CLASS ACTION OBJECTORS: THE GOOD, THE BAD, AND THE UGLY

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INTRODUCTION

When litigants reach a class action settlement, they usually present a unified front in seeking judicial approval of the settlement.[1] Plaintiffs' counsel, the class representatives, and the defendant are typically on the same page regarding the fairness of the settlement; and they are frequently on the same page with regard to the amount of attorneys' fees as well, with agreements often providing that a defendant will not oppose attorneys' fees up to a specified amount.[2] Moreover, when the court has not addressed class

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1. Under Federal Rule of Civil Procedure (FRCP) 23(e)(2), a court may approve a settlement only after finding that it is "fair, reasonable, and adequate." And under FRCP 23(h), the court must determine whether the attorneys' fees sought are "reasonable." In some cases, class counsel also request incentive payments or service awards for class members, and the court must decide whether such awards are proper. *See, e.g.*, Camp Drug Store, Inc. v. Cochran Wholesale Pharm., Inc., 897 F.3d 825, 834–35 (7th Cir. 2018); *In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. 202, 228–29 (N.D. Ill. 2019), *aff'd sub nom.*, Walker v. Nat'l Collegiate Athletic Ass'n, No. 19-2638, 2019 WL 8058082 (7th Cir. Oct. 25, 2019).

2. *See, e.g.*, Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 304 (6th Cir. 2016) (reporting that the defendant agreed not to oppose plaintiffs' attorneys' fees up to $10 million); Stokes v. Saga Int'l Holidays, Ltd., 376 F. Supp. 2d 86, 88 (D. Mass. 2005) (reporting that the defendants agreed not to oppose plaintiffs' attorneys' fees and costs up to $350,000). Of course, such unanimity of viewpoints among class counsel, class representatives, and the defendant does not always exist. There have been cases in which one or more class representatives opposes a settlement. *See, e.g.*, Olden v. LaFarge Corp., 472 F. Supp. 2d 922, 929 (E.D. Mich. 2007) (noting that the objectors to the proposed settlement included three class representatives). There also have been cases in which the defendant supports a settlement but disputes class counsel's position with respect to what constitutes

certification earlier in the case, the typical practice is for plaintiffs' counsel to argue that the class should be certified under Federal Rule of Civil Procedure (FRCP) 23, while the defendant takes no position on the issue.[3]

Without the adversarial posture of a contested class action, the court, as fiduciary for the class, must independently assess the settlement to ensure that it is fair to the class (including the many absent class members).[4] But the court does not undertake that task alone. Before a settlement is approved, class members (or putative class members when the class has not yet been certified) have the opportunity to object.[5] Such opportunity is spelled out in the class notice, with specific time frames and instructions for those who wish to object.[6] In many class actions, especially highly publicized ones, myriad objections are filed, some by counsel representing one or more individual class members and others by individual class members pro se.[7] But not all

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reasonable attorneys' fees. *See, e.g.*, *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs., & Prods. Liab. Litig. (*Volkswagen Clean Diesel I*), MDL No. 2672 (JSC), Nos. 2886 & 3092, 2017 WL 1352859, at *4 (N.D. Cal. Apr. 12, 2017); Facebook, Inc.'s Opposition to Plaintiffs' Motion for Attorneys' Fees & Costs at 2, Fraley v. Facebook, Inc., 2013 WL 4516806 (N.D. Cal. June 7, 2013) (No. 11-cv-01726), ECF No. 344.

3. *See, e.g.*, Day v. Air Methods Corp., No. 17-CV-183, 2019 WL 3976511, at *1 (E.D. Ky. Aug. 22, 2019) (certifying the class preliminarily and approving the settlement where the plaintiffs' motion for class certification and preliminary settlement approval was unopposed); Myers v. MedQuist, Inc., No. 05-4608, 2009 WL 900787, at *1 (D.N.J. Mar. 31, 2009) (noting that the plaintiffs' motion for class certification, final settlement approval, and attorneys' fees was unopposed).

4. *See, e.g.*, Rodriguez v. W. Publ'g Corp., 563 F.3d 948, 968 (9th Cir. 2009) ("[W]hen fees are to come out of the settlement fund, the district court has a fiduciary role for the class . . . ."); Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 280 (7th Cir. 2002) (noting that various courts "have gone so far as to term the district judge in the settlement phase of a class action suit a fiduciary of the class" and to apply "the high duty of care that the law requires of fiduciaries").

5. *See, e.g.*, Devlin v. Scardelletti, 536 U.S. 1, 8 (2002) (noting that class members "have been consistently allowed to [object to a class settlement] under the Federal Rules of Civil Procedure" (citing FED. R. CIV. P. 23(e))). Alternatively, in a class certified under FRCP 23(b)(3), class members also have the right to opt out of the class. If the class has not been previously certified, then the case is a "settlement class," and class members can opt out at the time they review the settlement. If the case was previously certified as a class action, and the opt-out period has expired, class members cannot opt out at the time of settlement unless the court agrees in its discretion to provide a second opt-out right under FRCP 23(e)(4). *See, e.g.*, Low v. Trump Univ., LLC, 881 F.3d 1111, 1117–21 (9th Cir. 2018) (finding that due process did not require a second opt-out period after settlement was reached when the class member was given the opportunity to opt out following class certification); Moulton v. U.S. Steel Corp., 581 F.3d 344, 353–54 (6th Cir. 2009) (same).

6. *See, e.g.*, *Bosch Settlement in the* Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation, BOSCH SETTLEMENT 11–13, https://www.boschvwsettlement.com/Content/Documents/Notice.pdf [https://perma.cc/WBL4-J3MU] (last visited Oct. 3, 2020); *Equifax Data Breach Class Action Settlement*, EQUIFAX DATA BREACH SETTLEMENT 15–16, https://www.equifaxbreachsettlement.com/admin/services/connectedapps.cms.extensions/1.0.0.0/a4f6125d-1f25-4e2c-aa90-3f2bb20e811f_1033_EFX_-_Long_Form_Notice.pdf [https://perma.cc/C83M-LW6B] (last visited Oct. 3, 2020).

7. For instance, in the Equifax data breach class action, 1106 objections were filed. *See* Supplemental Declaration of Professor Robert H. Klonoff Relating to Class Settlement Approval & Objections at 13, *In re* Equifax Inc. Customer Data Sec. Breach Litig, 2020 WL 256132 (N.D. Ga. Dec. 5, 2019) (No. 17-md-2800), ECF No. 900-2 [hereinafter Klonoff Equifax Declaration]. In the Volkswagen clean diesel class action, 462 objections were filed.

objectors and objections are of equal value. *The Good, the Bad, and the Ugly* is not just a classic Clint Eastwood/Sergio Leone movie from 1966; it is also an accurate categorization of the kinds of objectors that frequently appear during the class settlement approval process.

Some objectors are good; they offer thoughtful and potentially meritorious objections that engage the court and require substantive responses from the parties. Such objections sometimes serve to improve the settlement in significant ways. Good objectors are critical to the process because, as noted, the judge reviewing the settlement does not have the benefit of the usual adversarial setting.

Bad objectors raise objections that have no chance of persuading either the district court or an appellate court to reject the settlement. Yet, bad objectors (as I define the term) do not raise objections for the purpose of extracting payoffs to go away. Rather, they make arguments that do not withstand scrutiny based on the applicable law and facts. Frequently, such objections are filed pro se by class members who have no legal training or background. In some instances, such objectors base their concerns on a misunderstanding of the settlement's terms; in others, they may simply wish to express negative views regarding the defendant's conduct or vent generally about class actions, plaintiffs' lawyers, or the legal system. While such objections, standing alone, might not help the court in evaluating the settlement, bad objections are a necessary by-product of a system that actively encourages objections, including objections by nonlawyer class members.

Ugly objectors raise objections not to improve the settlement but to extort payments from class counsel in exchange for dismissing their objections. Such objectors do not even arguably serve a legitimate purpose. Instead, they impose serious, and sometimes irreparable, harm on the class action process.

These three categories of objectors noted above are not rigorous or always clear. For instance, a bad objector might unwittingly raise an argument that has potential merit. A repeat objector might decide to litigate an objection in one case but seek a payoff in another case. And even an entity with a track record for raising good objections might at times raise objections that are patently meritless. Most of the time, however, an objector will fit into one of the three categories.

