposed settlement is not fair, reasonable, and adequate.³

In theory, objectors can occasionally highlight aspects of a proposed settlement that are unreasonable or that expose conflicts among the interests of class members or between class counsel and the class.⁴ But in reality, all too frequently, objectors and their counsel see an opportunity to extract money from the parties or class counsel, whose efforts brought about the settlement, by threatening to upset or seriously detour the settlement. Objectors make arguments that are groundless yet sufficient to delay the settlement approval process for months or years unless class counsel or the parties agree to “buy off” the objector or the objector’s counsel. Objector tactics can prove lucrative because the other parties may prefer to “buy off” the objectors rather than suffer the delay and additional expense necessary to defeat the objection.

Courts have been somewhat schizophrenic about objectors. A few cases have recognized that objectors can sometimes inform the court of problems with a proposed settlement that the parties, no longer adversaries, would not perceive or raise.⁵ Far more courts, however, have noted that many objections are groundless and filed for purposes of extracting unwarranted payments.⁶ Such objections are most often filed by “professional objectors”—attorneys who make their living by objecting to class

³ See FED. R. CIV. P. 23(e)(5). The right of absent class members to object to a settlement is guaranteed by the Due Process Clause. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985). Absent class members in cases certifying classes under Federal Rule of Civil Procedure 23(b)(3) also have the right to exclude themselves from the settlement. FED. R. CIV. P. 23(c)(2)(B)(v) (stating that there is an absolute right to opt out of settlement where the class is certified in connection with settlement); *id.* 23(e)(4) (stating that the court may afford a new opportunity to opt out if the class was certified prior to settlement). Such exclusion is beyond the scope of this Article. Sometimes, in multiple defendant cases, nonsettling defendants object to settlements, often, though not always, based on “bar orders” that limit their right to shift responsibility to the settling defendant. See, e.g., *In re Heritage Bond Litig.*, 546 F.3d 667, 676 (9th Cir. 2008). Such objections are also beyond the scope of this Article.

⁴ See, e.g., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.643 (2004).

⁵ See *infra* note 73 and accompanying text.

⁶ See *infra* notes 55–64 and accompanying text.

action settlements and extracting a part of class counsel's hard-earned attorney fees or a payment from the settling parties for compromising those objections.⁷

In at least two ways, professional objectors harm the class members whose interests they claim to represent. First, professional objectors' almost invariably groundless objections delay the provision of relief to class members who, in most instances, have already waited years for resolution. Second, by feeding off the fees earned by class counsel who took the risk of suing defendants on a purely contingent basis, as is the normal practice in class actions, professional objectors create a disincentive for class counsel to take on such risky matters. That disincentive clashes with the public interest, repeatedly recognized by courts, to incentivize class counsel to handle such cases.

This Article proposes changes in the way courts evaluate objections and the persons who bring them. It also suggests a return to fundamental principles of the law governing attorney fees for objector counsel. Restricting objector counsel fees would reduce their incentive to file groundless objections, by limiting fee awards to only those who raise valid problems with a settlement that the courts would not otherwise perceive. Reducing the ability of objectors, particularly professional objectors, to obtain a fee will concomitantly lessen the frequency of their objections, thus benefiting class members by reducing delays in the implementation of appropriate settlements.

Part I shows that objectors, especially professional objectors, are frequently not needed, particularly in the high-dollar cases where they normally surface, since existing multi-layered protections ensure the fairness of settlements. The protections include the class counsel's fiduciary duty to the class, the class counsel's own economic interest in advocating only appropriate settlements, the obligation of judges to scrutinize settlements for

⁷ See Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 437 & n.150 (defining "professional objectors" as "attorneys who make a living free riding off the work of class counsel" by "filing objections in class action cases, usually after a proposed settlement has emerged, and always to collect a fee"). Professor Brunet found insufficient evidence at that time to determine whether professional objectors existed. *See id.* at 437-39. As this Article will demonstrate, however, cases since that time show conclusively the existence of professional objectors and their increasing unjustifiable interference with major proposed class action settlements.

fairness and the class counsel's requested fees for reasonableness, judges' track record of carefully evaluating settlements even before objectors come on the scene, and, in many cases, the role of governmental agencies who must be notified of proposed settlements and can protect class members' interests. Only in the relatively rare case in which an objector raises a valid problem with a settlement that a court would not otherwise have perceived does an objection have value, and professional objectors virtually never do that.

Instead, as Part II shows, professional objectors often fail to make the effort necessary to understand the settlement that they are attacking, as courts have frequently noted. Instead, professional objectors simply present the same "canned" objections again and again, often copying them verbatim from case to case regardless of their appropriateness. Part II identifies some of these boilerplate arguments made by objectors of all types and suggests that courts treat such objections, and any objections by professional objectors, either as presumptively invalid or incapable of supporting an objector counsel's request for fees.

Finally, Part III reviews the law applicable to objector fee requests. The general rule has been that objectors can only rarely win a fee award for objecting, but some courts recently have been more receptive to fee awards for objector counsel. Since professional objectors have perceived that it has become easier to obtain a fee, they have been emboldened to file objections in any case of significant size. That result disserves class members by: (1) delaying implementation of settlements; and (2) disincentivizing class counsel, who end up having to share their fees with professional objectors who did nothing to create the value from which the fees result. Courts should return to the rule that objector fees are only rarely available and then only where objector counsel substantially benefit the class.

I. THE CURRENT LANDSCAPE OF THE CLASS ACTION SETTLEMENT PROCESS

Class actions are risky and complex.⁸ In recognition of that fact, courts often state that there is no precise settlement amount

⁸ See, e.g., *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 458 (9th Cir. 2000); *Cotton v. Hinton*, 559 F.2d 1326, 1331 (5th Cir. 1977); see also *Jones v. Dominion*

that is fair, reasonable, and adequate. Rather, there is normally a “range of reasonableness,” at any point within which settlement negotiators might properly agree.⁹ Yet objections frequently focus on ways in which a proposed settlement falls short of an optimal one for the class, without regard to the plaintiffs’ likelihood of ultimate success at trial or whether the settlement as agreed is nonetheless within the range of reasonableness.¹⁰ In doing so, objectors allege that a lack of adversarialness by the representative plaintiffs and their counsel result in a disservice to the class.

A. *The Structural Protections Afforded to Class Members by the Settlement Process*

When the parties to a class action join hands and present a proposed settlement to a court, the adversarial process, which is

Res. Servs., Inc., 601 F. Supp. 2d 756, 762 (S.D. W. Va. 2009) (stating that class counsel “risk defeat at several stages of litigation: class certification, dispositive motions, and finally, trial”).

⁹ Courts have long listed “the range of reasonableness of the settlement fund in light of the best possible recovery” among the factors to be considered in evaluating a proposed settlement. *See, e.g.*, *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (citation omitted); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974) (citation omitted). Many cases have recognized that this range can encompass even settlements for only a few cents on the dollar, sometimes depending on the strength or weakness of the plaintiffs’ case. *See, e.g., Grinnell Corp.*, 495 F.2d at 455 & n.2 (finding that a settlement of even a few cents on the dollar can be reasonable); *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 429 (S.D.N.Y. 2007) (finding that a settlement payment of 37.5% of all sums allegedly improperly paid to defendants was “a very good settlement”); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 510 n.4 (W.D. Pa. 2003) (finding that settlement for between five percent and twenty-five percent of maximum provable damages was reasonable because in other cases, settlements for even lower percentages of maximum damages had been approved).

¹⁰ *See, e.g., Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971, at *8 (N.D. Cal. Nov. 16, 2007) (“The few objections that purport to consider the viability of Plaintiff’s claim either do so in a conclusory manner, or paint an unreasonably rosy picture of the prospects of success for this class.”); *Snell v. Allianz Life Ins. Co.*, No. Civ. 97-2784 RLE, 2000 WL 1336640, at *19 (D. Minn. Sept. 8, 2000); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 304 (N.D. Ga. 1993) (“[I]t is unrealistic to expect a recovery that is the equivalent of a victory by plaintiffs at trial.”); *In re Wash. Pub. Power Supply Sys. Sec. Litig.*, 720 F. Supp. 1379, 1394 (D. Ariz. 1989) (observing that objections were based on the “fallacious” assumption that “the case assured certain victory for Plaintiffs”). As the Seventh Circuit has stated, a “settlement will not be rejected solely because it does not provide a complete victory to the plaintiffs.” *Isby v. Bayh*, 75 F.3d 1191, 1200 (7th Cir. 1996).

often said to yield the most appropriate results,¹¹ is no longer fully operational.¹² That can be true both as to the substantive terms of the settlement and as to the fees to be paid to class counsel.¹³ Despite that, however, there are several significant structural guarantees that lead the parties and their counsel to settle only on appropriate terms.

First, class counsel have fiduciary duties that run not only to the named plaintiffs but to absent class members as well.¹⁴ To comply with those duties, class counsel will not settle a case except after considering the discovery taken, the applicable facts and law, and the likelihood of success.¹⁵ For this reason, many cases state that the judgment of experienced class counsel, who are familiar with the facts and law of the case, is to be given substantial weight in determining whether to approve a settlement.¹⁶

¹¹ See, e.g., *Mackey v. Montrym*, 443 U.S. 1, 13 (1979) (“[O]ur legal tradition regards the adversary process as the best means of ascertaining truth and minimizing the risk of error”); *In re Kensington Int’l Ltd.*, 368 F.3d 289, 310 (3d Cir. 2004) (“The adversary process plays an indispensable role in our system of justice”).

¹² See, e.g., *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 789 (3d Cir. 1995).

¹³ The parties sometimes negotiate a “clear sailing” agreement as to fees, under which the defendant will pay class counsel attorney fees, as awarded by the court, of up to a certain amount without objection. Courts have differed in their views of such agreements, though they in fact pose no problem in the context of an arms-length negotiation. Compare *Weinberger v. Great N. Nekoosa Corp.*, 925 F.2d 518, 525 (1st Cir. 1991) (“[T]he inclusion of a clear sailing clause in a fee application should put a court on its guard”), with *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 334–35 (3d Cir. 1998) (finding a clear sailing agreement negotiated only after agreement was reached on settlement for class was not improper); see also *Waters v. Int’l Precious Metals Corp.*, 190 F.3d 1291, 1293 n.4 (11th Cir. 1999) (citing cases on both sides of this issue). The Advisory Committee note to Federal Rule of Civil Procedure 23(h) states that “[t]he agreement by a settling party not to oppose a fee application up to a certain amount, for example, is worthy of consideration, but the court remains responsible to determine a reasonable fee.” FED. R. CIV. P. 23(h) advisory committee’s note.

¹⁴ See, e.g., *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 280 (7th Cir. 2002); *In re Cendant Corp. Litig.*, 264 F.3d 201, 231 (3d Cir. 2001).

¹⁵ These same factors are among those that guide courts’ analyses of whether a settlement is fair, reasonable, and adequate. See, e.g., *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 963–67 (9th Cir. 2009); *Int’l Union v. Gen. Motors Corp.*, 497 F.3d 615, 631 (6th Cir. 2007); *Isby*, 75 F.3d at 1198–99; *Girsh v. Jepson*, 521 F.2d 153, 156–57 (3d Cir. 1975); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974).

¹⁶ See, e.g., *Isby*, 75 F.3d at 1200; *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 292 (W.D. Tex. 2007); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 65 (S.D.N.Y. 2003).

Courts have ample reason to be confident in the judgment of class counsel. For example, in securities fraud cases, class counsel are no longer selected by the first plaintiff to file a lawsuit. Instead, class counsel are proposed by the court-appointed lead plaintiff, who is selected after a rigorous and often competitive process under the Private Securities Litigation Reform Act ("PSLRA"), and must be approved by the court.¹⁷ Even in nonsecurities matters, the court must appoint class counsel and ensure the adequacy of those counsel when it certifies a class.¹⁸ Rule 23(g)(1)(A) lists a number of criteria that the court must follow in making that appointment,¹⁹ designed to screen out unqualified or untrustworthy counsel. These criteria justify reliance on class counsel when they advocate a settlement.

Additionally, class counsel have a financial incentive to seek adequate settlements. When considering a class settlement, particularly in cases where a litigation class has not already been certified, courts are required to find that all the requirements for class certification, including adequacy of representation under Rule 23(a)(4), are satisfied.²⁰ Class counsel who recommend an inadequate settlement will not be found adequate, and the entire proposed settlement, as well as class counsel's own fee, will thus be jeopardized.²¹ This gives class counsel a financial incentive, beyond their fiduciary duty, itself a significant motivator,²² to offer only appropriate settlements for approval.

¹⁷ 15 U.S.C. § 78u-4(a)(3)(B)(v) (2006) (stating that lead plaintiff selects class counsel, but subject to court approval).

¹⁸ FED. R. CIV. P. 23(g)(1)(A)–(B).

¹⁹ *Id.* 23(g)(1)(A).

²⁰ *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 307–08 (3d Cir. 1998) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997)).

²¹ *See, e.g., In re Cmty. Bank of N. Va.*, 418 F.3d 277, 305–08 (3d Cir. 2005) (expressing discomfort with adequacy of class counsel and vacating settlement based on failure to satisfy Rule 23 criteria).

²² A finding in one case that class counsel is inadequate affects that counsel not only in that matter, but in subsequent cases where that same counsel seeks appointment as class counsel. Courts will be disinclined to appoint as class counsel attorneys who have been found inadequate elsewhere. Competitors for appointment as class counsel in such subsequent cases will be quick to highlight such findings of inadequacy. *See, e.g., John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 397 (2000) (noting "open warfare over which counsel is to be chosen lead counsel"); *Nowak v. Ford Motor Co.*, 240 F.R.D. 355, 358 n.4, 365–66 (E.D. Mich. 2006) (competitors for lead counsel position hurled charges of failing to meet deadlines or to observe court rules, filing "copycat" pleadings, and alleged conflicts of interest); *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 690 (N.D. Cal. 1990) (describing "volleys of

Second, as a backstop to class counsel, the judge who reviews a proposed settlement is charged with acting as a fiduciary who must protect the rights of absent class members.²³ Many cases hold that judges are not simply to rubber-stamp settlements but are instead to review them scrupulously.²⁴

There is a two-step process for evaluating settlements. First, the judge determines whether a proposed settlement is sufficient enough to justify notice to the class and full consideration of the settlement at a final hearing.²⁵ Though this preliminary review is deferential,²⁶ and occurs before class members are even made aware of the proposed settlement so that no objectors are yet present, judges have rejected a number of proposed settlements at that stage.²⁷ Second, at the final hearing, the judge considers

disparagement" launched by counsel competing for lead role). This cascading effect of a determination of inadequacy that could result from recommending an unfair settlement is a powerful check on any class counsel who might be considering "selling out" a class in settlement.

²³ See, e.g., *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, LLC*, 504 F.3d 229, 249 (2d Cir. 2007); *In re Bank Am. Corp. Sec. Litig.*, 350 F.3d 747, 751 (8th Cir. 2003); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279–80 (7th Cir. 2002) (citing cases); *In re Gen. Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 805 (3d Cir. 1995).

²⁴ See, e.g., *Weinberger v. Kendrick*, 698 F.2d 61, 82 (2d Cir. 1982); *In re Zoran Corp. Derivative Litig.*, No. C 06-05503 WHA, 2008 WL 941897, at *2 (N.D. Cal. Apr. 7, 2008). This is particularly so when no litigation class has been certified, so that the parties are seeking settlement approval and approval of a settlement class simultaneously. See, e.g., *In re Gen. Motors*, 55 F.3d at 805 (stating that "courts [must] . . . be even more scrupulous than usual" in such a context); *Mars Steel Corp. v. Cont'l Ill. Nat'l Bank & Trust Co.*, 834 F.2d 677, 682 (7th Cir. 1987).

²⁵ See, e.g., *Armstrong v. Bd. of Sch. Dirs. of Milwaukee*, 616 F.2d 305, 314 (7th Cir. 1980), *overruled on other grounds*, *Felzen v. Andreas*, 134 F.3d 873 (7th Cir. 1998); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 562 (D.N.J. 1997) (citation omitted), *aff'd*, 148 F.3d 283 (3d Cir. 1998); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 671, 675–76 (D. Kan. 2009); MANUAL FOR COMPLEX LITIGATION, *supra* note 4, § 13.14.

²⁶ See, e.g., *In re NASDAQ Mkt. Makers Antitrust Litig.*, 929 F. Supp. 174, 177 (S.D.N.Y. 1996) (preliminary approval required if no "obvious deficiencies" in proposed settlement); *In re Elec. Data Sys. Corp. ERISA Litig.*, No. 6:03-MD-1512, 2005 WL 1875545, at *4 (E.D. Tex. June 30, 2005) (characterizing preliminary approval review as a " cursory examination").