This Article examines all three kinds of objectors. It addresses a variety of options for deterring ugly objectors, in particular. It also considers options for expediting the appellate process for class settlements involving good, bad, and ugly objectors alike.[8]

See Declaration of Robert H. Klonoff Addressing Objections by Class Members to the Proposed Volkswagen "Clean Diesel" Settlement at 7, *Volkswagen Clean Diesel I*, 2017 WL 1352859 (Nos. 2886 & 3092), ECF No. 1976-1 [hereinafter Klonoff Volkswagen Declaration].

8. This Article's focus is solely on class member objectors. Thus, it does not consider various proposals for independent class action monitors to oversee class counsel. *See, e.g.*, Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 448–56 (discussing state and federal governments as class action monitors); *id.* at 464–71 (discussing court-appointed guardians); Alon Klement, *Who Should*

I. GOOD OBJECTORS

A. *Examples of Good Objectors*

There are a variety of good objectors who raise legitimate issues.[9] They can be individual pro se class members or class members represented by private attorneys. In addition, good objectors can be public interest organizations representing particular class members. Public Citizen and Public Justice are two examples of organizations that can be categorized as good objectors.[10] Good objectors sometimes focus on the underlying fairness of the settlement, the viability of the case as a class action, or the amount of attorneys' fees sought.[11] Objectors also sometimes complain about a confusing claims process, and such objections might trigger modifications to that process.[12]

Numerous examples of good objections can be cited.[13] For instance, in *Amchem Products, Inc. v. Windsor*,[14] objectors successfully challenged a massive asbestos settlement on the ground that class certification was improper under FRCP 23.[15] Likewise, in *Ortiz v. Fibreboard Corp.*,[16]

Guard the Guardians?: A New Approach for Monitoring Class Action Lawyers, 21 REV. LITIG. 25, 28 (2002) (urging the use of "private monitoring by self-interested individuals and organizations, who would compete and pay to obtain the monitor's position and would receive a share of the class recovery in return"). It also does not analyze the difficult questions involved in ascertaining whether a particular objector is in fact a member of the class. *See, e.g.*, *In re* Oil Spill by the Oil Rig "Deepwater Horizon," MDL No. 2179, 910 F. Supp. 2d 891, 922 (E.D. La. 2012) (noting the "large numbers of non-class members objecting to being excluded from the Settlement").

9. *See* Brunet, *supra* note 8, at 444 ("The common thread of the decisions supporting objector participation in the class action settlement approval process is simply that objectors might be in a position to provide beneficial information to a district judge faced with the unenviable task of assessing the validity of a proposed settlement.").

10. For numerous examples of objections by public interest organizations, such as Public Citizen, see *id.* at 456–63.

11. *See id.* at 442 (distinguishing between "[o]bjectors who are trying to enrich a settlement fund" and "objectors who seek to decrease attorneys' fees"); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626–28 (1997) (involving a successful challenge to a settlement as not properly certified under FRCP 23); Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., 825 F.3d 299, 306, 311 (6th Cir. 2016) (vacating and remanding a class settlement with instructions to "begin the Rule 23(e) process anew," because class members could not review basic filings, such as the amended complaint, the motion for class certification and response, and the expert report relied upon in the settlement, all of which were under seal when the district court approved the settlement).

12. *See, e.g.*, Edwards v. Nat'l Milk Producers Fed'n, No. 11-cv-04766, 2017 WL 4581926, at *2 (N.D. Cal. Sept. 13, 2017) (noting that objections regarding, inter alia, "the lack of information available to the class about the possible size of distributions . . . resulted in clarifications related to those issues"); *In re* Visa Check/MasterMoney Antitrust Litig., No. CV-96-5238, 2005 WL 8158401, at *2–3 (E.D.N.Y. Oct. 5, 2005) (noting that an objection that the settlement notice should have been provided in Spanish was "well-taken" and that some objectors' requests for notice in Spanish were subsequently implemented).

13. I do not necessarily agree with the reasoning or results in these cases. My point is simply that the objectors were able to convince the courts of the merits of their objections.

14. 521 U.S. 591 (1997).

15. FED. R. CIV. P. 23(a)(4), (b)(3); *Amchem Prods.*, 521 U.S. at 625.

16. 527 U.S. 815 (1999).

various objectors successfully challenged another asbestos settlement on the ground that the settlement did not satisfy the class certification requirements of FRCP 23(b)(1)(B).[17] In *In re Subway Footlong Sandwich Marketing and Sales Practices Litigation*,[18] where plaintiffs alleged that "footlong" Subway sandwiches were actually shorter, the Seventh Circuit found that the relief afforded to class members was "worthless" because it did not ensure that customers would in fact receive sandwiches that were twelve inches.[19] And in *Dewey v. Volkswagen Aktiengesellschaft*,[20] the court agreed with objectors that the representative plaintiffs did not adequately represent the interests of the class.[21]

In some instances, good objectors might serve a positive function just by raising important issues in an adversarial context, even if the court ultimately disagrees with the particular objections. As one court has noted,

> It is undisputed that some objectors add value to the class-action settlement process by: (1) transforming the fairness hearing into a truly adversarial proceeding; (2) supplying the Court with both precedent and argument to gauge the reasonableness of the settlement and lead counsel's fee request; and (3) preventing collusion between lead plaintiff and defendants.[22]

Conclusory objections, standing alone, do not qualify as good objections. For instance, a relatively small number of conclusory objections that a settlement is "unfair," "too small," "illegitimate," or a "fraud" provide no meaningful information to a court. In particular, the claim that a settlement

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17. FED. R. CIV. P. 23(b)(1)(B); *Ortiz*, 527 U.S. at 830.

18. 869 F.3d 551 (7th Cir. 2017).

19. *Id.* at 557.

20. 681 F.3d 170 (3d Cir. 2012).

21. *Id.* at 181–90. Numerous other examples can be cited. *See, e.g.*, *In re* Baby Prods. Antitrust Litig., 708 F.3d 163, 174–75 (3d Cir. 2014) (accepting an objector's arguments relating to the adequacy of recovery by class members); *In re* Bluetooth Headset Prods. Liab. Litig., 654 F.3d 935, 938 (9th Cir. 2011) (vacating class counsel's fee award), *remanded to* 2012 WL 6869641 (C.D. Cal. July 31, 2012) (reducing the award by 65 percent); *In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 806–07 (3d Cir. 1995) (accepting objectors' challenge to a coupon settlement).

22. *In re* Cardinal Health, Inc. Sec. Litig., 550 F. Supp. 2d 751, 753 (S.D. Ohio 2008); *see also, e.g.*, Reynolds v. Beneficial Nat'l Bank, 288 F.3d 277, 288 (7th Cir. 2002) ("It is desirable to have as broad a range of participants in the fairness hearing as possible because of the risk of collusion over attorneys' fees and the terms of settlement generally."); Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1310 (3d Cir. 1993) ("The parties can be expected to spotlight the proposal's strengths and slight its defects. In such circumstances, objectors play an important role by giving courts access to information on the settlement's merits." (citation omitted)); Edwards v. Nat'l Milk Producers Fed'n, No. 11-cv-04766, 2017 WL 4581926, at *2 (N.D. Cal. Sept. 13, 2017) (stating that the objectors, though overruled, provided information that was "helpful to the court" and "contributed in some measure to the savings to the class of $4,333,333"); *In re* AOL Time Warner ERISA Litig., No. 02 Cv. 8853, 2007 WL 4225486, at *2 (S.D.N.Y. Nov. 28, 2007) (noting "some courts have rewarded objectors' counsel for advancing non-frivolous arguments and transforming the settlement hearing into a truly adversarial proceeding," even without a showing that objections were successful); *In re* Domestic Air Transp. Antitrust Litig., 148 F.R.D. 297, 359 (N.D. Ga. 1993) ("[The] objectors significantly refined the issues germane to a consideration of the fairness of this complex settlement . . . and performed a valuable service for the class, even though their objections did not prevail.").

should be larger is always available and cannot be measured abstractly against the compromises that invariably led to the settlement.[23] Courts have thus repeatedly rejected such conclusory objections.[24] At the same time, if a very large percentage of the class were to lodge such objections (without some sort of organized campaign), even in a conclusory fashion, that fact might be deserving of at least some weight. By the same token, the very fact that only a small percentage of the class has objected is itself often probative that a settlement is fair,[25] as is a small percentage of opt outs.[26]

B. Fees for Good Objectors

A major issue with respect to good objectors is determining what, if any, compensation should be awarded. This is a complicated question that has received almost no attention in the academic literature. The problem is that, unlike class counsel—who often have invested substantial time and taken enormous risk—an objector may have devoted little effort to the case as a whole or to the objection in particular. In the context of fees for objectors, several points should be noted.

First, the award of fees to objectors is relatively rare.[27] Usually, such fees are allowed only when the objector was responsible for improving the settlement in some tangible way.[28]

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23. *See* Staton v. Boeing Co., 327 F.3d 938, 952 (9th Cir. 2003) ("The mere possibility of a better settlement is not sufficient grounds for finding the agreement unfair . . . . Judicial review also takes place in the shadow of the reality that rejection of a settlement creates not only delay but also a state of uncertainty on all sides, with whatever gains were potentially achieved for the putative class put at risk.").

24. *See, e.g.*, *In re* Equifax Inc. Customer Data Sec. Breach Litig., MDL No. 2800, No. 17-md-2800, 2020 WL 256132, at *35 (N.D. Ga. Mar. 17, 2020) ("summarily reject[ing]" conclusory objections to a motion for fees), *appeal filed*, No. 20-10249 (11th Cir. Feb. 11, 2020); Carter v. Forjas Taurus S.A., No. 13-CV-24583, 2016 WL 3982489, at *8 (S.D. Fla. July 22, 2016) (rejecting "conclusory objections"), *aff'd*, 701 F. App'x 759 (11th Cir. 2017); *In re* Bear Stearns Cos., Inc. Sec., Derivative, & ERISA Litig., 909 F. Supp. 2d 259, 264 n.3 (S.D.N.Y. 2012) ("[O]bjections [that] are conclusory and bereft of factual or legal support . . . are insufficient to weigh against a finding that the proposed settlement is fair and reasonable, and can be overruled without engaging in a substantive analysis."); *see also infra* Part III.C.1 (discussing a rule change requiring that objections be set forth "with specificity").

25. Some courts have stated that low numbers of objections support the fairness of a settlement. *See, e.g.*, Churchill Vill., L.L.C. v. Gen. Elec., 361 F.3d 566, 577 (9th Cir. 2004); *In re* Prudential Ins. Co. of Am. Sales Pracs. Litig., 148 F.3d 283, 318 (3d Cir. 1998); Gunthert v. Bankers Standard Ins. Co., No. 16-cv-00021, 2019 WL 1103408, at *4 (M.D. Ga. Mar. 8, 2019); Saccoccio v. JP Morgan Chase Bank, N.A., 297 F.R.D. 683, 694 (S.D. Fla. 2014); Francisco v. Numismatic Guar. Corp. of Am., No. 06-cv-61677, 2008 WL 649124, at *12 (S.D. Fla. Jan. 31, 2008); *In re* Motorsports Merch. Antitrust Litig., 112 F. Supp. 2d 1329, 1338 (N.D. Ga. 2000).

26. Some courts have stated that low numbers of opt outs support the fairness of a settlement. *See, e.g.*, *Churchill Vill.*, 361 F.3d at 577; *In re Prudential*, 148 F.3d at 318; *Gunthert*, 2019 WL 1103408, at *4; *Saccoccio*, 297 F.R.D. at 694; *Francisco*, 2008 WL 649124, at *12.

27. *See, e.g.*, McDonough v. Toys "R" Us, Inc., 80 F. Supp. 3d 626, 658, 661 (E.D. Pa. 2015) (stating that objectors are "not generally entitled to an award of counsel fees" and "courts rarely award attorneys' fees to objectors").

28. *In re* Excess Value Ins. Coverage Litig., MDL No. 1339, 598 F. Supp. 2d 380, 393 (S.D.N.Y. 2005) (stating that objectors "*may*, in *some* circumstances, be entitled to attorneys'

Second, courts have extensive discretion in setting fees for objectors.[29] Giving substantial deference to the district court makes perfect sense; that court is in a far better position than the appellate court to evaluate (for example) whether the objector was indeed the catalyst of a beneficial change and whether the objector's efforts in fact improved the settlement.[30]

Third, courts have made clear that objectors who are not helpful, or who have in fact obstructed the approval process, are not entitled to fees.[31]

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fees and expenses 'where a proper showing has been made that the settlement was improved as a result of their efforts'" (emphasis added) (quoting White v. Auerbach, 500 F.2d 822, 828 (2d Cir. 1974))).

29. Dewey v. Volkswagen of Am., 909 F. Supp. 2d 373, 395 (D.N.J. 2012) ("[W]hether to grant, and the method for calculating, an award of fees to objectors' counsel rests within the court's discretion."), *aff'd*, 558 F. App'x 191 (3d Cir. 2014); Lonardo v. Travelers Indem. Co., 706 F. Supp. 2d 766, 810 (N.D. Ohio 2010) ("[A]ttorneys' fee awards for objectors are within the sole discretion of the district court."); *In re* AT&T Corp. Sec. Litig., MDL No. 1399, No. 00-5364, 2006 WL 2786945, at *1 (D.N.J. Sept. 26, 2006) ("[T]he district court has 'broad discretion' in deciding what fees to award, based on its own evaluation of whether the objector 'assisted the court and enhanced the [class's] recovery.'" (quoting *In re* Cendant Corp. Sec. Litig., 404 F.3d 173, 201 n.17 (3d Cir. 2005))).

30. *See, e.g.*, Lobur v. Parker, 378 F. App'x 63, 64 (2d Cir. 2010) (stating that the court of appeals "will not overturn a district court's award of attorneys' fees absent an abuse of discretion, such as a mistake of law or a clearly erroneous factual finding"); UFCW Local 880–Retail Food Emps. Joint Pension Fund v. Newmont Mining Corp., 352 F. App'x 232, 235 (10th Cir. 2009) (stating that "the district court's familiarity with the parties and the proceedings supports an abuse-of-discretion standard" when reviewing a district court's award of attorneys' fees in the class action context).

31. *See, e.g.*, *In re* Hyundai & Kia Fuel Econ. Litig., 926 F.3d 539, 572 (9th Cir. 2019) (en banc) (affirming the district court's denial of attorneys' fees for an objector where the objector's "arguments [were] not only baseless, but also detrimental to the class," and the objector had "engaged in obstructive conduct throughout the litigation, including moving for discovery despite a stay and moving to remand despite an ongoing [multidistrict litigation]"); Fraley v. Facebook, Inc., No. C 11-1726, 2014 WL 806072, at *1–2 (N.D. Cal. Feb. 27, 2014) (denying an objector's fee motion where the objector's "assertion that it is 'likely' the cash payments [to the class] were increased in response to his objection [was] not supported by the record"), *aff'd sub nom.*, Fraley v. Batman, 638 F. App'x 594 (9th Cir. 2016); *In re* Currency Conversion Fee Antitrust Litig., MDL No. 1409, 263 F.R.D. 110, 132 (S.D.N.Y. 2009) (noting that various objections "were motivated entirely by self-interest and of no utility to the Class"), *aff'd sub nom.*, Priceline.com, Inc. v. Silberman, 405 F. App'x 532 (2d Cir. 2010); *In re* AOL Time Warner ERISA Litig., No. 02 Cv. 8853, 2007 WL 4225486, at *3 (S.D.N.Y. Nov. 28, 2007) (denying fees where the court "would have reached the same result notwithstanding the Objectors' participation"); *In re AT&T Corp.*, 2006 WL 2786945, at *2 (denying objectors' fee petition where "[t]he objections and the subsequent appeal were without merit and failed to improve the Class's recovery in any manner" and the objectors' actions "delayed the distribution of funds to the Class"); *In re Excess Value*, 598 F. Supp. 2d at 393 (denying fees where "[o]bjectors' efforts have not been shown appreciably to have benefitted the Class"); *In re* Anchor Sec. Litig., No. CV-88-3024, 1991 WL 53651, at *2 (E.D.N.Y. Apr. 8, 1991) (denying fees to objectors when they "did not assist [the court] in framing the issues for the settlement, nor did they serve to 'enhance' or 'improve' the recovery itself or its structure," and when, "[i]f anything, the issues raised by [objectors] clouded rather than sharpened the issues").

Fourth, although the percentage of the fund method is a useful way to set fees for class counsel,[32] it is rarely used in awarding fees to objectors.[33] Class counsel take on enormous risk and obligations when they represent a class, and they frequently devote thousands of hours and millions of dollars to that endeavor. Objectors, by contrast, may come to the party late, with little investment of time or expenses.[34]

Fifth, an objector might succeed in invalidating a settlement in its entirety. Without a settlement fund for paying fees, the objector might have to wait until a new settlement is approved to recover fees.[35]

Sixth, a pro se objector might raise a meritorious objection but not seek fees from the court.