²⁷ See, e.g., *Keene v. Coldwater Creek, Inc.*, No. C 07-05324 WHA, 2009 WL 1833992, at *1 (N.D. Cal. June 23, 2009) (noting denial of two prior applications for preliminary settlement approval); *Scott v. First Am. Title Ins. Co.*, Civil No. 06-cv-286-JD, 2008 WL 2563460, at *1, *3 (D.N.H. June 24, 2008) (noting repeated denials of motions for preliminary settlement approval); *In re Zoran*, 2008 WL 941897, at *2; *In re Chiron Corp. Sec. Litig.*, No. C-04-4293 VRW, 2007 WL 4249902, at *17–18 (N.D. Cal. Nov. 30, 2007); *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1299 (S.D. Fla. 2007) (noting denial of prior motion for preliminary settlement

the arguments of both the parties and any objectors and conscientiously determines whether the proposed settlement is fair, reasonable, and adequate.²⁸

The court's oversight duty is stronger still when concerning attorney fee awards to class counsel. In 2005, the Federal Rules of Civil Procedure were amended to add Rule 23(h). The Advisory Committee note to that new rule states that "[a]ctive judicial involvement in measuring fee awards is singularly important to the proper operation of the class-action process."²⁹ A number of cases have quoted that note in evaluating fee awards.³⁰ The Advisory Committee emphasized that "[e]ven in the absence of objections, the court bears this responsibility."³¹

These structural protections for class members—two sets of fiduciaries who have multiple motivations to prevent inadequate settlements—are very robust. They virtually always ensure that unfair or unreasonable settlements do not receive final approval.³² As a result, objectors are rarely necessary, since they normally do not tell judges anything that those judges do not

approval); *In re Gilat Satellite Networks, Ltd.*, No. CV-02-1510 (CPS) (SMG), 2007 WL 2743675, at *2 (E.D.N.Y. Sept. 18, 2007); *Acosta v. Trans Union, LLC*, 243 F.R.D. 377, 379 (C.D. Cal. 2007); *Woullard v. State Farm Fire & Cas. Co.*, No. 1:06cv1057 LTS-RHW, 2007 WL 208519, at *4, *6 (S.D. Miss. Jan. 26, 2007); *Carnegie v. Household Int'l, Inc.*, 445 F. Supp. 2d 1032, 1033 (N.D. Ill. 2006) (noting denial of two prior motions for preliminary settlement approval); *Johnson v. GMAC Mortgage Group, Inc.*, No. 04-cv-2004-LRR, 2006 WL 1071748, at *5 (N.D. Iowa Apr. 20, 2006); *In re Elec. Data Sys.*, 2005 WL 1875545, at *6; *Sutton v. Bernard*, No. 00 C 6676, 2002 WL 1794048, at *1 (N.D. Ill. Aug. 5, 2002); *In re Microsoft Corp. Antitrust Litig.*, 185 F. Supp. 2d 519, 525, 530 (D. Md. 2002); *cf. Laroque v. Domino's Pizza, LLC*, 557 F. Supp. 2d 346, 348 (E.D.N.Y. 2008) (noting partial denial of preliminary approval of collective action certification under Fair Labor Standards Act).

²⁸ See, e.g., MANUAL FOR COMPLEX LITIGATION, *supra* note 4, § 21.634.

²⁹ FED. R. CIV. P. 23(h) advisory committee's note.

³⁰ See, e.g., *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005); *Turner v. Murphy Oil USA, Inc.*, 472 F. Supp. 2d 830, 857 (E.D. La. 2007); *In re Cabletron Sys., Inc. Sec. Litig.*, 239 F.R.D. 30, 38 (D.N.H. 2006).

³¹ FED. R. CIV. P. 23(h) advisory committee's note.

³² There are, of course, isolated and inevitable exceptions. See, e.g., *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 311–12 (3d Cir. 2005) (criticizing district judge for simply adopting findings and conclusions submitted by class counsel before having reviewed them and indicating that class counsel might not be adequate representatives of class). But in virtually every other case, class counsel and judges have discharged their duties faithfully, as the system expects, even where settlements have ultimately been found unacceptable. Rejection of a settlement does not necessarily mean that class counsel, or a trial level judge, has betrayed duties to the class.

already perceive.³³ Moreover, in 2005, Congress enacted legislation that, among other things, directed that state attorneys general or federal authorities receive notice of many proposed settlements and have the opportunity to object to them.³⁴ These agencies, who act in the public interest and do not seek to extort payments from the settling parties, likely serve whatever useful function objectors can perform in such cases.³⁵

B. The Fallacy That Objectors Seek To Protect the Class, as Opposed to the Personal Interests of the Objectors or Their Counsel

The position that objectors are useful relies on the notion, more theoretical than real, that class counsel and district courts may fail to protect the class as required.³⁶ Thus, class counsel

³³ See, e.g., *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 278 n.32 (E.D.N.Y. 2009) (stating that the court “read with amusement” objector’s assertion that judge could not have read settlement papers and evaluated settlement on his own). This is particularly so of objectors to class counsel’s attorney fees requests. See *infra* notes 93–95, 101–02 and accompanying text. But it also applies to objectors who complain about the merits of the settlement. Professional objectors in particular often fail to read or understand the settlement to which they object. See *infra* notes 68, 137 and accompanying text. Pro se objectors often lack the expertise to understand all the components of and considerations underlying settlements despite the detailed notices that accompany them and the ability to telephone class counsel to get more information.

³⁴ 28 U.S.C. § 1715(b) (2006). These agencies are often underfunded and overburdened, leading to the need for “private attorneys general” such as class counsel to enforce the law. See, e.g., *Deposit Guar. Nat’l Bank of Jackson v. Roper*, 445 U.S. 326, 339 (1980) (“The aggregation of individual claims in . . . a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory action of the government.”); cf. *Agency Holding Corp. v. Malley-Duff & Assoc., Inc.*, 483 U.S. 143, 151 (1987) (noting the pressure brought by private attorneys general “on a serious national problem for which public prosecutorial resources are deemed inadequate”). However, these regulatory authorities are more likely to respond to specific and detailed invitations to comment on or object to class action settlements. Indeed, that has happened in at least one case, which led to the rejection of a proposed settlement. *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007).

³⁵ See Brunet, *supra* note 7, at 449–56 (describing activities and capabilities of state and federal government agencies in objecting to class action settlements).

³⁶ Much of the academic concern about the conduct of class counsel and the courts arose from celebrated mass tort litigation in the 1990s, especially asbestos class actions. See, e.g., *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 629–30 (3d Cir. 1996), *aff’d sub nom.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 507–08 (N.D. Tex. 1995) (discussing a private firm that also handled asbestos cases and a legal clinic that was a subsidiary of a maritime law firm), *aff’d sub nom.* *In re Asbestos Litig.*, 90 F.3d 963, 968 (5th Cir. 1996), *rev’d sub nom.* *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999);

might allow their own financial interests in a fee that will result from any settlement, even an inadequate one, to override their duties to their clients, the class.³⁷ Additionally, some judges may abandon their own duty and simply rubber-stamp what the settling parties present to dispose of a burdensome matter or to advance their own secret substantive agenda.³⁸

But actual experience shows that these cynical concerns about class counsel and the judiciary are virtually never realized. On the contrary, class counsel take on risky cases on an entirely contingent basis, against well-funded defendants represented by top-flight counsel.³⁹ Class counsel advance vast sums in out-of-pocket expenses and invest their time over periods of many years.⁴⁰ Only if they succeed by trial or a settlement that must be approved by the court do they earn a fee. Even that fee must likewise obtain judicial approval, after notice to the class and “beady-eyed scrutiny” by the court.⁴¹ Indeed, class counsel who betray their clients risk sanctions,⁴² malpractice actions,⁴³ or even

Coffee, *supra* note 22, at 372–74 (focusing on mass tort and non-opt out class actions while addressing broader issues); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045, 1047–49 (1995) (attacking the ethics of class counsel in *Georgine*, by a paid expert witness on behalf of settlement objectors); Symposium, *Mass Torts: Serving Up Just Desserts*, 80 CORNELL L. REV. 811 (1995). But the theoretical foundation was provided earlier by Professor John C. Coffee, Jr. in a number of articles, some of which date back to the 1980s. *See, e.g.*, Coffee, *supra* note 22; John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986).

³⁷ *See, e.g.*, *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002).

³⁸ *See, e.g.*, Charles W. Wolfram, *Mass Torts-Messy Ethics*, 80 CORNELL L. REV. 1228, 1233 (1995). For an apparent example of such rubber-stamping, see *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 300–01 (3d Cir. 2005).

³⁹ Courts often recognize that class actions are very risky and that class counsel must fight against excellent lawyers for defendants. *See, e.g.*, *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 357–59 (S.D.N.Y. 2005); *In re Lucent Tech., Inc. Sec. Litig.*, 327 F. Supp. 2d 426, 436–37 (D.N.J. 2004); *In re Ikon Office Sys., Inc. Sec. Litig.*, 194 F.R.D. 166, 194–95 (E.D. Pa. 2000) (discussing that securities fraud cases are difficult, and Private Securities Litigation Reform Act made them more so, and stating that defense counsel had “a fine reputation” and “displayed great skill”). *See also supra* note 8 and accompanying text.

⁴⁰ *See infra* notes 70, 99 and accompanying text.

⁴¹ FED. R. CIV. P. 23(e), (h); *Reynolds*, 288 F.3d at 286 (7th Cir. 2002) (stating that fee requests are to receive “beady-eyed scrutiny”).

⁴² The criminal proceedings brought against the Milberg Weiss Bershad Hynes & Lerach firm and several of its top members, which resulted in guilty pleas and jail sentences for the members, are an extreme example of this. *See, e.g.*, Michael

their licenses. There is no reason to presume that class counsel would risk such consequences. Judges, too, normally do their duty.⁴⁴ In the usual case, therefore, there is little need for objectors to look over the shoulders of class counsel and the court.

In reality, objectors and professional objector counsel often surface because they can profit by doing so.⁴⁵ Objectors can

Parrish, *Leading Class-Action Lawyer Is Sentenced to Two Years in Kickback Scheme*, N.Y. TIMES, Feb. 12, 2008, at C3 (discussing sentencing of William Lerach for concealing illegal payments to the firm's clients in class action cases).

⁴³ See generally Huber v. Taylor, 532 F.3d 237 (3d Cir. 2008) (legal malpractice action arising out of alleged breaches of duty to plaintiff clients by defendant attorneys); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1057 (1996) ("In short, our answer to class action abuse is 'sue the bastards.'").

⁴⁴ See, e.g., Richardson v. United States, 468 U.S. 317, 331 (1984) (expressing the belief that "judges faithfully honor their obligations to enforce applicable state and federal laws"); Huffman v. Pursue, Ltd., 420 U.S. 592, 611 (1975) (refusing to assume that "judges will not be faithful to their constitutional responsibilities"). Some scholars have concluded, however, that relying on trial judges to scrutinize settlements is "sure to fail." See, e.g., Coffee, *supra* note 22, at 438; Koniak & Cohen, *supra* note 43, at 1122–28. But if that were so, it would be expected that trial judges would virtually never deny preliminary settlement approval at a time when no objectors are yet present, and the parties should, according to critics of the judicial role, be able to have their way with allegedly pliable, uninformed, biased, lazy, or corrupt judges. That is particularly so since preliminary approval does little more than direct that notice of settlement—for which one or both settling parties pay—be given to the class and open a proposed settlement to more searching review at a final hearing. Thus, it should be very easy for a trial level judge to grant preliminary settlement approval, since the court incurs no cost by doing so and, if anything, advances its supposed overriding interest in facilitating settlements so as to clear its docket of a potentially burdensome matter. Yet, it is not difficult to find examples of courts denying preliminary settlement approval. See *supra* note 27 and accompanying text. The preliminary approval laboratory demonstrates the vitality of judicial review of proposed settlements, as do the not insignificant number of cases in which judges have awarded a reduced fee to class counsel even though there were no objections to the requested fees. See *infra* note 102. Such rulings go against the notion that judges' need for approval from lawyers in the settled cases and others who might later appear before them leads judges to accept settlements and counsel fee applications uncritically. See, e.g., Koniak & Cohen, *supra* note 43, at 1127.

⁴⁵ See, e.g., Barnes v. Fleetboston Fin. Corp., No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at *3 (D. Mass. Aug. 22, 2006) ("Repeat objectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements."); Spark v. MBNA Corp., 289 F. Supp. 2d 510, 514 (D. Del. 2003) (stating that groundless objection by serial objector counsel "appears to be nothing more than an attempt to receive attorneys' fees").

sometimes wangle special consideration for themselves.⁴⁶ But, more importantly, objector counsel can collect fees for filing objections, in at least two ways.

First, objector counsel can negotiate for payment of a fee as part of their clients' agreement to withdraw their objections, regardless of the merits of those objections.⁴⁷ Such payments often bear no relationship whatsoever to the actual time expended by such counsel since, unlike class counsel who seek a fee award from a court,⁴⁸ objector counsel frequently do not submit time records for judicial scrutiny or document their claimed fee in any other way.⁴⁹ The amount of the fee paid to objector counsel in exchange for going away is purely a matter of negotiation, in which objectors can take full advantage of the leverage that the threat of delay alone poses to the settling parties.⁵⁰

⁴⁶ See, e.g., Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 618 (1997).

⁴⁷ See, e.g., *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003) (noting that objectors may "intervene and cause expensive delay in the hope of getting paid to go away"); MANUAL FOR COMPLEX LITIGATION, *supra* note 4 ("An objection, even of little merit, can be costly and significantly delay implementation of a class settlement.")

⁴⁸ In general, there are two bases for a fee award to class counsel. The "lodestar method" is based on the number of hours reasonably billed, which class counsel must document for the court, multiplied by a reasonable hourly rate, subject to further adjustment, such as an enhancement by a multiplier. See *infra* text accompanying note 165. The "percentage of the fund" method awards class counsel a percentage of the settlement common fund or common benefit that counsel's efforts helped to create. See generally *Brytus v. Spang & Co.*, 203 F.3d 238, 242 (3d Cir. 2000) (discussing lodestar and percentage methods). Even where a percentage award is made, courts often use the lodestar as a "cross-check." See, e.g., *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 164 (3d Cir. 2006) (recommending such a cross-check); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1050 (9th Cir. 2002). Thus, though class counsel are not required to submit detailed time records to support a percentage award, see, e.g., *In re Prudential Ins. Co. of Am. Sales Practices Litig. Agent Actions*, 148 F.3d 283, 342 (3d Cir. 1998), some evidence of their actual time expended is always before the court in order to enable the "lodestar cross-check."

⁴⁹ See, e.g., *Mirfasihi v. Fleet Mortgage Corp.*, No. 01 C 722, 2007 WL 2608778, at *7 (N.D. Ill. Sept. 6, 2007), *aff'd*, 551 F.3d 682 (7th Cir. 2008), *cert. denied sub nom.* *Perry v. Mirfasihi*, 129 S. Ct. 2767 (2009); *Perez v. Asurion Corp.*, No. 06-20734-CIV, 2007 WL 2591174, at *1-2 (S.D. Fla. July 18, 2007); *In re WorldCom, Inc. Sec. Litig.*, No. 02 Civ.3288 (DLC), 2006 WL 1722573, at *1 (S.D.N.Y. June 20, 2006) (stating that objector counsel failed to submit time records to support demand for over \$100,000 in fees even after court specifically requested such records); *Spark*, 289 F. Supp. 2d at 514 n.5.

⁵⁰ See *Barnes*, 2006 U.S. Dist. LEXIS 71072, at *3-4.

Second, objector counsel have been awarded fees for purely cosmetic “improvements” to a settlement, or for merely “sharpening the issues” for the court without having enhanced the settlement.⁵¹ In such instances, objector counsel demand either a portion of the additional value that the “improvement” to the settlement can be said to be worth or a large portion of the attorney fees that class counsel earned through years of risky litigation that resulted in the questioned settlement, while objector counsel sat on the sidelines or failed in their own litigation against the defendant.⁵² Particularly in cases in which a large fee may be in the offing for class counsel, settlements make an inviting target for rapacious professional objectors.⁵³

⁵¹ See *infra* notes 154–57 and accompanying text.