Finally, as discussed below, when an objector has improved a settlement in some way but has simultaneously caused delay or other negative impacts, courts will consider both the positive and the negative impacts in arriving at a fair fee award, if any.

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32. *See, e.g.*, Camden I Condo Ass'n, Inc. v. Dunkle, 946 F.2d 768, 773–74 (11th Cir. 1991) (applying the percentage method to class counsel); Alon Klement & Robert Klonoff, *Class Actions in the United States and Israel: A Comparative Approach*, 19 THEORETICAL INQUIRIES L. 151, 169 (2018), https://www7.tau.ac.il/ojs/index.php/til/article/view/1544 [https://perma.cc/NDR3-32NW] (discussing the percentage method).

33. *See, e.g.*, Shane Grp., Inc. v. Blue Cross Blue Shield of Mich., No. 10-CV-14360, 2019 WL 4746744, at *7, *10–11 (E.D. Mich. Sept. 30, 2019) (awarding fees to class counsel under the percentage method (with a lodestar cross-check) but awarding fees to the objectors using the lodestar method), *appeal dismissed*, No. 19-2261, 2020 BL 321023 (6th Cir. Aug. 21, 2020); Jasper v. C.R. Eng., Inc., No. CV 08-5266, 2014 WL 12577426, at *8–9, *11 (C.D. Cal. Nov. 3, 2014) (same); *In re* Apple Inc. Sec. Litig., No. 06-CV-05208, 2011 WL 1877988, at *4–5 (N.D. Cal. May 17, 2011) (same); *In re* Domestic Air. Transp. Antitrust Litig., 148 F.R.D. 297, 357, 359–60 (N.D. Ga. 1993) (same); *see also* UFCW Local 880–Retail Food Emps. v. Newmont Mining Corp., Nos. 05-cv-01046, 05-cv-01100 & 05-cv-01141, 2008 WL 4452332, at *5–6 (D. Colo. Sept. 30, 2008) (awarding fees to an objector using the lodestar method); *In re* Indep. Energy Holdings PLC Sec. Litig., No. 00 Civ. 6689, 2003 WL 22801724, at *2 (S.D.N.Y. Nov. 24, 2003) (same). *But see In re* Prudential Ins. Co. of Am. Sales Pracs. Litig., 273 F. Supp. 2d 563, 572 (D.N.J. 2003) (awarding objector counsel 1.4 percent of class counsel's fee award based on the court's conclusion that objectors caused a 1.4 percent increase to the total settlement fund), *aff'd*, 103 F. App'x 695 (3d Cir. 2004); *In re* Horizon/CMS Healthcare Corp. Sec. Litig., 3 F. Supp. 2d 1208, 1215 (D.N.M. 1998) (exercising the court's "inherent equitable power" to reduce fees allocated to certain class counsel by 3 percent and award those funds instead to objector counsel to "more fairly distribute compensation based on benefits conferred on the Class").

34. *See In re* Nat'l Collegiate Athletic Ass'n Student-Athlete Concussion Inj. Litig., 332 F.R.D. 202, 225–28 (N.D. Ill. 2019) (awarding fees to class counsel under the lodestar method, with a 1.5 multiplier but denying multipliers to objectors because their attorneys "bore substantially less risk than Settlement Counsel in pursuing this action" and "relied primarily on the discovery that other counsel conducted"), *aff'd sub nom.*, Walker v. Nat'l Collegiate Athletic Ass'n, No. 19-2638, 2019 WL 8058082 (7th Cir. Oct. 25, 2019).

35. *See, e.g.*, Dewey v. Volkswagen of Am., 909 F. Supp. 2d 373, 377 (D.N.J. 2012) (granting an objector's attorneys' fees motion for prior work on a successful appeal to the Third Circuit, which reversed class certification and settlement approval and remanded to the district court, where parties negotiated a new and better settlement), *aff'd*, 558 F. App'x 191 (3d Cir. 2014).

C. Caution Regarding Reform to Address Bad and Ugly Objectors

Good objectors want to litigate their concerns, with the hope of convincing the court to reject a settlement or, at least, to refuse to approve it without certain changes by class counsel and the defendant. In that respect, a 2018 amendment to FRCP 23(e), which prohibits payoffs for dismissing objections (absent court approval),[36] should have no impact on good objectors. Such objectors *want* to litigate their concerns, not walk away from them to secure illicit payoffs. Nonetheless, various other proposals for curbing bad and ugly objectors could have the unintended consequence of discouraging good objectors.[37] Courts and rulemaking committees must be careful that, in addressing bad and ugly objectors, they do not deter legitimate objectors.

II. BAD OBJECTORS

As noted, in this Article the term "bad objectors" refers to objectors that lodge insubstantial objections out of ignorance, not for personal gain. Bad objectors do not just waste the courts' and the parties' time. To the extent that bad objectors appeal meritless objections, they can hold up the implementation of valid settlements for months or even years. At the same time, even frivolous objections by pro se class members are to be expected. As discussed below, while it makes sense to sanction lawyers for filing frivolous objections, punitive measures against pro se class members are almost always ill-advised and could have the undesirable effect of also discouraging good objections. Moreover, the burden on district courts from such objections is not enormous. Courts reviewing settlements have properly recognized that they do not need to address all objections but instead can focus only on those that have potential merit.[38]

In many instances, bad objections come from class members who are not represented by counsel. In some instances, the objections are all bad. In others, an objector may present both good and bad objections. Each scenario is discussed below.

A. All Bad

Numerous examples can be cited of class members who submit ill-advised objections. For instance, in *In re Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*[39] (*Volkswagen Clean Diesel I*), the parties reached a settlement that provided substantial funds to all class members, arguably more substantial than they would have received

36. *See infra* Part III.C.1.

37. *See infra* Part III.C.

38. For instance, in *Volkswagen Clean Diesel I*, the district court specifically analyzed only a fraction of the objections filed, and the Ninth Circuit affirmed the district court's settlement approval process. *In re* Volkswagen "Clean Diesel" Mktg., Sales Pracs. & Prods. Liab. Litig. (*Volkswagen Clean Diesel II*), 895 F.3d 597, 612–13 (9th Cir. 2018) (finding that the district court was under no obligation to respond to every objection).

39. MDL No. 2672, Nos. 2886 & 3092, 2017 WL 1352859 (N.D. Cal. Apr. 12, 2017).

after a trial.[40] Yet the court had to deal with myriad objections that, in many instances, were frivolous. As examples:

- An objector complained about the quality of the "hold music" during his calls to the online help number.[41]
- An objector complained about the inconvenience of having to make two trips to the Volkswagen dealership to register gift cards that Volkswagen had previously awarded after revealing a cheat device.[42] The reason for the two visits was that the only person authorized to issue the gift cards was at lunch during the objector's first visit.[43]
- An objector pointed out the higher costs of diesel fuel.[44]
- An objector argued that the Environmental Protection Agency (EPA) is an unlawful agency and that only states can regulate the environment.[45] That same objector argued that the Administrative Procedure Act should be repealed.
- An objector argued that the EPA, not Volkswagen, is really at fault for pollution.[46]
- An objector complained that there was no Volkswagen dealership in his hometown of Juneau, Alaska, and that it was inconvenient to have to drive to Anchorage to participate in the buyback program.[47]
- Even though the Volkswagen settlement provided substantially more than the full Kelley Blue Book value of the vehicles, some objectors complained about not being specially compensated for such items as extra windshield wipers, a bike hitch, sheepskin seat covers, headrest covers, and a car cover, even though such items are removable from the vehicle and can be sold separately on eBay or potentially used on other vehicles.[48]

Additional examples can be found in the *In re Equifax Inc. Customer Data Breach Litigation*[49] settlement. For example:

- Despite the fact that the case involved a private civil lawsuit, numerous objectors argued that company officials should be criminally prosecuted and incarcerated, that Equifax should be forced out of business, that company executives and board members

40. *Volkswagen Clean Diesel II*, 895 F.3d at 617 (noting that the class settlement "delivered tangible, substantial benefits to class members, seemingly the equivalent of—or superior to—those obtainable after successful litigation").

41. Klonoff Volkswagen Declaration, *supra* note 7, at 12 n.22.

42. Cheat devices, or "defeat devices" are "bits of software" Volkswagen had placed in its cars "to cheat on U.S. emissions tests." *Volkswagen Clean Diesel II*, 895 F.3d at 603.

43. Klonoff Volkswagen Declaration, *supra* note 7, at 12 n.22.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 12 n.21.

48. *Id.* at 24–26.