⁵² See, e.g., *In re Holocaust Victim Assets Litig.*, 424 F.3d 150, 155 (2d Cir. 2005) (objector’s counsel demanded a fee almost equal to the fee granted to class counsel); *Mirfasihi*, 2007 WL 2608778, at *7 n.5 (stating that objector’s counsel demanded one hundred percent of fee awarded to class counsel); *New England Carpenters Health Benefits Fund v. First Databank, Inc.*, No. 05-11148-PBS, 2009 WL 3418628, at *1 (D. Mass. Oct. 20, 2009) (stating that objector’s counsel demanded over \$28,000 in fees for objecting to class counsel’s request for fee of \$84,000,000); *Parker v. Time Warner Entm’t Co.*, 631 F. Supp. 2d 242, 278 (E.D.N.Y. 2009) (stating that objector demanded over \$860,000 in fees, which was over twenty five percent of the fee award to successful class counsel); *Azizian v. Federated Dep’t Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549, at *2, *5 (N.D. Cal. Sept. 29, 2006) (stating that objector counsel sought 12.5% of the class counsel fee and labeling that request “exorbitant”); *Great Neck Capital Appreciation Inv. P’ship, L.P. v. Pricewaterhousecoopers, L.L.P.*, 212 F.R.D. 400, 416 (E.D. Wis. 2002) (stating that objector sought ten percent of the class counsel fee, which court found excessive); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 359 (N.D. Ga. 1993) (rejecting one objector’s fee request as “exorbitant” and “excessive”). This happens with particular frequency in the context of objections to class counsel fees. If the court awards less than class counsel requested, objectors demand outlandish percentages of the reduction for themselves. See, e.g., *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682, 687 (7th Cir. 2008) (court labeled “chutzpah” and “preposterous” objector counsel’s demand that entire fee awarded to class counsel be transferred to objectors); *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008) (court reduced class counsel fee request by \$37 million; one objector sought eighteen percent of that amount, or \$6.66 million, while another demanded ten percent, amounting to \$3.7 million); *Spark*, 289 F. Supp. 2d at 513 (stating that objector sought 10.17% of fee reduction).

⁵³ See *In re Cardinal Health*, 550 F. Supp. 2d at 754 (“[O]pportunistic objectors . . . now seem to accompany every major securities litigation.”); *Azizian*, 2006 WL 4037549, at *9 (“The announcement of a large settlement in a class action involving widely used products, with \$24,000,000 for attorneys’ fees and costs often attracts other lawyers who had nothing to do with the instigation of the case to see if they might make some changes in the settlement agreement; thereby, permitting them to participate in the award of attorneys’ fees and costs.”); *Barnes*, 2006 U.S. Dist. LEXIS 71072, at *3–4 (“Because of these economic realities, professional objectors can levy what is effectively a tax on class action settlements, a tax that has

Thus, perversely, professional objectors have purely monetary incentives to find even a quibble to raise in opposition to a settlement—even as class counsel and the court are bound to ensure that the settlement is within the range of reasonableness.⁵⁴

Many courts have perceived that objectors often file mere “generic, unhelpful protests.”⁵⁵ Examples of professional objector counsel filing boilerplate papers, sometimes without even changing the names of parties from one case to the next, are

no benefit to anyone other than the objectors.”). Perhaps for this reason, professional objector counsel seem to travel in packs, with the same counsel surfacing together in many of the same cases. *See, e.g., In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 520–21 (3d Cir. 2004); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 212 (D.N.J. 2005); *Azizian*, 2006 WL 4037549, at *5 (illustrating that there are many of the same objector counsel on counsel lists in these cases and listing many of the most ubiquitous professional objectors). Since those professional objectors rarely, if ever, are found to have presented valid arguments, any alternative explanation that they all appear in the same cases because those settlements are inadequate is not sustainable. The selfish interest of professional objectors in extorting fees also explains why some scholarly analyses say that most class action settlements have no objectors. *See, e.g.,* THOMAS E. WILLGING, LAURAL L. HOOPER & ROBERT J. NIEMIC, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 178 (Fed. Judicial Ctr. 1996) (stating that between forty-two and sixty-four percent of settlements saw no objections); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004) (collecting data showing few or no objectors in many cases). Run-of-the-mill, smaller settlements, whether reasonable or not, entail smaller fees to class counsel, rather than the fat fee target that professional objectors seek, so that professional objectors are not motivated to scrutinize those smaller settlements.

⁵⁴ Some objectors have seized on typos or other technical glitches in the settlement documents as a basis for objections, even though the settlement terms were otherwise clear, and, in any event, any confusion caused by the typos could have been resolved by contacting class counsel or a settlement administrator. *See, e.g., DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 317 (W.D. Tex. 2007); *Varacallo*, 226 F.R.D. at 227.

⁵⁵ *Devlin v. Scardelletti*, 536 U.S. 1, 23 n.5 (2002) (Scalia, J., dissenting) (citing *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000); *see also Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1379 (S.D. Fla. 2007) (stating that objectors offered only “generic compilations of well-known case law and . . . standard form arguments filed in other cases”); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ.6689 SAS, 2003 WL 22801724, at *2 (S.D.N.Y. Nov. 24, 2003) (stating that objectors’ submissions were “boilerplate and routine. Moreover, this was not the first time these counsel have appeared for objectors and raised nearly identical objections.”); *Shaw*, 91 F. Supp. 2d at 973; *Varacallo*, 226 F.R.D. at 247–48 (“For the most part, these objections are general laments about the perceived unfairness of the Proposed Settlement.”).

legion.⁵⁶ Courts have labeled these objectors and their counsel as “spoilers,”⁵⁷ “naysayers,”⁵⁸ and “professional objectors.”⁵⁹ More pointedly, a growing number of courts state that professional objectors are “gnawing on a bone”⁶⁰ by filing objections in order to “extract a fee” from the settling parties.⁶¹

⁵⁶ See, e.g., *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 372, 381–82 (E.D.N.Y. 2004) (objector’s counsel simply retooled research done by his client for another case), *aff’d*, 424 F.3d 150, 154 (2d Cir. 2005); *In re AOL Time Warner, Inc., Sec. & ERISA Litig.*, No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *17 n.22 (S.D.N.Y. Apr. 6, 2006) (noting that criticism of objector’s counsel as submitting “canned objections” might be correct, since he had copied whole sentences from prior judicial opinion without attribution); *Shaw*, 91 F. Supp. 2d at 973 (criticizing objector counsel for filing “canned” objection); see also *Varacallo*, 226 F.R.D. at 241 n.22 (recognizing that “many of the objections that have been raised by the so-called ‘professional objectors’ have been raised in other courts in other class actions”).

⁵⁷ *Lobatz v. U.S. W. Cellular of Cal., Inc.*, 222 F.3d 1142, 1148 (9th Cir. 2000); *Torrisi v. Tucson Elec. Power Co.*, 8 F.3d 1370, 1378 (9th Cir. 1993).

⁵⁸ *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 564 (D.N.J. 1997), *aff’d*, 148 F.3d 283 (3d Cir. 1998).

⁵⁹ See, e.g., *O’Keefe v. Mercedes-Benz USA, LLC*, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003); *Shaw*, 91 F. Supp. 2d at 973; see also *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 386 (D. Md. 2006) (labeling an objector counsel a “professional and generally unsuccessful objector”); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, at *2 n.3 (D. Me. Oct. 7, 2003) (labeling same objectors’ attorney as a “repeat objector”).

⁶⁰ *Snell v. Allianz Life Ins. Co. of N. Am.*, No. Civ. 97-2784 RLE, 2000 WL 1336640, at *10 (D. Minn. Sept. 8, 2000).

⁶¹ *Shaw*, 91 F. Supp. 2d at 973. For comparably direct characterizations of professional objectors, see, for example, *In re UnitedHealth Group, Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1109 (D. Minn. 2009) (“[Objector counsel’s] goal was, and is, to hijack as many dollars for themselves as they can wrest from a negotiated settlement.”); *UFCW Local 880-Retail Food Employers Joint Pension Fund v. Newmont Mining Corp.*, No. 05-cv-01046-MSK-BNB, 2008 WL 4452332, at *3 (D. Colo. Sept. 30, 2008) (attacking objectors “who challenge fee requests largely in the hopes of obtaining their own personal payout”), *aff’d*, 352 F. App’x 232 (10th Cir. 2009); *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 754 (S.D. Ohio 2008) (criticizing “opportunistic objectors”); see also *In re Holocaust Victim Assets*, 311 F. Supp. 2d at 374–75, 381 (stating that, objector, as his counsel sat by, asked trial judge how much he would pay in attorney fees and other monies for objector not to appeal settlement approval and that trial court labeled this “blackmail[]” and a “hold-up”); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 520 n.12 (W.D. Pa. 2003) (noting, but not adjudicating, an allegation that objector counsel had telephoned class counsel and had attempted extortion at that time). Scholars have used comparable terms. See, e.g., CIVIL RULES ADVISORY COMMITTEE, JUDICIAL CONFERENCE OF THE UNITED STATES, REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 182–83 (Administrative Office of the U.S. Courts, May 20, 2002) (referring to “the standard extortionist [objector] tactic” of threatening an appeal of settlement approval unless class counsel gives objector counsel a share of the class counsel fee); Woolley, *supra* note 46, at 618 (“By filing or threatening to file an objection to the settlement, a class member may be able to ‘extort’ a settlement that represents a disproportionate amount of the settlement fund.”); Richard B. Schmitt,

It is certainly easy enough for “observers, who peer from outside the settlement process, [to] second-guess one detail, or another.”⁶² Objector counsel are often attorneys who did not risk any of their own time or capital in suing the defendant but attempt to take for themselves a portion of the attorney fees earned by the class counsel who successfully took on the defendant.⁶³ Such objector counsel merely “argue[] the nuances of the settlement during the twilight of [the] litigation,” instead of litigating against the defendants for years and “shoulder[ing] the financial burden of pursuing the action.”⁶⁴ In other instances, objector counsel are those who brought their own cases against the defendant but failed to achieve any success and seek to recoup their time and expense from those attorneys who did succeed.⁶⁵

Objecting to Class-Action Pacts Can Be Lucrative For Attorneys, WALL ST. J., Jan. 10, 1997, at B1 (quoting Professor Susan Koniak as labeling the tactics of objectors as “an extortion game”).

⁶² *Snell*, 2000 WL 1336640, at *10.

⁶³ See *In re Cardinal Health*, 550 F. Supp. 2d at 754 (stating that objectors “subsist primarily off the skill and labor of, to say nothing of the risk borne by, more capable attorneys”); *Azizian v. Federated Dep’t Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549, at *9 (N.D. Cal. Sept. 29, 2006) (stating that a large settlement “often attracts other lawyers who had nothing to do with the instigation of the case to see if they might make some changes in the settlement agreement; thereby, permitting them to participate in the award of attorneys’ fees and costs”). Class counsel in one Illinois state court class action expressed this view very colorfully: “Attorneys who specialize in objecting rather than performing could not have achieved these results. This is a classic example of the maxim: ‘Those who can do, those who can’t, criticize.’” Plaintiff’s Memorandum in Support of Final Approval of Class, *Block v. McDonald’s Corp.*, 355 Ill. App. 3d 1174 (Mar. 31, 2005), available at www.edcombs.com/CM/Notices/Notices187.asp.

⁶⁴ *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 359 (N.D. Ga. 1993); see also *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682, 687 (7th Cir. 2008) (noting that objector counsel “did not propose terms of settlement or otherwise participate constructively in the litigation other than to appeal”).

⁶⁵ Rhonda Wasserman, *Dueling Class Actions*, 80 B.U. L. REV. 461, 482–83 & n.97 (2000) (noting that counsel in competing class actions are prime candidates to object to settlements “out of self-interest”); see, e.g., *Rutter & Wilbanks Corp. v. Shell Oil Co.*, 314 F.3d 1180, 1183–84 (10th Cir. 2002); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 318 (3d Cir. 1998) (finding that district court did not err in discounting objections of counsel in competing or overlapping class actions); *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 132 (S.D.N.Y. 2009) (“[T]he principal thrust by [objector counsel] was to preserve the viability [of] their separate tag-along state court actions. As such, their objections were motivated entirely by self-interest and of no utility to the Class.”); *In re Katrina Canal Breaches Consol. Litig.*, 263 F.R.D. 340, 363 (E.D. La. 2009) (noting that some objectors had state court actions that would be enjoined by settlement, so they “have an incentive to object to this settlement”); *Figueroa v. Sharper Image*

Perhaps the most outlandish situation occurs when objector counsel, on behalf of a class member who has not filed his or her own case—and therefore could not recover anything absent a classwide resolution—attacks the ability of a class to be certified.⁶⁶ In that instance, professional objectors actually act against the interest of their own clients.⁶⁷ But objector counsel themselves can profit from attacking settlement class certification, since the parties may pay those counsel a fee to drop their objections. It is relatively simple for professional objectors to find some respect in which one or more of the many criteria for class certification can be questioned, and it is far easier to do that than to become familiar with the often voluminous discovery or the details of the settlement agreement.⁶⁸

Corp., 517 F. Supp. 2d 1292, 1315 (S.D. Fla. 2007) (noting contention of settlement proponents that “the small and vocal minority of class members who have objected are fueled by would-be class counsel in competing lawsuits”). However, the relatively rarer instance in which objector counsel has achieved some success in a competing case—such as a finding of liability—which would be negated by a proposed settlement of a different, less advanced case, may call for a different, more favorable view of that objector. *See, e.g.*, *Smith v. Sprint Commc'ns L.P.*, 387 F.3d 612, 614–15 (7th Cir. 2004) (noting that objector represented competing statewide classes that had been certified, had established liability, and was on eve of trial, and rejecting nationwide settlement on grounds that settlement proponents did not adequately represent certified statewide classe). In such circumstances, the court may be facing a “reverse auction,” in which a defendant facing multiple class actions “picks the most ineffectual class lawyers to negotiate a settlement with in the hope that the district court will approve a weak settlement that will preclude other claims against the defendant.” *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 282 (7th Cir. 2002).

⁶⁶ *See infra* notes 112–16 and accompanying text.

⁶⁷ Professor Brunet has noted “the problem of monitoring the monitor.” Brunet, *supra* note 7, at 409. “Clients of counsel who object may be unable to monitor their own attorneys effectively. Some objecting by attorneys who represent small stakes plaintiffs may be only an effort to obtain attorneys fees’ [sic] for the objecting attorney.” *id.*; *see also id.* at 425–26.

⁶⁸ Objector counsel frequently fail to apprise themselves sufficiently about the settlement, so that courts are compelled to note that those counsel misunderstood the settlement about which they complain. *See, e.g.*, *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 369 (E.D.N.Y. 2004), *aff'd*, 424 F.3d 150 (2d Cir. 2005). For other cases in which courts found that objectors simply did not understand the settlement, *see infra* note 137. In most cases, objectors do not seek discovery of the underlying litigation file, and, often, even when they do, they fail to take advantage of the ability to review that material. *See, e.g.*, *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 563 (D.N.J. 1997) (stating that objector counsel spent only three days in the document depository, where over one million discovery documents were available), *aff'd*, 148 F.3d 283 (3d Cir. 1998). Objectors can get access to the file material without preconditions, *see ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS*, §8:32, at 268 (4th ed. 2002), other than

Even a baseless objection can delay the implementation of a proposed settlement.⁶⁹ As a result, diligent class counsel may agree to “pay off” a professional objector to ensure that their clients, the class members, get relief quickly once a settlement is finally achieved after many years of litigation.⁷⁰ Defendants too have an interest in removing impediments to an agreed upon settlement, so that they can put the litigation behind them.⁷¹

signing on to a confidentiality order that is the essentially the same as that governing class counsel. Thus, assertions that objectors’ alleged inability to review discovery prevents them from learning about the settlement are without merit.

⁶⁹ See, e.g., *In re AT&T Corp. Sec. Litig.*, Civ. No. 00-5364(GEB), 2006 WL 2786945, at *2 (D.N.J. Sept. 26, 2006) (stating that since objections were “without merit . . . [and] appear to have impeded the Class’s recovery—[those] objections and subsequent appeal resulted in wasteful litigation and delayed the distribution of funds to the Class”). Other cases have noted that objectors have hindered rather than helped the process. See, e.g., *Mirfasihi*, 2007 WL 2608778, at *6–7 (reducing fee by fifty percent for objectors who “burdened the court at least as much as they have helped it” despite having benefited the class and the community); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 570 (D.N.J. 2003) (noting that objector counsel seemingly “did everything he could to make this matter as inefficient and contentious as possible” and was “often more of an unjustifiable hindrance to the progression of this litigation”); *Gerstein v. Micron Tech., Inc.*, Civ. No. 89-1262, 1993 WL 735031, at *1 (D. Ida. Jan. 9, 1993); *In re Anchor Sec. Litig.*, No. CV-88-3024, 1991 WL 53651, at *2 (E.D.N.Y. Apr. 8, 1991) (noting that objector had “clouded rather than sharpened the issues”); *Saylor v. Bastedo*, 594 F. Supp. 371, 375 (S.D.N.Y. 1984) (awarding no counsel fee for objector who “hindered rather than promoted the prosecution of this action”).

⁷⁰ See, e.g., Mike Absmeier, *The Professional Objector and Revised Rule 23: Protecting Voice Rights While Limiting Objector Abuse*, 24 REV. LITIG. 609, 627 (2005). Class actions routinely consume many years. See, e.g., *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1046 (9th Cir. 2002) (lasting over ten years); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 253 (D.N.J. 2005) (lasting over eight years). After all that time, “jeopardizing a settlement agreement causes prejudice to the existing parties to a lawsuit,” see *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 490 (S.D.N.Y. 1998) (quoting *United States v. Bowes*, 25 F.3d 66, 72 (2d Cir. 1994)), which often leads class counsel to buy off professional objectors rather than delaying still longer the settlement benefits to class members.

⁷¹ Ironically, defendants themselves are partially to blame for the plague of objectors. Defendants’ interests have generated a flood of criticism of class actions and the attorneys who bring them. For example, the so-called Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.), was propelled by years of extensive lobbying and anti-class action propaganda from corporate interests. See, e.g., Public Citizen Congress Watch, *Unfairness Incorporated: The Corporate Campaign Against Consumer Class Actions*, 1, 18 (June 2003), available at www.citizen.org/documents/ACF2813.pdf (reporting that over 475 lobbyists for major corporations, many of whom were the subject of class action litigation, had lobbied for anti-class action legislation). As *The Wall Street Journal* stated after President Bush signed the bill into law, “[t]o a remarkable degree, the business lobby was able to set the tone of the debate with a steady drumbeat of anecdotes portraying wealthy trial lawyers making off with large

Objectors play on this to extract a fee. In their zeal to find anything at all to object to, professional objectors sometimes make inconsistent arguments within the same objection.⁷²

The right to object to a settlement can be a useful supplement to the other structural protections. Legitimate objectors can bring a measure of adversarialness to the settlement stage of a case.⁷³ They can “keep the parties honest” by pointing out those rare occasions when a settlement is unfair or when a settlement creates conflicts within the settlement class.

But the right to object, though an essential right of class members, is easily abused. Professional objectors seek out cases that offer them the ability to extort a fee rather than cases in which an unreasonable settlement is proposed.⁷⁴ Courts must

settlements at the expense of not only corporations but their customers.” David Rogers & Monica Langley, *Bush Set To Sign Landmark Bill on Class Action*, WALL ST. J., Feb. 18, 2005, at A1. By making all class actions, class counsel, and class settlements suspect, defendants’ interests unwittingly emboldened objectors to try to block settlements that defendants seek to have approved.

⁷² See, e.g., *In re AOL Time Warner ERISA Litig.*, No. 02 Cv. 8853(SWK), 2007 WL 4225486, at *3 n.4 (S.D.N.Y. Nov. 28, 2007); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 319 (W.D. Tex. 2007); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 235 n.19 (D.N.J. 2005); *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 497 (E.D. Pa. 2003) (all noting and criticizing inconsistent arguments made by professional objector counsel).

⁷³ See, e.g., *Vollmer v. Selden*, 350 F.3d 656, 660 (7th Cir. 2003); *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008); *In re Indep. Energy Holdings P.L.C. Sec. Litig.*, No. 00 Civ. 6689 SAS, 2003 WL 22801724, at *1–2 (S.D.N.Y. Nov. 24, 2003); *Great Neck Capital Appreciation Inv. P’ship, L.P. v. Pricewaterhousecoopers, L.L.P.*, 212 F.R.D. 400, 412–13 (E.D. Wis. 2002); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 278 F.3d 175, 201–03 (3d Cir. 2002) (Rosenn, J., dissenting). However, cases that assign a high value to mere “adversarialness,” unmoored to whether a court would perceive on its own the issues that professional objectors raise, are mistaken. Just as class counsel do not earn a fee for creating “adversarialness” by filing a case, professional objectors should not receive a fee merely for appearing in opposition to a settlement. See *infra* notes 162–64 and accompanying text.

⁷⁴ Indeed, in the landmark egregious cases where settlements were overturned, professional objectors played no role in doing that. Instead, the successful objectors were academics, public interest organizations, government agencies, or private attorneys who had comparable cases pending but made their living from such cases rather than by objecting to settlements. See, e.g., *Georgine v. Amchem Prods., Inc.*, 157 F.R.D. 246, 286, 296–97, 302–04, 306, 313 (E.D. Pa. 1994) (noting that private attorneys who had other cases represented objectors, with several law professors as their experts; White Lung Association of New Jersey also represented objectors, and Trial Lawyers for Public Justice was amicus in opposition to settlement), *vacated* 83 F.3d 610 (3d Cir. 1996), *aff’d sub nom.* *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (noting that other law professors sought, but were denied, status of amicus in

discern which objections have potential validity and which are filed merely for selfish leverage.⁷⁵ Objectors and objections that aid the court by providing information or arguments that the court would not otherwise have or perceive can be useful.⁷⁶ Objectors who do not meet that standard should be viewed

opposition to settlement); *In re* Gen. Motors Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 775–76 (3d Cir. 1995) (noting that Public Citizen Litigation Group, Center for Auto Safety, and several public agencies, along with a few private lawyers, represented objectors); *Ahearn v. Fibreboard Corp.*, 162 F.R.D. 505, 508 (E.D. Tex. 1995) (noting that private firm that also handled asbestos cases and a legal clinic that was a subsidiary of a maritime law firm represented objectors), *aff'd sub nom. In re Asbestos Litig.*, 90 F.3d 963 (5th Cir. 1996), *rev'd sub nom. Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); see also John Leubsdorf, *Co-Opting the Class Action*, 80 CORNELL L. REV. 1222, 1222 (1995). The same is true of a poster child for alleged class action abuse, *Kamilewicz v. Bank of Boston Corp.*, 92 F.3d 506 (7th Cir. 1996), which figured prominently in the campaign to adopt the Class Action Fairness Act of 2005. See, e.g., S. REP. No. 109-14, at 14 (Feb. 28, 2005), (referring to the settlement as “now infamous”). That case arose from an underlying decision of an Alabama state court judge to approve a settlement in which class members’ bank accounts were charged an amount for their attorney fees that exceeded the amounts, if any, that they were awarded under the settlement. See generally *id.* at 14–15; Koniak & Cohen, *supra* note 43, at 1057–80 (detailing facts of settlement). The objectors there were the Florida Attorney General and a large private firm whom Professor Koniak asked to get involved. *Id.* at 1057 n.16, 1082 n.103; see also *id.* at 1272 (noting that nine state attorneys general participated as amici in the Seventh Circuit in support of the settled class). Many of the settlements that cause the greatest concern to scholars are those that arise under Federal Rule of Civil Procedure 23(b)(1) and (b)(2), where no opt-outs are permitted, and mass tort cases, where problems such as conflicts between current and future claimants and other issues unique to the mass tort context present themselves. See *supra* note 36. Professional objectors have been noticeably absent from those cases.

⁷⁵ Federal Rule of Civil Procedure 23(e)(5) requires court approval before an objection can be withdrawn. In theory, that rule offers a way to call the bluff of objectors whose objections will ultimately be found groundless. See MANUAL FOR COMPLEX LITIGATION, *supra* note 4, §21.643, at 328; Absmeier, *supra* note 70, at 634. But Rule 23(e)(5) is no panacea. Many judges may not wish to look behind objections that have effectively been mooted by being withdrawn. *Id.* That will be particularly so when the parties represent that the withdrawal was with their consent. Courts have enough to do in addressing objections that are not withdrawn and in the larger endeavor of ensuring that settlements are fair, reasonable, and adequate. But see *Yeagley v. Wells Fargo & Co.*, No. C 05-03403 CRB, 2008 WL 171083, at *2 (N.D. Cal. Jan. 18, 2008) (rejecting attempt to withdraw objections, finding that “class counsel simply ‘bought off’ objectors’ counsel” in exchange for agreement to withdraw objections and noting that approving withdrawal of objections would “encourage attorneys to interject objections for the sole purpose of extracting a payment from class counsel”).

⁷⁶ *Great Neck Capital*, 212 F.R.D. at 415–16 (fee awarded to objectors who raised issues that “otherwise would have gone unnoticed”); cf. Woolley, *supra* note 46, at 603 (arguing that the right to be heard and participate in class action litigation “is properly conceived as the right to present admissible evidence and make nonfrivolous legal arguments that otherwise would not be placed before the Court”).

skeptically. Merely “sharpening the issues” or, even more amorphously, otherwise “assisting the court” should not earn a fee.⁷⁷

Under this standard, certain broad types of objections, no matter who asserts them, appear to be presumptively invalid or, at the very least, unworthy of a fee award. All objections by professional objectors who surface in cases solely to extract a fee should be treated similarly.

II. PRESUMPTIVELY VALUELESS OBJECTIONS THAT OBJECTORS AND PROFESSIONAL OBJECTOR COUNSEL OFTEN RAISE

Certain categories of objections appear to be presumptively useless to judges who are weighing settlement approval. This is because judges, as fiduciaries for the class,⁷⁸ are already aware of the relevant legal principles that objectors might raise, or for other reasons stated in this Section. Accordingly, these types of objections should rarely, if ever, be credited and should certainly not be a basis for a fee award to objector counsel.

A. *Objections to the Form, Content, or Timing of Notice*

Rule 23(e)(1) requires that notice of the pendency of a class action be sent to all class members who would be bound by the proposed settlement.⁷⁹ That notice must be given “in a reasonable manner.”⁸⁰ The object of the notice is to summarize the litigation and the settlement, to apprise class members of their rights to inspect the complete settlement documents, and to accept the settlement, object to it, or exclude themselves from it.⁸¹

There is always a tension between notice being too general and being so detailed that it cannot be understood.⁸² It is easy

⁷⁷ See *infra* notes 154–57 and accompanying text.

⁷⁸ See *supra* notes 23–31 and accompanying text.

⁷⁹ FED. R. CIV. P. 23(e)(1). If a class was not already certified in the course of the litigation but a settlement class is being proposed as part of the settlement, the notice must also satisfy Federal Rule of Civil Procedure 23(c)(2) regarding class certification.

⁸⁰ *Id.* 23(e)(1).

⁸¹ See, e.g., *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 962 (9th Cir. 2009); *Wal-Mart Stores, Inc. v. VISA USA, Inc.*, 396 F.3d 96, 114 (2d Cir. 2005); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 326–27 (3d Cir. 1998); *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 122 (8th Cir. 1975).

⁸² See, e.g., *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 300 (W.D. Tex. 2007) (noting that objectors attacked notice as “confusing” while, “in the next breath,” arguing that notice should have included other information that court found

for an objector either to demand more specificity or to complain that a notice that contains too much specificity is too complex.⁸³ In fact, there is “a wide range of possible notices, . . . each of which would strike an appropriate balance between inclusiveness and brevity.”⁸⁴

The form and content of the notice is within the discretion of the trial court and must be approved by that court before it is issued.⁸⁵ Thus, objections to notice seek to second-guess the court, not the class counsel who supposedly need to be kept honest.

The timing of notice is largely settled. Cases around the country repeatedly state that thirty to sixty days notice is sufficient to allow class members to make their decision to accept the settlement, object, or exclude themselves.⁸⁶

Professional objectors frequently make the same boilerplate complaints about notice, such as the oft-repeated, but unrealistic, contention that notice should tell each class member how much

“complicated and potentially confusing”); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 528 (D.N.J. 1997) (“On the one hand, the notice must be readable. . . . And, on the other hand, the parties must be careful to include the requisite core information.”), *aff'd*, 148 F.3d 283 (3d Cir. 1998); *see also* *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 68 (S.D.N.Y. 2003) (noting that some objectors challenged notice as omitting certain items, while others complained that notice “contains too much information and is overly complicated”).

⁸³ There is an almost infinite array of facts or other matters that, arguably, might be included in a notice. *See, e.g., Rodriguez*, 563 F.3d at 962 (noting that objectors demanded that the content of objections be included in notice); *Bell Atl. Corp. v. Bolger*, 2 F.3d 1304, 1317 (3d Cir. 1993) (objectors complained that notice should have included various items); *In re Prudential*, 962 F. Supp. at 528–33 (noting that objectors cited a dozen different items that allegedly should have been included in notice); *UAW v. Gen. Motors Corp.*, No. 05-CV-73991-DT, 2006 WL 891151, at *33 (E.D. Mich. Mar. 31, 2006) (“A summary, by its nature, cannot discuss every term of the [settlement] agreement.”).

⁸⁴ *In re Prudential*, 962 F. Supp. at 528; *see In re Metro. Life Ins. Co. Sales Practices Litig.*, 1999 U.S. Dist. LEXIS 22688, at *52 (W.D. Pa. Dec. 28, 1999) (noting that some objectors demanded more detail while others argued notice was already too complex “demonstrated that the Class Notice Package strikes a proper balance and provides sufficient information in as clear and concise a manner as possible given the nature of the proposed settlement”).

⁸⁵ For examples of cases applying the abuse of discretion standard to review a settlement notice, *see Int'l Union v. Gen. Motors Corp.*, 497 F.3d 615, 630 (6th Cir. 2007); *Bell Atl. Corp.*, 2 F.3d at 1317.

⁸⁶ *See, e.g., In re Prudential*, 962 F. Supp. at 562 (citing cases); 3 ALBA CONTE & HERBERT NEWBERG, *NEWBERG ON CLASS ACTIONS* § 8:37, at 276 (4th ed. 2002). At least one case held that twelve days notice was sufficient. *Armstrong v. Bd. of Sch. Dirs.*, 616 F.2d 305, 310 (7th Cir. 1980).

he or she might receive under the settlement.⁸⁷ There is virtually “nothing new under the sun”⁸⁸ in terms of objections to notice. Those objections to notice that have been and continue to be made are virtually all insupportable in the normal case.

That is particularly so now that settlement notices routinely include a toll-free telephone number for class members to call for more information and a website that provides more detail about the settlement and, often, copies of pleadings, settlement papers, and more.⁸⁹ Any class member with questions about the notice can receive answers regardless of the notice's clarity regardless of how clear the notice is.⁹⁰ For all these reasons, objections to the form, content, or timing of notice should be considered presumptively invalid.⁹¹ Objectors often merely cloud the issues with their attacks on notice.⁹²

⁸⁷ See, e.g., *Rodriguez*, 563 F.3d at 962 (finding no reason why notice should “analyze the expected value [of fully litigating the case]”); *Petrovic v. Amoco Oil Co.*, 200 F.3d 1140, 1153 (8th Cir. 1999); *In re Katrina Canal Breaches Consol. Litig.*, 263 F.R.D. 340, 360 (E.D. La. 2009); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 253 (D. Del. 2002), *aff'd*, 391 F.3d 516 (3d Cir. 2004); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 227 (D.N.J. 2005) (stating that “each Class Member’s individual circumstances and every contingency could not possibly be summarized in any Notice”); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 67 (S.D.N.Y. 2003); see also *In re Corel Corp. Sec. Litig.*, 293 F. Supp. 2d 484, 491 (E.D. Pa. 2003) (finding the objection that notice did not afford class members “enough information to adequately assess the prospects of litigation” was “without merit”).

⁸⁸ Ecclesiastes 1:9.

⁸⁹ *In re Warfarin*, 212 F.R.D. at 252.

⁹⁰ See, e.g., *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 2006 WL 5062697, at *7 (S.D. Ill. June 5, 2006) (finding that the notice need not have included the entire settlement agreement, particularly where long form notice, release, and other material was available on website and class members could telephone class counsel toll-free for answers to questions); *Varacallo*, 226 F.R.D. at 227.