49. MDL No. 2800, No. 17-md-2800, 2020 WL 256132 (N.D. Ga. March 17, 2020), *appeal filed*, No. 20-10249 (11th Cir. Feb. 11, 2020).

should forfeit their jobs and board positions, and that all assets of company executives and board members should be seized.[50]

- Other objectors argued for settlement amounts that were wholly unrealistic. Thus, although the entire net worth of Equifax was $16.7 billion at the relevant time, various objectors argued that the settlement should be as much as $1.47 *trillion*.[51]
- Other objectors filed disrespectful, nonsubstantive objections, such as referring to the judiciary as "*clowns in black gowns*" and signing the objections "[r]espectfully" but noting that "[t]he respectfully part is obviously sarcastic!"[52]
- One objector claimed that Equifax has denied class members "Life, Liberty, and the Pursuit of Happiness."[53]
- Another objector stated, "I don't trust them and doubt I'll get a dime though I've done nothing wrong."[54]

Other examples can also be found in the *Jabbari v. Wells Fargo & Co.*[55] settlement:

- An objector made a conclusory objection that the class definition was "overbroad and vague."[56]
- An objector argued, without explanation, that separate subclasses should be created for homeless, minor, and non-English-speaking class members.[57]
- An objector argued that the settlement was deficient because it did not "put [Wells Fargo] out of business completely."[58]
- An objector argued that "the release is vague and overly broad,"[59] even though the release applied only to the "identical factual predicate" of the claims in the lawsuit.[60]
- An objector argued that class counsel took on little or no risk in representing the class, even though (1) the court had already held that claims in court were barred by individual arbitration agreements, and

50. Klonoff Equifax Declaration, *supra* note 7, at 19–20.

51. *Id.* at 26

52. *Id.* at 27 n.49. (quoting Objection to *In re Equifax, Inc.* Settlement by Ronald D. Williamson at 1, *In re Equifax*, 2020 WL 256132 (No. 17-md-2800), ECF No. 900-1).

53. *Id.* (quoting Objection to *In re Equifax, Inc.* Settlement by Paul Carlberg at 1, *In re Equifax*, 2020 WL 256132 (No. 17-md-2800), ECF No. 900-1).

54. *Id.* (quoting Objection to *In re Equifax, Inc.* Settlement by David Williams at 1, *In re Equifax*, 2020 WL 256132 (No. 17-md-2800), ECF No. 900-1).

55. No. 15-cv-02159, 2018 WL 11024841 (N.D. Cal. June 14, 2018), *aff'd*, 813 F. App'x 259 (9th Cir. 2020).

56. Supplemental Declaration of Professor Robert H. Klonoff Relating to Class Settlement Approval, Attorney's Fees, Costs & Incentive Payments at 6, *Jabbari*, 2018 WL 11024841 (No. 15-cv-02159), ECF No. 251 (quoting Objections to Final Approval at 4, *Jabbari*, 2018 WL 11024841 (No. 15-cv-02159), ECF No. 193).

57. *Id.* at 8.

58. *Id.* at 15.

59. *Id.* at 18 (quoting Objection by Paul Squicciarini at 5, *Jabbari*, 2018 WL 11024841 (No. 15-cv-02159), ECF No. 244).

60. *Id.* (quoting Amended Stipulation & Agreement of Class Action Settlement & Release at 14, *Jabbari*, 2018 WL 11024841 (No. 15-cv-02159), ECF No. 162).

(2) no lawyers other than class counsel thought the claims were strong enough to file their own lawsuits.[61]

- An objector (without supporting citations) opposed giving class counsel *any* fees for the time spent negotiating the settlement in the case.[62]

Still other examples can be found in *Douglas v. Western Union Co.*,[63] a case arising under the Telephone Consumer Protection Act (TCPA).[64] In that case:

- Two objectors complained that there was no time frame for distributing settlement checks, even though the settlement made clear that such checks would be distributed within thirty days after final judgment, including all appeals.[65]
- An objector complained that the claims procedure was burdensome but did not provide a single example of why that was so.[66]
- An objector complained about not receiving notice of the class settlement, but the objector was not a member of the class.[67]
- An objector complained that the claims administration process lacked any reporting mechanism, even though the settlement administrator, an agent of the court, was required to report how many checks were distributed, cashed, and deposited.[68]

B. Mixed: Good/Bad

It is not uncommon for some objectors to offer useful objections but at the same time lodge frivolous objections that serve only to waste the court's time. For example, in *In re Prudential Insurance Co. of America Sales Practices Litigation*,[69] the court granted, in part, an objectors' petition for attorneys' fees.[70] The court accepted the objectors' estimate (which was not disputed by class counsel) that they had contributed about $56 million to the value of the settlement fund.[71] Nonetheless, the court awarded less than the amount sought by the objectors, in part because of the litigation conduct of one of the objectors' attorneys.[72] The court explained that "at many points during the course of this litigation it seemed as if [the attorney] did everything he could to make this matter as inefficient and contentious as possible."[73] The court

61. *See id.* at 15, 21.
62. *Id.* at 22.
63. 328 F.R.D. 204 (N.D. Ill. 2018).
64. 47 U.S.C. § 227. The TCPA prohibits the use of any automatic telephone dialing system or artificial or prerecorded voice to call or send text messages to cell phones without the recipient's permission.
65. *Douglas*, 328 F.R.D. at 217.
66. *Id.*
67. *Id.*
68. *Id.*
69. 273 F. Supp. 2d 563 (D.N.J. 2003), *aff'd*, 103 F. App'x 695 (3d Cir. 2004).
70. *Id.* at 564.
71. *Id.* at 569.
72. *Id.* at 570.
73. *Id.*

did "not take issue with the number of objections made . . . for that is the role of the objector," but it "wishe[d] that [the objector] had been as concerned with the quality of the objections."[74] In short, the court found that the objectors, despite having added value to the settlement, were "often more of an unjustifiable hindrance to the progression of [the] litigation."[75]

Similarly, in *In re Petrobras Securities Litigation*,[76] the court granted an objector's fee petition only in part.[77] It noted that one of the objector's points was accepted, resulting in a savings of about $18 million, but that "[n]one of [the objector's] other objections contributed to the class's recovery; on the contrary, they occasioned added expenses to the class, since Class Counsel had to spend considerable time responding to them."[78]

C. Appropriateness of Sanctions

When bad objections come directly from class members—at least those without a law degree—courts almost never sanction such objectors, even for frivolous objections. In my view, that is the correct approach. Courts can quickly sift through large numbers of such objections (like those in the bullet points above) and readily dispose of those lacking merit. It is not surprising that nonlawyer class members may display a lack of understanding about the relevant law and facts. Sanctioning class members who weigh in with comments—even when such comments are ill-conceived—would deter other class members from weighing in, at least without first retaining counsel to draft the objection. And requiring class member objectors to retain counsel could drastically reduce the number of objections in many cases, to the detriment of the settlement review process.

By contrast, when objectors who lodge specious objections are represented by counsel, the court should be more vigilant in imposing sanctions against

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74. *Id.*
75. *Id.*
76. No. 14-CV-9662, 2019 WL 4727534 (S.D.N.Y. Sept. 27, 2019).
77. *Id.* at *4–5.
78. *Id.* at *2. For other examples, see *id.* at *1–2, *4 (granting objector's fee petition only in part, noting that one of the objector's points was accepted, resulting in a savings of about $18 million, but that "[n]one of [the objector's] other objections contributed to the class's recovery; on the contrary, they occasioned added expenses to the class, since Class Counsel had to spend considerable time responding to them"); Etter v. Thetford Corp., No. SACV 13-00081, 2017 WL 1433312, at *3 (C.D. Cal. Apr. 14, 2017) (granting an objector's fee request only in part and noting that the objector "helped remedy potential conflicts of interest" and "helped facilitate a three-million-dollar increase in the settlement fund" but also made numerous other objections that the court described as "not persuasive," "entirely speculative," "wildly implausible," "demonstrat[ing] a fundamental 'misunderstanding of the Court's role in approving class action settlement[s],'" and "lack[ing] merit and result[ing] in no benefit to the class" (second alteration in original) (quoting Order Granting Plaintiffs' Renewed Motion for Preliminary Approval of Class Action Settlement (Doc. 411) at 22, *Etter*, No. SACV 13-00081, ECF No. 468); *In re* Prudential Ins. Co. Am. Sales Pracs. Litig., 273 F. Supp. 2d 563, 564, 570, 572 (D.N.J. 2003) (awarding less than the amount requested by the objectors, noting that "the Court cannot find that [the objector's attorney] acted with any sense of efficiency" but "at many points during the course of this litigation it seemed as if [objector's attorney] did everything he could to make this matter as inefficient and contentious as possible").

counsel. It is in the court's interest to discourage counsel from filing frivolous papers of all kinds, including objections to class settlements that are not justified under the law and facts. For many years, courts had been extremely reluctant to sanction attorneys for ill-advised objections,[79] but that approach is changing, especially as courts become more knowledgeable about the problem of ugly objectors. Indeed, numerous recent examples of sanctions being imposed for ill-advised objections filed by attorneys can be found.[80] Of course, courts must ensure that they do not sanction attorneys unless the objections are frivolous. As noted, even a meritless objection can sometimes add value by focusing the court's attention on key issues and ensuring that all possible arguments are considered.