⁹¹ For a rare instance in which the parties simply failed to include in the notice the items required by Federal Rule of Civil Procedure 23(c)(2), leading to the rejection of that notice, see *Larson v. Sprint Nextel Corp.*, No. 07-5325(JLL), 2009 WL 1228443, at *10–11 (D.N.J. Apr. 30, 2009). Occasionally, objections to the *method* of disseminating notice are found valid. See *In re Homestore.com, Inc. Sec. Litig.*, No. CV01-11115 RSWL(CWX), 2004 WL 2792185, at *1 (C.D. Cal. Aug. 10, 2004) (ordering re-noticing of class members on finding that a strong likelihood existed that a substantial portion of the class would not have received timely notice). And, of course, if settling parties fail to send individual notice even though such notice is plainly practicable and reasonable, see FED. R. CIV. P. 23(c)(2)(B) (stating that notice of class certification, applicable where no litigation class was certified prior to settlement, must be “the best notice that is practicable under the circumstances”); *id.* 23(e)(1) (stating that notice of settlement must be disseminated “in a reasonable manner”), an objection to the settlement on that basis would certainly be appropriate. See *Larson*, 2009 WL 1228443, at *5, *7, *9 (noting that requirements of Rule 23(c)(2) are “more stringent” than those of Rule 23(e)(1), and

B. Objections to Class Counsel Fees

Class counsel fees are a prominent issue in virtually every settlement. Each Circuit has one or more leading cases on that subject.⁹³ As a result, courts are already aware of the standards for fee awards even without submissions from objectors.⁹⁴ In the instances in which courts have reduced the fees requested, they likely would have done so even without objector submissions.⁹⁵

Moreover, there is a range of reasonableness for attorney fees.⁹⁶ Thus an objector can *always* assert that class counsel should have received less, making this a fertile argument for professional objectors. Nonetheless, the trial judge's award should be affirmed unless it constitutes an abuse of discretion, which is an extraordinarily rare occurrence.⁹⁷ Accordingly, appellate objections that class counsel received too high a fee are unlikely to be useful.

Furthermore, encouraging objections to class counsel fees runs counter to the settled policy of using generous fee awards to incentivize class counsel to bring risky litigation in the public

holding that individual notice of pendency and settlement is required under Rule 23(c)(2) where less than all, but a "significant amount of [class members] have been identified" with individual addresses).

⁹² *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008).

⁹³ *See, e.g.*, *Gunter v. Ridgewood Energy Corp.*, 223 F.3d 190, 190 (3d Cir. 2001); *Goldberger v. Integrated Res., Inc.*, 209 F.3d 43, 47 (2d Cir. 2000). For a useful summary of the approaches of many Circuits to percentage of the fund awards in particular, see *Nilsen v. York Cnty.*, 400 F. Supp. 2d 266, 273–76 (D. Me. 2005).

⁹⁴ *In re Currency Conversion Fee Antitrust Litig.*, 263 F.R.D. 110, 129 (S.D.N.Y. 2009); *In re Cardinal Health*, 550 F. Supp. 2d at 753; *In re Qwest Commc'ns Int'l, Inc. Sec. Litig.*, No. 01-cv-01451-REB-CBS, 2007 WL 2087536, at *3 (D. Colo. July 17, 2007); *Spark v. MBNA Corp.*, 289 F. Supp. 2d 510, 513 (D. Del. 2003).

⁹⁵ *In re Qwest*, 2007 WL 2087536, at *2–3; *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 520 (W.D. Pa. 2003); *Gerstein v. Micron Tech., Inc.*, Civ. No. 89-1262, 1993 WL 735031, at *1 (D. Ida. Jan. 9, 1993); *In re Anchor Sec. Litig.*, CV-88-3024, 1991 WL 53651, at *2 (E.D.N.Y. Apr. 8, 1991).

⁹⁶ *See, e.g.*, *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 341 (3d Cir. 1998) ("[M]ultiples ranging from one to four are frequently awarded in common fund cases when the lodestar method is applied." (quoting WILLIAM B. RUBENSTEIN, HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS*; § 14.6, at 17 (3d ed. 1992))); *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1052 (9th Cir. 2002) (surveying range of percentage awards); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Product Liab. Litig.*, 55 F.3d 768, 822 (3d Cir. 1995) (noting fee awards range from nineteen to four-five percent).

⁹⁷ *See, e.g.*, *Taubenfeld v. Aon Corp.*, 415 F.3d 597, 600 (7th Cir. 2005); *Gunter*, 223 F.3d at 195–96 (applying abuse of discretion standard).

interest.⁹⁸ Class counsel normally handle such cases on a contingent basis, under which they risk not only their time but often millions of dollars in out of pocket expenses.⁹⁹ Objectors' insistence on less than generous fees would kill the goose that lays the golden egg of recoveries for class members who, by definition, cannot economically fight for themselves.¹⁰⁰

Finally, the duty of courts to protect the class in the settlement context is already accentuated under Rule 23 in the area of counsel fees.¹⁰¹ For this reason too, there is no reason to encourage objections to class counsel fees.¹⁰²

⁹⁸ See, e.g., *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 193 (3d Cir. 2005) (recognizing the need for fee structures negotiated under PSLRA to "provid[e] counsel with incentives to perform excellent work"); *Florin v. Nationsbank of Ga.*, 60 F.3d 1245, 1247 (7th Cir. 1995) ("[T]he court must also be careful to sustain the incentive for attorneys to continue to represent such clients on an 'inescapably contingent' basis." (quoting *Cont'l Ill. Sec. Litig.*, 962 F.2d 566, 569 (7th Cir. 1992))); *Jones v. Dominion Res. Servs., Inc.*, 601 F. Supp. 2d 756, 765 (S.D. W. Va. 2009) (recognizing public policy in favor of sufficient fees to ensure that competent counsel will take on "the often risky and arduous task of representing a class" (quoting *In re Microstrategy, Inc. Sec. Litig.*, 172 F. Supp. 2d 178, 188 (E.D. Va. 2001)); *In re WorldCom, Inc. Sec. Litig.*, 388 F. Supp. 2d 319, 359 (S.D.N.Y. 2005); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 306 (N.D. Ga. 1993) (discussing "the financial incentive necessary to induce experienced and well-qualified counsel to take on complex and time-consuming cases for the benefit of the public and for which they may never be paid or even reimbursed for considerable out-of-pocket expenses"); *Coffee*, *supra* note 22, at 398 (referring to undesirability of reducing economic incentives for class counsel to act as "private attorneys general").

⁹⁹ See, e.g., *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 256 (D.N.J. 2005) (awarding over \$2.5 million in expenses); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 489-90 (S.D.N.Y. 1998) (awarding over \$4.4 million in expenses); *In re Domestic Air*, 148 F.R.D. at 306 (awarding over \$1.6 million in expenses).

¹⁰⁰ This principle derives from the superiority criterion of Federal Rule of Civil Procedure 23(b)(3), which addresses, in subsection (A), "the class members' interests in individually controlling the prosecution or defense of separate actions," as opposed to a class action. The superiority criterion weighs in favor of a class action where the amounts involved are relatively small or where there are other reasons why class members would not pursue individual actions against the defendant. See, e.g., *Smilow v. Sw. Bell Mobile Sys., Inc.*, 323 F.3d 32, 41-42 (1st Cir. 2003). In such instances, the only way that victims have a chance to recover their losses is if class counsel are willing to take the risk of contingent class action litigation, which requires potential fees sufficient to entice them to take that extraordinary risk.

¹⁰¹ See *supra* notes 29-31 and accompanying text.

¹⁰² Courts have reduced fee requests even when no objector has challenged them. See, e.g., *Fischel v. Equitable Life Assurance Soc'y*, 307 F.3d 997, 1007-08 (9th Cir. 2002); *Munoz v. UPS Ground Freight, Inc.*, No. C 07-00970 MHP, 2009 WL 1626376, at *3-5 (N.D. Cal. June 9, 2009); *Gribble v. Cool Transports, Inc.*, No. CV 06-04863 GAF (SHx), 2008 WL 5281665, at *11-12 (C.D. Cal. Dec. 15, 2008); *In re Top Tankers Sec. Litig.*, No. 06 Civ. 13761(CM), 2008 WL 2944620, at *17 (S.D.N.Y. July

Professional objectors who object to fees ultimately wish to claim much of the “savings” for themselves.¹⁰³ They are far from disinterested advocates seeking to protect the class. Fee objections from pro se class members are problematic for a different reason: they are usually unsupported by applicable attorney fees caselaw principles. Instead, they are often based on: (1) misplaced comparisons between the amount of class members’ individual recoveries and class counsel’s aggregate fee, which is often a percentage of the total classwide settlement; or (2) bald assertions that the attorneys are getting too much or that class actions are worthless to the class and benefit only the lawyers.¹⁰⁴ Perhaps the only valid objections to fees may come from state pension funds or other institutional clients whose counsel are not seeking a piece of the fee for themselves.¹⁰⁵

As a policy matter, objections to class counsel fees, even if valid and based on considerations that the court would not otherwise perceive, do not produce enough benefits to the class to justify the disincentive that such objections pose to enticing counsel to take on risky class action matters. If a fee is reduced and the difference goes back to the defendants, the class obtains no benefit at all. Even where the reduction in the fee goes to the class, the amounts involved are so small that the benefit to the class is *de minimis*.¹⁰⁶ But fee reductions—except in the rare case in which class counsel seek a fee that is outside the range of reasonableness—have the effect of discouraging attorneys from risking their time and incurring the substantial expense of handling these purely contingent cases.¹⁰⁷ Particularly since

31, 2008); *In re Renaissancere Holdings Ltd. Sec. Litig.*, No. 05 Civ. 6764(WHP), 2008 WL 236684, at *5 (S.D.N.Y. Jan. 18, 2008); *Silberblatt v. Morgan Stanley*, 524 F. Supp. 2d 425, 433 (S.D.N.Y. 2007); *Nienaber v. Citibank, N.A.*, CIV No. 04-4054, 2007 WL 2003761, at *5 (D.S.D. July 5, 2007); *see also, e.g.*, *Sutton v. Bernard*, 504 F.3d 688, 694 (7th Cir. 2007) (holding the district court incorrectly reduced the fee that no one had objected to and reversing and remanding because the district court based its fee reduction on the “degree of success”); *Gunter*, 223 F.3d at 192.

¹⁰³ *See supra* note 52 and accompanying text.

¹⁰⁴ *See, e.g.*, *In re Xcel Energy Sec., Deriv. & ERISA Litig.*, 364 F. Supp. 2d 980, 997–98 (D. Minn. 2005); *Varacallo*, 226 F.R.D. at 252; *In re Domestic Air*, 148 F.R.D. at 306.

¹⁰⁵ *See In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008) (reducing class counsel fee based on objections by state pension funds).

¹⁰⁶ *In re AT&T Corp. Sec. Litig.*, 455 F.3d 160, 168 (3d Cir. 2006) (noting this *de minimis* effect, though in a different context).

¹⁰⁷ *See supra* notes 98–100 and accompanying text; *see also Brunet, supra* note 7, at 431–32.

judges are already acutely aware of the governing standards, fee objections should be discouraged, and objectors who make them should not be compensated even if the class counsel fee is reduced.

Recognizing that the *amount* of the class counsel fee is within the court's broad discretion, professional objector counsel frequently demand that all or part of that fee be withheld until the settlement claims and distribution process is complete.¹⁰⁸ Objector counsel then seek a fee based on this "benefit" to the class. This objection plays on the surface appeal of the notion that class counsel should not be compensated until class members receive their settlement benefits. However, class counsel are already under a fiduciary duty to represent the class zealously until the end. Especially when the class counsel have a track record of excellent performance, there is no need to "stage" their fees to ensure that they continue to represent the class properly.¹⁰⁹ Class counsel have a right to prompt payment after their long years of fighting for the class without compensation.¹¹⁰ Prompt payment is necessary to encourage class counsel to take on such risky cases.¹¹¹

C. *Objections to Class Certification by a Class Member Who, Absent Class Certification, Would Recover Nothing from the Defendant*

A court must find that a proposed settlement class satisfies the requirements of Rule 23 in addition to determining that the settlement itself is fair, reasonable, and adequate.¹¹² Among the

¹⁰⁸ Many cases reject this argument, see, for example, *In re AT&T*, 455 F.3d at 174–75; *Varacallo*, 226 F.R.D. at 251–52. *But see* *Perez v. Asurion Corp.*, No. 06-20734-CIV, 2007 WL 2591180, at *8 (S.D. Fla. Aug. 8, 2007) (ordering that nearly thirty-three percent of fee was to be escrowed until ten days after defendants certified to provision of settlement relief, in accordance with court's "practice in most class actions," having nothing to do with objectors' advocacy).

¹⁰⁹ *See In re AT&T*, 455 F.3d at 174–75 (finding "no indication [that] class counsel would stop working diligently on behalf of the class"); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 106 F. Supp. 2d 721, 734 (D.N.J. 2000) (noting that "[e]ven in the time since the settlement in this matter was finally approved, Class Counsel have continued to remain actively involved in the matter").

¹¹⁰ *See supra* note 70 and accompanying text.

¹¹¹ For a discussion of the need for incentives to induce counsel to handle risky class action matters, see *supra* notes 98–100 and accompanying text.

¹¹² *In re Gen. Motors Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 55 F.3d 768, 794–97 (3d Cir. 1995). An exception to that principle is that, since the proposal is

most cynical objections are those made to certification of a class by a settlement class member who could not recover anything from the defendant if the settlement were disapproved. Such objections occur when that class member has not filed his or her own lawsuit, and when there is no competing class action, perhaps with a different class definition, to afford potential relief.¹¹³ As a result, if the settlement fails due to a supposed impropriety in certifying a settlement class or otherwise, the class member would have no chance of recovery at all.

Objections by class members that would not recover if settlement were not approved are a frequent stratagem of professional objectors, who often find it easier to attack abstract class certification criteria than to understand the details of the settlement or the particular underlying facts of the case.¹¹⁴ Counsel use these objections to try to obtain a fee for themselves, but the objections, if successful, are actually to the detriment of their clients, who will get nothing if the settlement fails. If a class member does not like a settlement or the proposed settlement class, he or she should exercise the right to be excluded from that settlement.¹¹⁵ Objector counsel do not advise

that there be no trial, the superiority prong of Rule 23(b)(3) need not be satisfied by a settlement class. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 619 (1997).

¹¹³ In contrast, where there is another pending putative class action, an objection to class certification is not facially absurd. *See, e.g., In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 313 (3d Cir. 1998) (noting that objector Krell contended that his own putative statewide class action, involving only certain of the claims encompassed in the nationwide class action, would have afforded more relief as to those claims than did the nationwide class action to which he objected).

¹¹⁴ For examples of this phenomenon, see *In re Ins. Brokerage Antitrust Litig.*, Nos. 04-5184(GEB), 05-1079(GEB), 2007 WL 2589950, at *13–15 (D.N.J. Sept. 4, 2007) (noting that objector Van Enterprises opposed class certification but had not filed its own case), *aff'd*, 579 F.3d 241 (3d Cir. 2009); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 229, 232 (D.N.J. 2005) (noting an objection to class certification by objector Wolfson, who had not filed her own case). In *In re Insurance Brokerage*, the Third Circuit found it “peculiar that [the Van Enterprise objectors’] interests [were] so closely aligned with the non-settling defendants” but nonetheless accepted those arguments at face value. 579 F.3d at 261 n.21.

¹¹⁵ Federal Rule Civil Procedure 23(c)(2)(B) affords a right to exclusion that applies to settlement classes as well as litigation classes. Rule 23(e)(3) may give members of an already certified litigation class a second opportunity to exclude themselves when the case is settled. These opt-out rights, however, are available only in monetary damage cases under Rule 23(b)(3). The discussion in the text is limited to such cases. Professional objectors rarely surface in cases not falling under Rule 23(b)(3), since such cases generally do not generate a fund from which class counsel, and, derivatively, objector counsel, can seek a fee.

their clients to exclude themselves because they would then lack standing to object to the settlement, thus depriving objector counsel of their potential payday.¹¹⁶ Courts should see through this stratagem and reject such objections out of hand.

D. Objections That Supposedly "Improve the Settlement" at the Margins

Objectors whose objections result in substantial improvements of the proposed settlement can get attorney fees, whether a percentage of the value of the improvement or otherwise.¹¹⁷ However, courts have awarded fees to objectors who proposed only more marginal improvements to settlements.¹¹⁸ Since, by definition, a settlement is never the optimal result for the plaintiffs,¹¹⁹ there is *always* room for an objector to demand more and then, if the parties acquiesce, to seek a fee.

Courts routinely state that they will not second-guess the views of class and defense counsel who have lived the case if the settlement presented by the parties is within the range of reasonableness.¹²⁰ Objector counsel should not be able to do so either.

Once again, the delays in the provision of the agreed-upon relief to the class and the other negatives that objectors present outweigh any marginal benefits that their objections may occasionally produce for the class. A settlement that falls within the range of reasonableness is approvable and should be approved. Only very rarely is an objector's proposed improvement substantial. Even more infrequently does it lift a proposed settlement that is below the range of reasonableness

¹¹⁶ See, e.g., FED. R. CIV. P. 23(e)(5) ("Any *class member* may object to the propos[ed settlement] if it requires court approval under this subdivision (e)" (emphasis added)); *Gould v. Alleco, Inc.*, 883 F.2d 281, 284 (4th Cir. 1989).

¹¹⁷ See *infra* notes 154–56, 160 and accompanying text.

¹¹⁸ See *infra* notes 157–59 and accompanying text.