D. Bad Objectors Who File Appeals and Hold Up Relief for the Class

As I define the term, bad objectors do not use the objection process to extract side payments. Rather, when they appeal their objections, they do so to obtain a ruling from the appellate court. As I discuss below,[81] it is possible to address such appeals by imposing appeal bonds or through expedited appellate review. The former option must be pursued cautiously, however, because frequent use of appeal bonds would likely deter not only bad objections but good ones as well.

III. UGLY OBJECTORS

A. The Phenomenon of Ugly Objectors

Most of the focus of judges, scholars, and practitioners has been on ugly objectors. By "ugly objectors," I mean objectors in class actions who lodge objections not to improve a settlement but to extract side payments, mainly from plaintiffs' counsel, to go away (i.e., to dismiss their objections at the trial level or on appeal). Such objectors have often been referred to as "serial objectors,"[82] but it is important to note that an objector may qualify as an

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79. *See, e.g.*, John E. Lopatka & D. Brooks Smith, *Class Action Professional Objectors: What to Do About Them?*, 39 FLA. ST. U. L. REV. 865, 898–99 (2012); *see also, e.g.*, *In re* Initial Pub. Offering Sec. Litig., 728 F. Supp. 2d 289, 295 (S.D.N.Y. 2010) (declining to impose sanctions but requiring objectors to post a bond where objectors and their attorneys had engaged in "bad faith and vexatious conduct" and some had previously been involved in extortion-like payments in exchange for dropping appeals).

80. *See, e.g.*, *In re* Petrobras Sec. Litig., No. 14-cv-9662, 2018 WL 4521211, at *6 (S.D.N.Y. Sept. 21, 2018) (imposing a $10,000 sanction against an attorney for an objector to class settlement under 28 U.S.C. § 1927 and the court's inherent authority, where the court found the objections to be frivolous), *aff'd*, 778 F. App'x 46 (2d Cir. 2019); *In re* Polyurethane Foam Antitrust Litig., 165 F. Supp. 3d 664, 666 (N.D. Ohio 2015) (imposing sanctions of $10,000 against an objector to class settlement where the court found that the objector "could not reasonably believe that he [was] a class member, and he maintain[ed] his Objection for an improper purpose" and explaining that, although the objector was a pro se litigant, he was also a former attorney, and thus his "formal legal training" led the court to hold him "to a higher standard than the typical, lay pro se litigant").

81. *See infra* Parts III.C.2, IV.

82. *See, e.g.*, *In re* Syngenta AG Mir 162 Corn Litig., MDL No. 2591, 357 F. Supp. 3d 1094, 1104 (D. Kan. 2018) (describing "a serial objector to class action settlements, with a

ugly objector without a prior pattern of seeking to coerce side payments in exchange for dismissal of an objection. The crucial inquiry involves the purpose of the objection at issue, not whether an objector has been an ugly objector in another case. Thus, it is possible that someone who has filed legitimate objections in the past may still qualify as an ugly objector in a particular case because of an attempt to coerce a payment in exchange for dismissing the objection. By the same token, even an objector with a history of seeking payments in exchange for dismissing objections might, in a particular case, raise a legitimate objection for the purpose of pursuing it on the merits. Of course, in the latter situation, a court would be justified in giving such an objector the highest degree of scrutiny based on the objector's past conduct. Indeed, sophisticated ugly objectors might try to dress up an objection to be plausible, even though their true goal is to force a payoff in exchange for withdrawing the objection.

When the Federal Advisory Committee on Civil Rules ("the Rules Committee") was exploring possible changes to the class action rule, the complaint that committee members heard most frequently was about ugly objectors. Indeed, many practitioners indicated that this was the most serious issue for class action rule reform.[83] Ugly objectors have leverage because an appeal of an order rejecting an objection could hold up the settlement (including the payment of compensation to class members and fees to class counsel) for many years.

A hypothetical will illustrate the dynamic at work. Assume that a class action alleging defective Chevrolet engines settles in federal court. It is a massive case, with 10,000 class members. Every class member will receive $20,000, meaning that the total settlement is $200 million. And General Motors agrees, on top of that, to pay attorneys' fees of $20 million. At the fairness hearing, there is only one objection, and it is by an individual represented by attorney Bill Jones. Jones files a brief that says, in its entirety, "The settlement is unfair." There is no analysis or argument. The district court approves the settlement, and Jones appeals to the Sixth Circuit. Jones then calls John Smith, the attorney representing the class, and says he will drop the appeal for a side payment of $500,000. Assume further that the backlog in the Sixth Circuit is two years, with another six months factored in for the U.S. Supreme Court certiorari petition process. Although the appeal is frivolous, Smith decides to pay the $500,000 out of the $20 million attorneys' fees. This is exactly what has been going on for years. In the

history of attempting to extract payment for the withdrawal of objections"), *appeal filed*, No. 19-3008 (10th Cir. Jan. 8, 2019); *In re Initial Pub. Offering*, 728 F. Supp. 2d at 295 (requiring class members "represented by serial objectors" to post bond, noting that such "professional objectors undermine the administration of justice by disrupting settlements in the hopes of extorting a greater share . . . for themselves and their clients").

83. *See, e.g.*, Advisory Comm. on Civ. Rules, *Agenda: Meeting of the Advisory Committee on Civil Rules*, U.S. CTS. 53 (Apr. 14–15, 2016), https://www.uscourts.gov/sites/default/files/2016-04-civil-agenda_book_0.pdf [https://perma.cc/DRL3-WUKX] (noting that the issue of requirements for class action objectors was "the most oft-repeated topic at all the conferences"); *id.* at 151 (noting that "the objector problem" was "the topic on which the most attention had focused during the Standing Committee meeting").

hypothetical, $500,000 may be a small price to pay to accelerate the payments to the class and the fees to counsel. But there is no valid justification for a process that allows an attorney to file a frivolous objection and then hold up payments to the class and class counsel for years unless a side payment is forthcoming.

An objector that does this sort of thing repeatedly is known as a "serial objector." A website, www.serialobjector.com, which is maintained by a plaintiffs' law firm (Anderson+Wanca), keeps track of ugly objectors. The website says that ugly objectors "maraud proposed settlements—not to assess their merits but in order to extort the parties . . . into ransoming a settlement that could otherwise be undermined by a time-consuming appeals process."[84] The website lists numerous examples of ill-founded objections by a single lawyer, Christopher Bandas,[85] and large numbers by many others.[86] The website calls ugly objectors "the least popular parties in the

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84. *About*, SERIAL OBJECTOR INDEX, https://www.serialobjector.com/pages/about [https://perma.cc/Q8YN-PXU2] (last visited Oct. 3, 2020) (quoting Snell v. Allianz Life Ins. Co., No. 97-2784, 2000 U.S. Dist. LEXIS 13611, at *31 (D. Minn. Sept. 8, 2000)).