¹¹⁹ See *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 317 (3d Cir. 1998) ("[A]fter all, settlement is a compromise, a yielding of the highest hopes in exchange for certainty and resolution."); *Thompson v. Metro. Life Ins. Co.*, 216 F.R.D. 55, 65 (S.D.N.Y. 2003) (stating that a settlement is not a "wish-list of class members that the Defendant must fulfill").

¹²⁰ See, e.g., *Ass'n for Disabled Ams., Inc. v. Amoco Oil Co.*, 211 F.R.D. 457, 467 (S.D. Fla. 2002); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 450, 543 (D.N.J. 1997), *aff'd*, 148 F.3d 283 (3d Cir. 1998).

into the reasonable range.¹²¹ Those are the only circumstances in which an objection that seeks to “improve the settlement” should even be considered.

E. Objections to Securities Fraud Settlements in Which Institutional Investors Have Served as Lead Plaintiff

Securities fraud cases under the Private Securities Litigation Reform Act¹²² afford class members yet another layer of protection beyond that provided by the inherent obligations of the class counsel and the fiduciary duty of the court.¹²³ The PSLRA requires that the court appoint as lead plaintiff the member or members of the putative class whom the court “determines to be most capable of adequately representing the interests of class members.”¹²⁴ The court-appointed lead plaintiff is then to select class counsel, but that choice must be approved by the court.¹²⁵

Congress’s goal in adopting the PSLRA was to place control of securities fraud class actions in the hands of large institutional lead plaintiffs, rather than small investors, whom Congress perceived were controlled by their attorneys.¹²⁶ Institutional investors were viewed as more sophisticated and more independent and therefore more able to protect the interests of the class, including, when necessary, standing up to class counsel who might accept a settlement that falls short of the range of

¹²¹ The more common case is that the “improvement” arguably affords a relatively small additional benefit to the class. However, the class, class counsel, and defendants all have an incentive to adopt the objector’s “improvement” to make the objector go away and permit the settlement to proceed to approval. *See supra* notes 57–60, 70 and accompanying text. But that is no basis to take a portion of class counsel’s hard-earned fee and give it to opportunistic objector counsel. *See also infra* notes 157–61 and accompanying text. At most, objector counsel might justifiably be awarded a lodestar-based fee payable by the defendant.

¹²² 15 U.S.C. § 78u-4 (2006).

¹²³ For discussion of those obligations and duties, see *supra* notes 14–31 and accompanying text.

¹²⁴ 15 U.S.C. § 78u-4(a)(3)(B).

¹²⁵ *See id.* § 78u-4(a)(3)(B)(v).

¹²⁶ *See, e.g., In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1020 (N.D. Cal. 1999); *Gluck v. Cellstar Corp.*, 976 F. Supp. 542, 548 (N.D. Tex. 1997) (“[T]hrough the PSLRA, Congress has unequivocally expressed its preference for securities fraud litigation to be directed by large institutional investors.”); *see also* H.R. REP. NO. 104-369, at 34 (1995) (Conf. Rep.) (“The Conference Committee seeks to increase the likelihood that institutional investors will serve as lead plaintiffs . . .”); S. REP. NO. 104-98, at 11 (1995) (Conf. Rep.).

reasonableness due to counsel's own concerns.¹²⁷ Congress's objective has been realized in many, if not most, securities fraud class actions, as state pension funds and other large institutions have stepped forward to claim the mantle of lead plaintiff.¹²⁸

In at least two recent cases, institutional lead plaintiffs have taken securities fraud cases to trial, resulting in one jury verdict for the defense and the other verdict for the plaintiffs.¹²⁹ The sophistication and independence of institutional lead plaintiffs offers substantial guarantees that they will not enter into an inadequate settlement. Objections to settlements reached by such lead plaintiffs should therefore be considered presumptively unpersuasive.

F. *Objections by Professional Objectors*

Professional objectors find a way to object to any substantial settlement that offers a large fee, seeking a piece for themselves.¹³⁰ But their objections are almost invariably frivolous. For example, the objections of one professional objector, E.F.S., have been rejected repeatedly by courts around the

¹²⁷ See, e.g., *Sherleigh Assocs. LLC v. Windmere-Durable Holdings, Inc.*, 184 F.R.D. 688, 691 (S.D. Fla. 1999) (stating that the holder of "largest financial stake can best prosecute the claims" and "is presumed best able to negotiate with and oversee counsel"); H.R. REP. NO. 104-369, at 32, 34 (1995). For the argument that class counsel are likely to be more risk-averse than their clients, particularly as the case proceeds further along, see *Coffee*, *supra* note 22, at 390-91.

¹²⁸ See, e.g., Elliot J. Weiss, *The Lead Plaintiff Provisions of the PSLRA After a Decade, or "Look What's Happened to My Baby"*, 61 VAND. L. REV. 543, 551-52 (2008) (noting that, after a slow start, institutional investors have increasingly sought and obtained roles as lead plaintiff); LAURA E. SIMMONS & ELLEN M. RYAN, CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2008 REVIEW AND ANALYSIS 11 (2009), available at http://www.cornerstone.com/files/News/c94cedf0-2a04-4779-840d-5accf866dd4f/Presentation/NewsAttachment/732194ea-2f86-40cd-bb7e-5bc7c530dcfe/Cornerstone_Research_Settlements_2008_Analysis.pdf (stating that institutions served as lead plaintiffs in almost sixty percent of securities settlements in 2008, and cases involving institutional investors, particularly public pension plans, as lead plaintiffs are associated with higher settlement amounts); Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provisions of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869, 877-78 (2005).

¹²⁹ See Ashby Jones, *Theory & Practice: JDS Wins Investor Lawsuit, Bucking a Trend—Firm Goes to Trial Rather Than Settling*, WALL ST. J., June 2, 2008, at B4; see also *In re Apollo Group, Inc. Sec. Litig.*, No. CV-04-2147-PHX-JAT, 2008 WL 3072731 (D. Ariz. Aug. 4, 2008), *rev'd, and reinstated jury verdict*, *In re Apollo Group, Inc. Sec. Litig.*, No. 08-16971 (9th Cir. June 23, 2010) (unpublished memorandum opinion).

¹³⁰ See *supra* notes 45-54 and accompanying text.

country, often accompanied by severe criticism of the arguments that he made.¹³¹ Another professional objector, L.S., who has touted himself as “nationally and internationally recognized as an authority on the issue of class action abuse, particularly in the area of excessive attorneys’ fee awards,”¹³² has seen one court determine that his papers were “at best, negligently created and, at worst, suspiciously manufactured”¹³³ and his objections rejected out of hand in many other cases.¹³⁴ Likewise, many

¹³¹ The full names of this and other professional objectors are omitted from this article. Readers interested in the identities of those professional objectors can find those names in the cited cases. For cases involving E.F.S., see, e.g., *In re AT&T Corp.*, 455 F.3d 160, 172 n.8 (3d Cir. 2006) (labeling one argument “misleading” and rejected all arguments); *In re Bristol-Myers Squibb Sec. Litig.*, No. 06-2964, 2007 WL 2153284 (3d Cir. 2007); *In re UnitedHealth Group, Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1108–09 & n.1 (D. Minn. 2009) (characterizing position of objector counsel, including E.F.S., as “disingenuous,” “preposterous,” and “laughable,” among other criticisms); *Grays Harbor Adventist Christian Sch. v. Carrier Corp.*, No. 05-05437 RBL, 2008 WL 1901988, at *5 (W.D. Wash. Apr. 24, 2008) (finding that objection “ignores applicable law”); *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971 (N.D. Cal. Nov. 16, 2007); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1379 (S.D. Fla. 2007) (stating that the court “did not find any of the papers filed by Objectors’ Counsel to be particularly helpful or to have conferred a benefit on the Class, as they were generic compilations of well-known case law and lacked specific application to this case,” but because E.F.S.’s appearance at oral argument “provided a safety check for the parties and the Court,” he would be reimbursed his travel expenses and a reasonable hourly rate for time actually spent at settlement hearing).

¹³² *Shaw v. Toshiba Am. Info. Syst.*, 91 F. Supp. 2d 942, 974 (E.D. Tex. 2000) (discussing professional objector L.S.).

¹³³ *Id.* at 975 & n.19 (admonishing L.S. and revoking his admission pro hac vice).

¹³⁴ See, e.g., *UFCW Local 880 Joint Pension Fund v. Newmont Mining Corp.*, No. 05-cv-01046-MSK-BNB, 2008 WL 4452332, at *4 (D. Colo. Sept. 30, 2008) (stating that L.S., who appeared pro se in that case, had merely raised same objection as another, and his objection was “general in nature, largely unsupported by specific citation to the record or to supporting caselaw,” and “lacking in meaningful analysis”; denying L.S. the “incentive award” he sought for his participation), *aff’d*, 352 F. App’x 232 (10th Cir. 2009); *In re Enron Corp. Sec., Derivative & ERISA Litig.*, 586 F. Supp. 2d 732, 811–17 (S.D. Tex. 2008) (rejecting numerous “picky” objections to attorney fees based on “no authority”); *In re NASDAQ Market-Makers Antitrust Litig.*, 187 F.R.D. 465, 479–81 (S.D.N.Y. 1998) (noting objections with “no authority” in support of the objection, “contrary to the law,” and otherwise meritless). In particular, L.S. often demands the appointment of a “guardian” for the class, despite his previous recognition, see *Shaw*, 91 F. Supp. 2d at 974–75, and the applicable law stating, see *supra* notes 23–31 and accompanying text, that the court is already the guardian of the class. Courts have repeatedly and emphatically refused to accept L.S.’s demand for a “guardian.” See, e.g., *In re Enron*, 586 F. Supp. 2d at 811–12; *In re NASDAQ*, 187 F.R.D. at 481; *In re Intelligent Electronics Sec. Litig.*, No. 92-CV-1905, 1997 WL 786984, at *10 (E.D. Pa. Nov. 26, 1997); see also *Weissman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1196–97 (9th Cir. 1999) (quoting district court finding that L.S.’s arguments were “groundless, contrived and misplaced” and that his

courts have rebuffed, often harshly, the objections of another serial objector, E.C.¹³⁵

Professional objectors often make the same objections in case after case.¹³⁶ Courts frequently note that these counsel do not even understand the settlement to which they object.¹³⁷ Some decisions have even sanctioned or harshly criticized the conduct of professional objectors.¹³⁸ Serial objector counsel often make

participation in the case “reflects a serious lack of professionalism and good judgment” and refusing to disturb those conclusions, but vacating a “vexatious litigant” order that forbade him from filing objections to other class action settlements).

¹³⁵ See, e.g., *In re Warfarin Sodium Antitrust Litig.*, 391 F.3d 516, 538 (3d Cir. 2004) (finding that E.C.’s objection was made “without the support of expert evaluation, citation, or discovery”); *In re UnitedHealth Group, Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1108–09 (D. Minn. 2009) (condemning objection in colorful language); *Azizian v. Federated Dep’t Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549, at *9 (N.D. Cal. Sept. 29, 2006) (finding that objections by E.C. and other “Coordinated Objectors” made no material contribution); *In re Relafen Antitrust Litig.*, 231 F.R.D. 52, 80 n.21 (D. Mass. 2005) (finding that objection was contradicted by the record); *Varacallo v. Mass. Mut. Life Ins. Co.*, 226 F.R.D. 207, 246 (D.N.J. 2005) (finding that objector had “fail[ed] to substantiate [his] argument with anything more than speculation and one [groundless] example”); *Clark v. Experian Info. Solutions, Inc.*, No. 8:00-1217-22, 2004 WL 256433 (D.S.C. Jan. 14, 2004); *In re VisaCheck Money Master Litig.*, 297 F. Supp. 2d 503 (E.D.N.Y. 2003).

¹³⁶ For example, serial objector counsel K.N. routinely demands that class counsel’s fee be paid in installments rather than all at once. That objection fails again and again, see, e.g., *In re AT&T*, 455 F.3d at 174; *Perez*, 2007 WL 2591174, at *1; *Varacallo*, 226 F.R.D. at 251–52, but there is nothing to keep him and others who parrot that argumen from raising it again in another case in hopes of generating a fee.

¹³⁷ Serial objector counsel J.P. has been the subject of a series of opinions finding his objections groundless and stating that he simply did not understand the settlements to which he objected. See, e.g., *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 350–51 (E.D.N.Y. 2010) (labeling J.P.’s objections “meritless” and “based in part upon [a] misconception”); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, No. MDL 1361, 2003 WL 22417252, at *2 & n.3 (D. Me. Oct. 7, 2003) (finding that J.P., a “repeat objector,” had filed a “groundless objection,” imposing an appeal bond because his appeal “might be frivolous,” and noting that sanctions on appeal were “a real possibility”); *In re Warfarin Sodium Antitrust Litig.*, 212 F.R.D. 231, 258 (D. Del. 2002), *aff’d*, 391 F.3d 516 (3d Cir. 2004) (approving settlement despite objection and finding that J.P., and other serial objector counsel, had misunderstood allocation and distribution plan); *Tenuto v. Transworld Sys., Inc.*, No. 99-4228, 2002 WL 188569, at *3 (E.D. Pa. Jan. 31, 2002) (approving settlement and finding that J.P. had been unaware of applicable law and had misstated value of settlement).

¹³⁸ See, e.g., *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682, 687 (7th Cir. 2008), *cert. denied*, 129 S. Ct. 2767 (2009) (objector attorney fees had been “cut it in half as a sanction for their irresponsible litigation tactics”); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 278 F.3d 175, 193 (3d Cir. 2002) (affirming in part sanctions against objector counsel); *Turner v. Murphy Oil USA, Inc.*, 582 F. Supp. 2d 797, 806

arguments that are obviously unsupported by the record.¹³⁹ To add insult to injury, these slipshod objections are frequently submitted late.¹⁴⁰

Current law does not require courts to ask whether objectors or their counsel have a track record of groundless objections. Proponents of the settlement are left to ferret out and inform the court of the unsavory histories of serial objectors and their professional objector counsel. Objectors and their counsel purport to be acting in the best interest of the entire class. They do so in opposition to the court-appointed attorneys for that class, who must demonstrate their adequacy.¹⁴¹

In light of the prevalence of serial objectors and the problems they cause, objectors and their counsel should be required to prove their own adequacy by submitting a list of cases in which they have represented objectors to class action settlements, what objections were raised, and what the results of those cases were.¹⁴² This requirement would place objector counsel in a

n.32 (E.D. La. Oct. 6, 2008) (offending paper filed by objector withdrawn after sanctions motion filed); *Perez*, 2007 WL 2591174, at *1 n.1 (criticizing tone of submissions by professional objector counsel as “unprofessional and antagonistic,” which court found “unproductive and unacceptable”); *Shaw*, 91 F. Supp. 2d at 975 (revoking pro hac vice admission of objector counsel after noting that counsel had “submitted documents to [the] Court which [were], at best, negligently created and, at worst, suspiciously manufactured”).

¹³⁹ Such cases have been cited throughout this Article. In addition, see, for example *Mirfasihi*, 551 F.3d at 687 (citing “the many inaccurate and misleading statements in [objectors’] briefs and post-argument submission”); *In re Cendant Corp. Litig.*, 264 F.3d 201, 233 n.18, 235, 236, 238 n.20 (3d Cir. 2001) (rejecting numerous objections by group of objector counsel as such objections were “undermined by the evidence in the record,” were “purely speculative,” and based on “conjecture”); *In re AOL Time Warner, Inc.*, No. MDL 1500, 02 Civ. 5575(SWK), 2006 WL 903236, at *18 (S.D.N.Y. Apr. 6, 2006) (rebuffing objection as “conclusory”).

¹⁴⁰ See, e.g., *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 371 (E.D.N.Y. 2004) (noting individual objector’s input was “belated”), *aff’d*, 424 F.3d 150 (2d Cir. 2005); *In re UnitedHealth Group, Inc. PSLRA Litig.*, 643 F. Supp. 2d 1107, 1109 & n.1 (D. Minn. 2009) (noting objectors filed two weeks late); *Varacallo*, 226 F.R.D. at 245–46; *In re Lorazepam & Chlorazepate Antitrust Litig.*, 205 F.R.D. 369, 404 (D.D.C. 2002); cf. *Wal-Mart Stores, Inc. v. VISA USA, Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005) (noting that objector’s challenge to class counsel fees was not raised below and therefore would not be considered).

¹⁴¹ See FED. R. CIV. P. 23(a)(3), (g)(1)(B).

¹⁴² The results of such a required disclosure may be illuminating. Some objector counsel have repeatedly represented the same purported client, who sometimes shares a last name with objector counsel. See, e.g., *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 327 (E.D.N.Y. 2010) (noting that objector counsel J.P. represented J.P., Jr.); *In re Ins. Brokerage Antitrust Litig.*, No. 04-5184, 2009 WL 411856, at *1 (D.N.J. Feb. 17, 2009) (noting that J.P. represented objector Connie P.

comparable situation to that of attorneys seeking appointment as class counsel, who routinely submit firm resumes or declarations detailing their class action experience and results achieved.¹⁴³ Objections by professional objectors who have a proven track record of groundless or boilerplate objections, or both, should be presumptively invalid.¹⁴⁴ There is certainly no due process or

Realty Company); *Meyenburg v. Exxon Mobil Corp.*, No. 3:05-cv-15-DGW, 2006 WL 5062697, at *7 (S.D. Ill. June 5, 2006) (J.P. represented objector David P.); *In re Serzone Products Liab. Litig.*, 231 F.R.D. 221, 228 n.9 (S.D. W. Va. 2005) (J.P. again represented David P.); *In re Bristol-Myers Squibb Sec. Litig.*, No. 06-2964, 2007 WL 2153284, at *1 (3d Cir. July 27, 2007) (noting that objector counsel E.F.S. represented objector Rita Carfagna); *Perez v. Asurion Corp.*, 501 F. Supp. 2d 1360, 1378 (S.D. Fla. 2007) (E.F.S. again represented Ms. Carfagna). The PSLRA was enacted, in part, to foreclose class counsel from maintaining a stable of class action plaintiffs who could instantly file suits that Congress viewed as questionable. *See, e.g.*, 141 CONG. REC. S9074 (daily ed. June 26, 1995) (Sen. Hatch) (“Often, the firms [involved in perceived strike suits] use the same professional plaintiffs in multiple suits.”). The judicial system has the same interest in ensuring that serial objectors do not generate questionable objections to class action settlements that, if approved, would benefit thousands of persons. Moreover, courts have declined to appoint as class counsel an attorney who is closely related to the named plaintiff. [cases cited]. Objector counsel should not be treated better than class counsel would be in this regard. *See, e.g.*, *Zylstra v. Safeway Stores, Inc.*, 578 F.2d 102, 104 (5th Cir. 1978) (noting that class counsel was married to representative plaintiff); *Susman v. Lincoln Am. Corp.*, 561 F.2d 86, 90 & n.6 (7th Cir. 1977) (noting that class counsel was named representative’s brother); *Zlotnick v. TIE Commc’ns, Inc.*, 123 F.R.D. 189, 193–94 (E.D. Pa. 1988) (noting that class counsel was representative plaintiff’s son). Objector counsel should not be treated better than class counsel would be in this regard.

¹⁴³ *See, e.g.*, *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 282 (W.D. Tex. 2007); *Varacallo*, 226 F.R.D. at 233.

¹⁴⁴ In addition to the cases cited *supra* note 137, J.P., for example, has seen his objections rebuffed in many other decisions. *See, e.g.*, *Taubenfeld v. AON Corp.*, 415 F.3d 597, 600 (7th Cir. 2005) (noting that objections had been waived in district court and that objection to expense award “barely warrant[ed] comment”); *In re Initial Pub. Offering Sec. Litig.*, 671 F. Supp. 2d 467, 497 & n.219 (S.D.N.Y. 2009) (citing other cases in which courts labeled J.P.’s objections “counterproductive” and “not well reasoned” (quoting *In re Royal Ahold N.V. Sec. & ERISA Litig.*, 461 F. Supp. 2d 383, 386 (D. Md. 2006); *Taubenfeld*, 415 F.3d at 599)); *Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 12–13 (S.D.N.Y. Apr. 2, 2009); *In re AOL Time Warner ERISA Litig.*, No. 02 Cv. 8853(SWK), 2007 WL 4225486, at *3 (S.D.N.Y. Nov. 28, 2007) (finding that “several arguments” were “irrelevant or simply incorrect”); *Azizian v. Federated Dep’t Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549 (N.D. Cal. Sept. 29, 2006); *Spark v. MBNA Corp.*, 289 F. Supp. 2d 510, 513–14 (D. Del. 2003). K.N., *see supra* note 136, has appeared in numerous insurance sales practices cases, often with the same objections, and has been repeatedly rebuffed. *See, e.g.*, *Benacquisto v. Am. Express Fin. Corp.*, No. 00-1980 (DSD/JMM), 2001 U.S. Dist. LEXIS 23914 (D. Minn. May 15, 2001); *Michels v. Phoenix Home Life Mut. Ins. Co.*, No. 95/53181997 WL 1161145, at *5 & n.1 (Sup. Ct. Albany Cnty. Jan. 3, 1997).

other valid objection to treating objector counsel like class counsel in this regard.¹⁴⁵

Among other things, this requirement would shed light on the validity of the time allegedly incurred by objector counsel. If the same counsel made the same objection in prior cases, then little or no original work was required in the case at issue. That absence of real effort should affect the fee award, if any, that could be made to objector counsel.

Likewise, objecting class members themselves should provide a list of prior cases in which they have objected to settlements. Such a requirement would to some extent parallel the mandate of the PSLRA that proposed lead plaintiffs identify other actions in which they have served as representative plaintiffs.¹⁴⁶ Objections by clients who make a habit of asserting baseless objections to class action settlements should also be deemed presumptively invalid.

Courts should even consider requiring objectors to submit to depositions by the settling parties, either in every case in which the settling parties wish to take such depositions or in particular circumstances only. Class representatives are normally deposed before class certification. Such questioning can bring to light how those representatives found their counsel and other facts that defendants believe might show that the putative representatives are not adequate.¹⁴⁷ The settling parties often may have reason to believe that objectors have been recruited by professional objector counsel, primarily to serve counsel's

¹⁴⁵ At least one case imposed this requirement and rejected objectors' arguments that it was unfair. *DeHoyos*, 240 F.R.D. at 316.

¹⁴⁶ 15 U.S.C. § 78u-4(a)(2)(A)(v) (2006). A person may be a lead plaintiff in no more than five cases within three years absent leave of court. *Id.* § 78u-4(a)(3)(B)(vi).

¹⁴⁷ *See, e.g., In re Monster Worldwide, Inc. Sec. Litig.*, 251 F.R.D. 132, 135–36 (S.D.N.Y. 2008); *Burkhalter Travel Agency v. MacFarms Intern., Inc.*, 141 F.R.D. 144, 154 (N.D. Cal. 1991).

interests, rather than the other way around.¹⁴⁸ Depositions of objectors may expose that fact, just as a deposition of a class representative may reveal inadequacy.¹⁴⁹

III. THE NEED TO TIGHTEN THE STANDARDS FOR FEE AWARDS TO OBJECTOR COUNSEL

In addition to viewing more skeptically the objections presented by serial objector counsel, courts should tighten the standards for awarding fees to objector counsel.¹⁵⁰ Though the

¹⁴⁸ See, e.g., *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 705 (7th Cir. 2001) (affirming denial of intervention but reversing sanctions against objector counsel where the district judge both denied intervention to objector and imposed sanctions on his professional objector counsel and stating “that the attorneys recruited [their objector client] to intervene so that they could extract a fee from the proceedings”).

¹⁴⁹ For an excerpt of a deposition of a “know-nothing class representative,” see Linda S. Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U. L. REV. 413, 437–38 (1999). Professor Mullenix asserts that the presence of such class representatives is “pervasive.” *Id.* at 437. Whether or not that is so, objector clients are likely often utterly ignorant of the case and their role in it but are instead merely a convenient tool for the interests of professional objector counsel. See, e.g., *supra* notes 112–16 and accompanying text (discussing objections to class certification that go against the interest of objecting clients themselves).

¹⁵⁰ The arguments in this section relate, of course, only to objector counsel who appear on a contingent fee basis. Objector counsel whose clients have agreed to pay them on a different basis would be subject only to the normal rules that govern attorney fees. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.5 (2010). Noncontingent fees should be encouraged in the objector context, as they are the most rational and fair arrangement in many ways. Indeed, in some jurisdictions, objector counsel may be required to offer clients “an arrangement for compensation on the basis of the reasonable value of the services” before entering into a contingent arrangement. See, e.g., N.J. CT. R. 1:21-7(b) (2010). First, an hourly or flat fee arrangement would resolve the conundrum identified by prominent scholars: Under the contingent fee regime, objector counsel are rewarded with a fee if they “improve” an inadequate settlement but not if they defeat it altogether. See, e.g., *Coffee*, *supra* note 22, at 423; *Koniak & Cohen*, *supra* note 43, at 1107 n.184. Second, replacing contingent fees with an alternative regime avoids the problem of disincentivizing class counsel by requiring them to share their fee with objector counsel, while still ensuring that objector counsel are paid. See *supra* notes 98–100 and accompanying text. Third, particularly given the relatively limited scope of most objector legal work, which begins only after a settlement is reached and largely involves only the review of others' efforts, it would be expected that an objector client who really believes that a settlement is unfair, unreasonable, or inadequate would find it in his or her economic interest to pay an appropriate, relatively small hourly or flat fee for counsel to vindicate that position. Objectors who must pay their counsel will consider whether it is objectively worthwhile to object, thereby reducing the number of groundless objections or those motivated by motives of extortion. In contrast, objectors who retain counsel on a contingent fee basis have no reason to evaluate

general principles of current law permit objector fee awards only in limited circumstances, enough exceptions have been made that serial objectors believe that they can earn a living by undermining class action settlements. The courts should return to the strict rules that severely limit fee awards to objector counsel to cases in which their objections substantially benefit the class.

Fee awards to class action objectors are “few and far between.”¹⁵¹ The general rule is that objectors are not entitled to fees.¹⁵² At least one case refers to this as a “presumption.”¹⁵³ Objectors are to be awarded fees only when they have “expended large amounts of time, money and resources, aided the court considerably in its consideration of proposed settlements and fee awards, and the class members were ultimately benefited as a result of the objectors’ efforts.”¹⁵⁴ Even objector counsel whose

whether an objection is rational, since they literally make no investment, financial or otherwise, in objecting and are thus indifferent to whether they are merely being used as the tools of professional objector counsel. Fourth, the decision of counsel to represent an objector will likewise be based on proper economic considerations rather than the potential to extort a portion of class counsel’s fees. It is not unheard of for objector counsel to act on a basis other than contingency. At oral argument in the Third Circuit on an objector appeal from the settlement approval in *In re Insurance Brokerage Antitrust Litigation*, No. 04-5184(GEB), 2007 WL 2589950 (D.N.J. Sept. 4, 2007), appellate counsel for the objector told the court that he was working on an hourly basis. See Transcript of Oral Argument at 76, *In re Ins. Brokerage Antitrust Litig.*, 2007 WL 2589950.

¹⁵¹ *Spark v. MBNA Corp.*, 289 F. Supp. 2d 510, 513 (D. Del. 2003).

¹⁵² *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 520 (W.D. Pa. 2003); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 565 (D.N.J. 2003).

¹⁵³ *Martin v. Foster Wheeler Energy Corp.*, No. 3:06-CV-0878, 2008 WL 906472, at *10 (M.D. Pa. Mar. 31, 2008).

¹⁵⁴ *Spark*, 289 F. Supp. 2d at 513 (citing *In re Harnischfeger Indust., Inc. Sec. Litig.*, 212 F.R.D. 400, 413–15 (E.D. Wis. 2002); *In re Horizon/CMS Healthcare Corp. Sec. Litig.*, 3 F. Supp. 2d 1208, 1214 (D.N.M. 1998)); see, e.g., *Prudential*, 273 F. Supp. 2d at 571 (noting that a fee was awarded to objector counsel who added significant value even though “much of [that counsel’s] time was foolishly spent on parochial matters that did little to advance the progress of the litigation”); *Shaw v. Toshiba Am. Info. Syst.*, 91 F. Supp. 2d 942, 974 (E.D. Tex. 2000) (noting that fees were awarded to certain objectors who conferred substantial benefit on class in the form of an extension of time to redeem coupons); *Henry v. Sears Roebuck & Co.*, No. 98-C-4110, 1999 WL 33526864, at *1 (N.D. Ill. July 23, 1999) (awarding attorney fees, with consent of class counsel, for over 590 hours spent by objector who added three features to settlement, which according to plaintiffs’ experts were “very advantageous” to class.). Cases such as *In re Riverstone Networks, Inc.*, 256 F. App’x 168 (9th Cir. 2007), which awarded fees even while finding that the objector “raised objections similar to those already raised by another objector,” *id.* at 170, should not be followed.

efforts substantially benefit only a portion of the class can earn a fee.¹⁵⁵ However, objector counsel should be required to submit specific proofs showing that their efforts substantially benefited the class and that the benefit would not have been achieved without their efforts.¹⁵⁶

More troubling, however, are awards to objectors who have not succeeded but merely “sharp[en] the] focus” of the court by “transform[ing] the settlement hearing into a truly adversary proceeding.”¹⁵⁷ Sharpening the focus or creating an adversarial atmosphere, separately or together, should never be a basis for a fee award.¹⁵⁸ Those largely intangible and amorphous

¹⁵⁵ See, e.g., *In re Visa Check/Master Money Antitrust Litig.*, No. CV-96-5238, 2005 WL 2077286, at *13, *17 (S.D.N.Y. Aug. 25, 2005) (awarding fee for causing addition of Spanish in claims process documents, which benefited only part of class); *Great Neck Capital Appreciation Inv. P'ship, L.P. v. Pricewaterhousecoopers, L.L.P.*, 212 F.R.D. 400, 414 (E.D. Wis. 2002) (rejecting argument that entire class must benefit in order for objector counsel to get a fee award).

¹⁵⁶ For examples of cases applying this standard, see *In re Cendant Corp. Sec. Litig.*, 404 F.3d 173, 200 (3d Cir. 2005); *DeHoyos v. Allstate Corp.*, 240 F.R.D. 269, 337 (W.D. Tex. 2007).

¹⁵⁷ *Frankenstein v. McCrory Corp.*, 425 F. Supp. 762, 767 (S.D.N.Y. 1977). *Frankenstein* was among the first cases to adopt this idea, though the only case that *Frankenstein* cited as authority for doing so, *City of Detroit v. Grinnell Corp.*, No. 68 Civ. 4026, 1976 WL 1264 (S.D.N.Y. Apr. 21, 1976), expressly did not reach the issue of objector fees. *Id.* at *3. The “sharpening” concept appears to retain its greatest strength in the Second Circuit. See, e.g., *In re MetLife Demutualization Litig.*, 689 F. Supp. 2d 297, 367–68 (E.D.N.Y. 2010); *Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 11 (S.D.N.Y. 2009); *Denney v. Jenkins & Gilchrist*, 230 F.R.D. 317, 354 (S.D.N.Y. 2005), *aff'd in part, rev'd in part on other grounds sub nom. Denney v. Deutsche Bank AG*, 443 F.3d 253 (2d Cir. 2006); *In re Indep. Energy Holdings PLC Sec. Litig.*, 2003 WL 22801724, at *1 (S.D.N.Y. Nov. 24, 2003) (awarding fee to objectors even though result would have been the same with or without them); see also *In re AOL Time Warner ERISA Litig.*, No. 02 Cv. 8853(SWK), 2007 WL 4225486, at *2 (S.D.N.Y. Nov. 28, 2007) (listing district court cases in Second Circuit that did or did not award objector fees merely for creating adversarial atmosphere). However, some cases elsewhere have also adopted this rationale. See, e.g., *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 358 (N.D. Ga. 1993). *But see Martin*, 2008 WL 906472, at *9–10 (noting that district courts in the Third Circuit do not follow the district courts in the Second Circuit that have awarded fees for “transforming the settlement hearing into a truly adversarial proceeding”). In *In re Holocaust Victim Assets Litigation*, the Second Circuit rejected an objector’s claim for fees for “sharpen[ing] the focus of settlement issues and provid[ing] important insights shaping the settlement.” 424 F.3d 150, 157 (2d Cir. 2005). However, before finding that the objector had not reached that threshold, the court assumed, *arguendo*, that this standard was an accurate statement of the law. *Id.* To the extent that this foreshadows a retreat from the “sharpening” idea, it would be the appropriate path for the law to take.