85. Bandas, a well-known "serial objector," has filed at least *eighty-four* objections to class settlements. *See Christopher A. Bandas*, SERIAL OBJECTOR INDEX, https://www.serialobjector.com/persons/4 [https://perma.cc/Y6T8-APAC] (last visited Oct. 3, 2020). He has been criticized and sanctioned by several federal courts for filing frivolous objections. *See, e.g.*, *In re* Gen. Elec. Sec. Litig., 998 F. Supp. 2d 145, 156 (S.D.N.Y. 2014) (noting that Bandas "has been repeatedly admonished for pursuing frivolous appeals of objections to class action settlements" and concluding that the objector's "relationship with Bandas, a known vexatious appellant, further supports a finding that [the objector] brings this appeal in bad faith"); Dremak v. Iovate Health Scis. Grp. (*In re* Hydroxycut Mktg. & Sales Pracs. Litig.), Nos. 09md2087 & 09cv1088, 2013 WL 5275618, at *4 (S.D. Cal. Sept. 17, 2013) (noting that "Mr. Bandas was attempting to pressure the parties to give him $400,000 as payment to withdraw the objections and go away" and "was using the threat of questionable litigation to tie up the settlement unless the payment was made"); *In re* Cathode Ray Tube (CRT) Antitrust Litig., MDL No. 1917, 281 F.R.D. 531, 533 (N.D. Cal. 2012) ("Bandas routinely represents objectors purporting to challenge class action settlements, and does not do so to effectuate changes to settlements, but does so for his own personal financial gain; he has been excoriated by Courts for this conduct."). The eighty-four objections mentioned on serialobjector.com are just the ones report by people who complained. Presumably many lawyers who paid off Bandas and others kept such payments confidential.

86. John J. Pentz has filed at least thirty-two objections to class settlements. *John J. Pentz*, SERIAL OBJECTOR INDEX, https://www.serialobjector.com/persons/46 [https://perma.cc/KJ35-TBPK] (last visited Oct. 3, 2020). He has been criticized by courts as a serial objector. *See, e.g.*, *In re* Initial Pub. Offering Sec. Litig., 721 F. Supp. 2d 210, 214–15 (S.D.N.Y. 2010) (calling Pentz a "serial" objector, finding "evidence of bad faith or vexatious conduct" by Pentz and other attorneys for objectors, and requiring Pentz to post an appeal bond), *appeal denied*, No. 21 MC 92, 2010 WL 2605233 (S.D.N.Y. June 28, 2010), *and enforced*, No. 21 MC 92, 2010 WL 5186791 (S.D.N.Y. July 20, 2010); *In re* Wal-Mart Wage & Hour Emp. Pracs. Litig., MDL No. 1735, No. 06-CV-00225, 2010 WL 786513, at *1–2 (D. Nev. Mar. 8, 2010) (noting, in requiring that Pentz post an appeal bond, that Pentz has "a documented history of filing notices of appeal from orders approving other class action settlements, and thereafter dismissing said appeals when [he and his clients] were compensated by the settling class or counsel for the settling class"); *In re* MetLife Demutualization Litig., 689 F. Supp. 2d 297, 350–51 (E.D.N.Y. 2010) (characterizing Pentz's objections as "meritless"); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., No. MDL 1361, 2003 WL 22417252, at *2 n.3 (D. Me. Oct. 7, 2003) (requiring an appeal bond, calling Pentz a "repeat objector," and characterizing his objection as "groundless" and potentially frivolous). Timothy R. Hanigan is another serial objector—according to serialobjector.com—having filed

history of civil procedure."[87] A federal district court in Ohio echoed those sentiments, noting that ugly objectors

> subsist primarily off of the skill and labor of . . . more capable attorneys. These are the opportunistic objectors. Although they contribute nothing to the class, they object to the settlement . . . in the hope that [class counsel] will pay them to go away. Unfortunately, the class-action kingdom has seen a Malthusian explosion of these opportunistic objectors . . . .[88]

Another court described ugly objectors as "remoras,"[89] which are small fish with sucker-like organs that attach themselves to larger fish. That image is not inaccurate in conveying the underlying problem.

Courts should use every legitimate means possible to discourage ugly objectors. Virtually all of the academic literature (and rule reform efforts) has focused solely or primarily on ugly objectors. For ugly objectors, the issue—discussed below in Part III.C—is how to deter such objectors from using the settlement approval process for personal gain, while at the same time not discourage potentially valid objections.

B. Examples of Ugly Objectors

In the last several years, plaintiffs' class counsel firms have become more aggressive in challenging objectors who lodge objections for the purpose of extracting payoffs. For example, Chicago law firm Edelson PC filed a Racketeer Influenced and Corrupt Organizations Act[90] (RICO) case against Christopher Bandas.[91] The court noted that Edelson "has identified fifteen cases since 2009 in which [Bandas and his cohorts] have repeated this same basic pattern—frivolously object, appeal its denial, settle out of court, withdraw—and suggests that, because the Defendants have hidden their activities in various cases, the true number is much larger."[92] Although the court held that the case did not satisfy the elements for RICO, it did enter an order, at Bandas's request, to dismiss the case in exchange for his agreement to a permanent injunction prohibiting him from practicing law in Illinois or acting in conjunction with other lawyers to practice in Illinois.[93]

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at least eighteen different objections to class action settlements as of 2020. *See Timothy R. Hanigan*, SERIAL OBJECTOR INDEX, https://www.serialobjector.com/persons/10 [https://perma.cc/N4R4-N9CS] (last visited Oct. 3, 2020). As one district court stated, Hanigan is a "'serial' objector who [is] well-known for routinely filing meritless objections to class action settlements for the improper purpose of extracting a fee rather than to benefit the Class." Chambers v. Whirlpool Corp., 214 F. Supp. 3d 877, 890 (C.D. Cal. 2016).

87. *About*, *supra* note 84 (quoting Brunet, *supra* note 8, at 438–42).

88. *In re* Cardinal Health, Inc. Sec. Litig., 550 F. Supp. 2d 751, 754 (S.D. Ohio 2008).

89. *In re* UnitedHealth Grp. Inc. PSLRA Litig., 643 F. Supp. 2d 1107, 1108 (D. Minn. 2009).

90. 18 U.S.C. §§ 1961–1968.

91. Edelson PC v. Bandas L. Firm PC, No. 16 C 11057, 2018 WL 3496085 (N.D. Ill. July 20, 2018); *see supra* note 85 and accompanying text (discussing Bandas).

92. *Edelson PC*, 2018 WL 3496085, at *2.

93. Defendants' Motion for Leave to Amend Answer & Withdraw Counterclaim & for Judgment on the Pleadings at 2–3, *Edelson PC*, 2019 WL 272812 (No. 16-CV-11057), ECF No. 175.

Several other examples can be cited, in a variety of contexts, in which federal courts have sanctioned or otherwise condemned ugly objectors. For example, a district court "revoke[d] [an ugly objector's] authorization to practice in the Western District of Washington."[94] Another court called an ugly objector's conduct "at best, unprofessional, and at worst, an unseemly effort to extract fees from class counsel," and it noted that "[n]umerous courts throughout the country have publicly excoriated" this same ugly objector, Bandas, "for the frivolous objections that he has penned and injected into class action settlements" and for his "attempt to throw a monkey wrench into the settlement process and to extort a pay-off."[95] And in yet another case, a court wrote that "settlement funds of $147 million, the product of four years of hard-fought litigation, have hung in limbo for more than eight months because a person who knows he has no right to object to the settlements nonetheless refuses to withdraw his meritless Objection."[96]

The problem exists in state courts as well as in federal courts. For example, in *Clark v. Gannett*,[97] the Illinois Appellate Court wrote that

> when objector's counsel happens to be professional objectors, who impose objections for personal financial gain [with] little or no regard for the interests of the class members, open hostility often ensues. Objector's counsel here, Christopher A. Bandas, of Corpus Christi, Texas, and C. Jeffrey Thut, of Chicago, have provoked more than the ire of class counsel, earning condemnation for their antics from courts around the country. Yet, their obstructionism continues.[98]

As reflected above, judges have occasionally punished ugly objectors by imposing sanctions, such as barring them from practicing in the particular court. But there are fifty states and the District of Columbia, with federal and state courts in each, and unless an ugly objector has been barred from practicing in every court in the United States, the objector may continue engaging in this reprehensible behavior.

C. Approaches for Curbing Ugly Objectors

Until recently, little was being done to curb ugly objectors, in part because of a concern that doing so might deter good objectors like Public Citizen and Public Justice, which have a track record of filing objections that make the FRCP 23 process work better. Recently, however, there has been intense focus on how to stop ugly objectors from engaging in their abusive behavior. The following subsections discuss several practices being employed.[99] In

94. Dennings v. Clearwire Corp., No. 10-cv-01859 (W.D. Wash. Aug. 20, 2013), ECF No. 166 (minute entry granting motion to withdraw).

95. Garber v. Off. of Comm'r of Baseball, No. 12-CV-03704, 2017 WL 752183, at *4, *6 (S.D.N.Y. Feb. 27, 2017).

96. *In re* Polyurethane Foam Antitrust Litig., 165 F. Supp. 3d 664, 670–71 (N.D. Ohio 2015).

97. 122 N.E.3d 376 (Ill. App. Ct. 2018).

98. *Id.* at 380.