¹⁵⁸ See *Martin*, 2008 WL 906472, at *9–10.

considerations do not benefit the class monetarily and are too easy to find, even in cases where no material sharpening occurred.¹⁵⁹ Creating controversy should never justify a counsel fee. Only substantial enhancement of the benefits to the class should give rise to a fee award.¹⁶⁰ “Fee awards made on the basis of insignificant or cosmetic changes in the settlement serve to condone and encourage improper use of the objection process.”¹⁶¹

In this regard, a comparison of objector counsel with class counsel is again useful.¹⁶² Class counsel are not compensated merely for raising important issues or creating an adversarial atmosphere. If they do not create a benefit for the class, they do not receive a fee. Sometimes class counsel do not get a fee even when they create such benefits, due to the vagaries of attorney fees law.¹⁶³ It should not be easier for objector counsel to earn a fee than class counsel.¹⁶⁴

¹⁵⁹ See, e.g., *In re Synthroid Marketing Litig.*, 201 F. Supp. 2d 861, 882–83 (N.D. Ill. 2002) (denying an objector fee request when the “sharpened” issue was already “obvious”), *aff’d in part, modified in part on other grounds*, 325 F.3d 974 (7th Cir. 2003).

¹⁶⁰ See *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1051–52 (9th Cir. 2002); *In re Leapfrog Enterprises, Inc. Sec. Litig.*, No. C-03-05421 RMW, 2008 WL 5000208, at *3 (N.D. Cal. Nov. 21, 2008) (finding that even though objectors provided “some” benefit to class, it was not “substantial” and therefore did not warrant fee award); *In re Rent-Way Sec. Litig.*, 305 F. Supp. 2d 491, 520 (W.D. Pa. 2003); *Spark v. MBNA Corp.*, 289 F. Supp. 2d 510, 513 (D. Del. 2003); *In re Great Neck Capital*, 212 F.R.D. at 415 (awarding fees to objector lawyers who “contributed materially to the proceeding”); see also *Azizian v. Federated Dep’t Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549, at *3 (N.D. Cal. Sept. 29, 2006) (noting that while objectors “provided some value to the process, they [had] not demonstrated that their involvement significantly enhanced the settlement”); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 273 F. Supp. 2d 563, 572 (D.N.J. 2003) (reducing objector counsel fee request despite lack of objection to it because, despite “extensive” hours expended, the benefit to class from objections was “limited”).

¹⁶¹ MANUAL FOR COMPLEX LITIGATION, *supra* note 4.

¹⁶² See *id.* (“So long as an objector is acting at least in part on behalf of the class, it is appropriate to impose on the objector a duty to the class similar to the duty assumed by a named class representative.”).

¹⁶³ For example, the United States Supreme Court abolished the “catalyst doctrine,” under which a plaintiff whose efforts are a catalyst for relief could obtain fees as a prevailing party under various federal statutes. *Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res.*, 532 U.S. 598, 605 (2001). As a result, when a defendant “voluntarily” provides relief sought in a class action, while refusing to enter into a formal settlement, the defendant may be able to defeat a fee claim. This occurred in *Chin v. Daimler-Chrysler Corp.*, 520 F. Supp. 2d 589 (D.N.J. 2006), *rev’d sub nom. Chin v. Chrysler LLC*, 538 F.3d 272 (3d Cir. 2008). There, the district court found that class counsel’s many years of effort led to an extension of automobile warranties and other relief worth millions of dollars to purchasers and lessees of Chrysler vehicles. *Chin v. Daimler-Chrysler Corp.*, 461 F. Supp. 2d 279

Even in the rare circumstances where a fee to objector counsel could be justified, the fee should be no more than the objecting counsel's lodestar, which is defined as the number of hours multiplied by the attorney's reasonable rate.¹⁶⁵ Unlike class counsel, who litigate for years while advancing huge amounts of out-of-pocket costs, objector counsel rarely, if ever, have real risk.¹⁶⁶ Often, they merely parrot arguments raised more effectively by others¹⁶⁷ or offer "suggestions" that the court

(D.N.J. 2006). The district court then awarded class counsel an attorney fee for that success. *Chin*, 520 F. Supp. 2d 589. The Third Circuit reversed the fee award on choice of law grounds. *Chin*, 538 F.3d 272. Class counsel ended up with no fee at all, despite having obtained substantial relief for the class.

¹⁶⁴ Rule 23(h), which addresses fee awards, makes no distinction between class counsel and objector counsel in this regard. Rule 23(h) "does not undertake to create new grounds for an award of attorney fees or nontaxable costs." FED. R. CIV. P. 23(h) advisory committee's note. Thus, the adoption of Rule 23(h) does not alter the previously enunciated standards for objector attorney fees. See *Fleury v. Richemont North America Inc.*, No. C-05-4525-EMC, 2008 WL 4829868, at *3 (N.D. Cal. Nov. 4, 2008) (finding that Rule 23(h) does not create independent right to objector attorney fees and that the objector "must find an independent basis in substantive law authorizing such fees").

¹⁶⁵ In many circumstances, plaintiff's counsel who succeed in a contingent fee case can receive more than their lodestar. See, e.g., *In re Prudential Ins. Co. of Am. Sales Practice Litig.*, 148 F.3d 283, 341 (3d Cir. 1998) (stating that multipliers of between one and four on counsel's lodestar are frequently awarded) (citation omitted). But see *Perdue v. Kenny A.*, ___ U.S. ___, 130 S. Ct. 1662, 176 L. Ed. 2d 494 (2010) (limiting enhancements that are based on results achieved or quality of performance).

¹⁶⁶ See, e.g., *UFCW Local 880 Joint Pension Fund v. Newmont Mining Corp.*, No. 05-cv-01046-MSK-BNB, 2008 WL 4452332, at *6 (D. Colo. Sept. 30, 2008). Many courts have refused to award a fee multiplier to objector counsel. See, e.g., *In re Riverstone Networks, Inc.*, 256 F. App'x 168, 170 (9th Cir. 2007) (denying objector counsel's request for fee multiplier because little or no risk incurred); *Wininger v. SI Mgmt., L.P.*, 301 F.3d 1115, 1126 (9th Cir. 2002); *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 804 (N.D. Ohio 2010); *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 279 (E.D.N.Y. 2009); *Park v. Thomson Corp.*, 633 F. Supp. 2d 8, 13 (S.D.N.Y. 2009); *Perez v. Asurion Corp.*, No. 06-20734-CIV, 2007 WL 2591174, at *1 (S.D. Fla. July 31, 2007) (rejecting demand for 3.5 multiplier for "risk and lost opportunity"); *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d 363, 381-82 (E.D.N.Y. 2004) (rejecting risk argument), *aff'd*, 424 F.3d 150 (2d Cir. 2005); *In re Elan Sec. Litig.*, 385 F. Supp. 2d 363, 377 (S.D.N.Y. 2005); *In re Homestore.com, Inc. Sec. Litig.*, No. CV01-11115 RSWL(CWX), 2004 WL 2792185, at *1 (C.D. Cal. Aug. 10, 2004); *In re Indep. Energy Holdings PLC Sec. Litig.*, No. 00 Civ.6689 SAS, 2003 WL 22801724, at *2 (S.D.N.Y. Nov. 24, 2003) (rejecting multiplier requests).

¹⁶⁷ See, e.g., *In re Holocaust Victim Assets Litig.*, 424 F.3d at 157 (noting that others had made similar points more effectively and timely); *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 289 (7th Cir. 2002) (finding that "objectors added nothing" since the subject of their objection was already presented to the court); *Parker*, 631 F. Supp. 2d at 279 (awarding no fee for objectors whose submission came after, but "added nothing to, the substance of . . . a more effective objection" by others); *UFCW*

already had in mind.¹⁶⁸ Merely “laudable” involvement, without “substantially enhanc[ing] the value of the settlement or benefit[ing] the class sufficiently [does not] warrant [the] award of attorneys’ fees.”¹⁶⁹ Objector counsel “should not be rewarded simply because they joined the battle on the side that prevailed.”¹⁷⁰

A potential exception to the general rule that objectors should not receive fees may be institutional objectors. Several courts have found that the input of institutional objectors had value.¹⁷¹ Congress directed that state attorneys general be notified of settlements and given the chance to opine on them.¹⁷²

Local 880, 2008 WL 4452332, at *4 (awarding no payment to serial objector who raised same objections that another objector did, in general form only, without meaningful analysis); *Azizian v. Federated Dep’t Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549, at *3, *9 (N.D. Cal. Sept. 29, 2006) (“[Objectors’] role was one of confirmation [of matters raised by others] not origination.”); *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 962 F. Supp. 572, 593 n.50 (D.N.J. 1997) (stating objectors’ arguments were not novel and had been raised by state attorneys general), *aff’d*, 148 F.3d 283 (3d Cir. 1998).

¹⁶⁸ See, e.g., *UFCW Local 880*, 2008 WL 4452332, at *6 (awarding nominal payment for objector’s procedure suggestion because the court would have required the procedure on its own); *Perez*, 2007 WL 2591174, at *1 (awarding no fee for “suggestions” that court already incorporated into its oversight plan for the settlement).

¹⁶⁹ *Azizian v. Federated Dep’t Stores, Inc.*, No. C-03-3359 SBA, 2007 WL 425850, at *1 (N.D. Cal. Feb. 8, 2006).

¹⁷⁰ *UFCW Local 880*, 2008 WL 4452332, at *3.

¹⁷¹ *In re Holocaust Victim Assets Litig.*, 311 F. Supp. 2d at 370–71 (E.D.N.Y. 2004), *aff’d*, 424 F.3d 150 (2d Cir. 2005) (finding that individual objector’s input was “belated” and “of no consequence” but that state Commissioner of Insurance’s timely submission on same subject had been helpful); *In re Cardinal Health, Inc. Sec. Litig.*, 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008) (finding that individual objectors did “virtually nothing” but that institutional objectors had “play[ed] an important role in delineating the reasonableness of the fee award”). In *In re Horizon/CMS Healthcare Corp. Securities Litigation*, the court reduced class counsel’s fees by three percent and awarded that entire amount to counsel for objector state pension funds, who had “provided a useful, historical and comparative backdrop” for the court’s benefit. 3 F. Supp. 2d 1208, 1215 (D.N.M. 1998). The court emphasized the importance of input from institutional investors. *Id.* The fee award may have been an attempt to encourage institutional investors to take a more active role in securities class action litigation, as contemplated by the PSLRA. See *id.* at 1212 n.5 (noting that, though Congress had hoped to encourage involvement of institutional investors, objector institutions had declined to seek lead plaintiff position in this litigation).

¹⁷² 28 U.S.C. § 1715(a)–(b), (d) (2006). For an earlier argument that the “state is another potentially useful monitor of class action abuse,” see Brunet, *supra* note 7, at 410–11. Professor Brunet rightly observes, however, that such participants are “atypical” and that the prototypical objector is a class member represented by an “entrepreneurial” private attorney. *Id.* at 425.

In at least one recent case, a court found that such input from state attorneys general was persuasive in the court's decision to disapprove a proposed settlement.¹⁷³ Analogously, just as Congress intended for institutional investors to be favored in the context of appointment as lead plaintiffs in securities fraud cases,¹⁷⁴ institutions may have a better claim to a counsel fee for a successful objection than do other objectors. Institutions are less likely to become repeat objectors or to use the objection process as a means to make money for themselves or their counsel. As a result, their objections may be more likely to be soundly reasoned.¹⁷⁵

Certain public interest organizations may qualify for different treatment as well, even though they are sometimes repeat objectors.¹⁷⁶ Scholars have noted the legitimate contributions of such objectors.¹⁷⁷ Unlike professional objector counsel, these public interest organizations are not motivated primarily by fees, even though such organizations are sometimes awarded fees where their efforts substantially benefit the class.¹⁷⁸

Finally, even if objectors are to be awarded fees, they should be able to claim them only when they submit detailed, contemporaneous time records supporting the time they claim.¹⁷⁹

¹⁷³ *Figueroa v. Sharper Image Corp.*, 517 F. Supp. 2d 1292, 1328 (S.D. Fla. 2007). Attorney general objections are not always valid, however. In at least two recent cases, courts rejected objections by attorneys general. *Dewey v. Volkswagen*, No. 07-2240, 2010 WL 3018305, at *20-21 (D.N.J. July 30, 2010); *Radosti v. Envision EMI, LLC*, No. 09-887, 2010 WL 2292343, at *22 (D.D.C. June 8, 2010).

¹⁷⁴ See *supra* notes 126-29 and accompanying text.

¹⁷⁵ See *supra* notes 105, 170 and accompanying text.

¹⁷⁶ Such organizations would not include those who are ideologically opposed to class actions or to the attorneys who bring them. The ulterior motive of such organizations disqualifies them from claiming that they are acting in the interest of class members rather than in their own selfish, even if nonmonetary, interests.

¹⁷⁷ See, e.g., *Brunet*, *supra* note 7, at 456-63.

¹⁷⁸ See *id.* at 437 n.150 (defining "professional objectors" so as to exclude those "attorneys who sometimes are repeat players in the class action business who work for state attorneys general or public interest groups . . . [because they] are unlikely to be extortionists and particularly unlikely to withdraw an objection in exchange for a privately negotiated fee"). For cases awarding fees to objecting public interest organizations, see, for example, *Bowling v. Pfizer, Inc.*, 102 F.3d 777, 779 (6th Cir. 1996); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 2 F. Supp. 2d 175, 176 (D. Mass. 1998); *In re Domestic Air Transp. Antitrust Litig.*, 148 F.R.D. 297, 359-60 (N.D. Ga. 1993).

¹⁷⁹ Often, objector counsel submit only opaque summaries that do not permit meaningful review of their efforts. See, e.g., *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682, 687 (7th Cir.) (noting that objectors' "fee applications . . . were barren of the detail required"), *cert. denied*, 129 S. Ct. 2767 (2008); *Park v. Thomson Corp.*,

Though class counsel normally are not required to submit their own time records in cases in which their fee award is based on the percentage of the fund method,¹⁸⁰ a key reason for that is the volume of information the court would have to review, given the length and breadth of class action matters. In contrast, objector counsel surface very late in the process and have relatively little time invested in their objections.¹⁸¹ The court and class counsel, whose fee would be shared with objector counsel, would have no difficulty reviewing and analyzing such a limited amount of information.

Again, to avoid deterring class counsel from taking on inherently risky class action litigation, courts should avoid reducing class counsel's hard-earned fees by requiring that part of those payments be given to objector counsel.¹⁸² Requiring submission of time records would prevent extortionate fee applications by objector counsel.¹⁸³

CONCLUSION

The vast majority of class action settlements are fair and reasonable results for the class. The vast majority of the cases in which courts rejected settlements as unfair did so because those courts exercised their fiduciary duty to the class and carefully reviewed the proposed settlement, not because an objector enlightened the courts about something that the judges had not perceived. Objectors and those who advocate for them have "vastly overstated the significance of the role they played" in those cases.¹⁸⁴

633 F. Supp. 2d 8, 13 (S.D.N.Y. 2009) (objector offered "no billing records or statement of time expended"); *In re* Indep. Energy Holdings PLC Sec. Litig., 2003 WL 22801724, at *2 (S.D.N.Y. Nov. 24, 2003).

¹⁸⁰ See, e.g., *In re* Prudential Ins. Co. of Am. Sales Practices Litig., 148 F.3d 283, 342 (3d Cir. 1998).

¹⁸¹ See, e.g., *Lonardo v. Travelers Indem. Co.*, 706 F. Supp. 2d 766, 785–86 (N.D. Ohio 2010); *Park*, 633 F. Supp. 2d at 13 ("[Professional objector J.P.] did not appear in this action until three years [after the complaint was filed] and the time that he devoted to this matter spanned a far shorter interval [than that of class counsel].").

¹⁸² See *supra* notes 98–100 and accompanying text (stating that generous fees are needed to give counsel incentive to bring risky, public interest-oriented cases).

¹⁸³ The concern that objector counsel will demand an excessive fee is not an academic one. See *supra* note 52 and accompanying text.

¹⁸⁴ *Azizian v. Federated Dep't Stores, Inc.*, No. C-03-3359 SBA, 2006 WL 4037549, at *6 (N.D. Cal. Sept. 29, 2006); see also *Parker v. Time Warner Entm't Co., L.P.*, 631 F. Supp. 2d 242, 278 (E.D.N.Y. 2009) (noting the "immodesty" of

Courts have “a duty to the silent majority as well as the vocal minority.”¹⁸⁵ That duty calls on courts to discourage objections that are made primarily to delay the delivery of settlement benefits to that “silent majority.” Preventing objectors, particularly professional objector counsel, from extorting benefits for sitting by while class counsel worked hard, at great risk, to create the settlement benefits for the class is an additional benefit of restricting objections. By refusing requests for objector counsel fees except when objectors present issues that the court would not otherwise already perceive and which substantially benefit class members, courts will reduce or even remove the scourge of extortionate and dilatory objections from the class action system, which would be a highly positive result for class members.

objector counsel fee petition and stating that effect of that objection was “audacious” and “exaggerated to say the least”).

¹⁸⁵ *In re Wireless Tel. Fed. Cost Recovery Fees Litig.*, 396 F.3d 922, 933 (8th Cir. 2005).