99. In addition to the approaches discussed below, other ideas have been advanced that, in my opinion, are thoughtful but not as promising. For instance, Professor Brian Fitzpatrick

Part IV, an additional approach is offered for accelerating appeals of good, bad, and ugly class objectors alike.

1. FRCP 23 Amendments

As noted, several years ago the Rules Committee began to examine possible amendments to FRCP 23.[100] The Rules Committee sought input from members of the plaintiffs' bar, the defense bar, the academy, and the bench about what they deemed the most serious issues in class action practice.[101] Overwhelmingly, the committee heard that the most serious issue was ugly objectors.[102] Thus, the committee decided early on to take up that issue. Ultimately, on December 1, 2018, new language for FCRP 23 was adopted to address ugly objectors.

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argues that objectors should be barred from settling their appeals in all cases. Brian Fitzpatrick, *Objector Blackmail Update: What Have the 2018 Amendments Done?*, 89 FORDHAM L. REV. 437, 441 (2020); Brian Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1659–66 (2009) [hereinafter Fitzpatrick, *End of Blackmail*]. The problem with that approach, however, is that it "could prevent socially valuable agreements between class counsel and legitimate objectors." Lopatka & Smith, *supra* note 79, at 907; *cf.* Order of Indicative Ruling Under Federal Rule of Civil Procedure 62.1, at 2–3, *In re* Takata Airbag Prods. Liab. Litig., MDL No. 2599, No. 15-md-02599 (S.D. Fla. Jan. 27, 2020), ECF No. 3632 (approving payment to objectors and their counsel based on their improvements to the class settlement, including "researching and proposing a mass media campaign" and other changes to incentivize class members and presumably increase the number of claims). When the objector has in fact caused the litigants to improve the settlement, there may well be a legitimate reason for a court to approve a payment. "Quick pay provisions" (enabling class counsel to obtain their fees at the district court level—with refunds required—if the settlement is reversed on appeal) are also problematic. As Professor Fitzpatrick notes, such provisions are concerning because: (1) "avoiding the delay in the receipt of fee awards is only one reason why class counsel are willing to pay objectors to drop their appeals"; (2) they "help only class counsel" when "class action defendants might themselves be eager to buy off even meritless objector appeals"; and (3) quick pay provisions only work if defendants agree to them, and defendants could assert their own leverage in exchange for agreeing to such provisions, thus merely "transfer[ring] the blackmail leverage from class action objectors to class action defendants." Fitzpatrick, *End of Blackmail*, *supra*, at 1649–51. Another possible approach—requiring objectors to intervene at the district court level under FRCP 24—is a nonstarter in light of *Devlin v. Scardelletti*, 536 U.S. 1, 3–4 (2002), which held that a class member who objects at the district court level does not need to seek formal intervention under FRCP 24 in order to appeal a class settlement. *See* Lopatka & Smith, *supra* note 79, at 894–96 (arguing that *Devlin* forecloses any requirement that class objectors formally intervene under FRCP 24). Moreover, a rule change to require formal intervention could "prevent[] class members with legitimate concerns from obtaining appellate review of settlements." Fitzpatrick, *End of Blackmail*, *supra*, at 1657.

100. *See supra* note 83 and accompanying text.

101. *See* Advisory Comm. on Civ. Rules, *supra* note 83, at 151.

102. *See id.*

New FRCP 23(e)(5) does several things.[103] First, an objection must state "with specificity" the grounds for the objection.[104] No longer can an objector just say "the settlement is unfair." One of the attractions for ugly objectors has been that they could file a frivolous one-sentence objection and then hold up the process for several years. Indeed, the whole reason that ugly objectors have found the practice attractive is that they do not need to do the hard work of identifying and briefing legitimate objections; they can simply file objections with no substance and then hold up the process, potentially for years, while appealing to a federal court of appeals and possibly to the Supreme Court (or, in a state case, appealing through the state appellate system). The amendment thus requires all objectors to articulate the specific grounds for an objection, not just conclusory gibberish.[105]

In addition, the amendment provides that the objection must state whether it applies only to the objector or to a specific subset of the class.[106] Again, the process of requiring an objector to determine the scope and applicability of the objection is designed to force an ugly objector to do the hard work of crafting a potentially legitimate objection.[107]

The centerpiece of the December 2018 amendment, however, is a new provision that requires court approval of any payment in connection with the dismissal of any objection, either at the trial level or on appeal.[108] It adopts the process of FRCP 62.1,[109] which deals with the situation in which a case

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103. FRCP 23(e)(5) provides:

> (5) *Class-Member Objections*.
>
> (A) *In General*. Any class member may object to the proposal if it requires court approval under this subdivision (e). The objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class, and also state with specificity the grounds for the objection.
>
> (B) *Court Approval Required for Payment in Connection with an Objection*. Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with:
>
> (i) forgoing or withdrawing an objection, or
>
> (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.
>
> (C) *Procedure for Approval After an Appeal*. If approval under Rule 23(e)(5)(B) has not been obtained before an appeal is docketed in the court of appeals, the procedure of Rule 62.1 applies while the appeal remains pending.

FED. R. CIV. P. 23(e)(5).

104. *Id.*

105. *See, e.g.*, Advisory Comm. on Civ. Rules, *supra* note 83, at 53 ("The first step in addressing objectors is a draft that requires some measure of detail in making an objection. This draft responds to suggestions that some 'professional objectors' simply file routine, boilerplate objections in every case, do nothing to explain or support them, fail to appear at a hearing on objections, and then seek to appeal the judgment approving the settlement.").

106. FED. R. CIV. P. 23(e)(5).

107. *See* Advisory Comm. on Civ. Rules, *supra* note 83, at 53.

108. FED. R. CIV. P. 23(e)(5).

109. FRCP 62.1 provides:

> (a) RELIEF PENDING APPEAL. If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may:
>
> (1) defer considering the motion;
>
> (2) deny the motion; or

is on appeal but the court wishes to obtain the views of the trial court. Thus, the amendment addresses a major shortcoming of the prior rule: the requirement of disclosure of side agreements to the district court under FRCP 23(e)(3) could be circumvented once the objector filed an appeal from the approval of the settlement.[110]

Consider what would happen if class counsel and an ugly objector were to go to court jointly and ask the judge to approve the dismissal of the appeal in exchange for a cash payment. The amendment contemplates precisely this scenario. It assumes that few lawyers will want to stand up in front of a federal judge and explain what is *actually* going on.[111] Imagine the argument: "Your Honor, we're here today to move jointly for the dismissal of Mr. Smith's objection." The lawyer would then proceed to read the frivolous objection to the court and say: "And, in exchange for the dismissal, we're disclosing to the court that we have agreed to pay Mr. Smith $500,000, and we'd like the court's permission to do that." Few lawyers will want to seek such approval, because the first question from the judge would be, "Why are you paying this objector $500,000?" The only truthful answer is that it is an extortionate payment. The contemplation of the amendment is that by requiring such motions and court approval, people are not going to engage in that practice any longer. As Justice Louis D. Brandeis famously put it: "Sunlight is said to be the best of disinfectants."[112] Of course, class counsel can eliminate the need for such awkward moments by simply refusing to engage objectors in discussions about buying off objections.

Only time will tell whether the problem of ugly objectors will subside. Three very encouraging signs should be noted, however, in light of the December 2018 rule change on ugly objectors. The first involves *In re Chrysler-Dodge-Jeep Ecodiesel Marketing, Sales Practices, and Products Liability Litigation*.[113] It was a follow-on to the *In re Volkswagen "Clean*

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(3) state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.

(b) NOTICE TO THE COURT OF APPEALS. The movant must promptly notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court states that it would grant the motion or that the motion raises a substantial issue.

(c) REMAND. The district court may decide the motion if the court of appeals remands for that purpose.

FED. R. CIV. P. 62.1.

110. *See* Elizabeth J. Cabraser & Adam N. Steinman, *What Is a Fair Price for Objector Blackmail?: Class Action Objectors and the 2018 Amendments to Rule 23*, 24 LEWIS & CLARK L. REV. 549, 554 (2020) ("Under the 2003 amendment [to FRCP 23(f)], a district court must approve the withdrawal of an objection, but no judicial approval was required for an objector's decision to forgo an appeal—or to withdraw such an appeal after it was filed. This was potentially a significant omission, because the risks and delay inherent in appellate review of a class action settlement gave 'strategic objectors' even greater leverage." (emphasis omitted)).

111. *Id.* at 557 (citing Advisory Comm. on Civ. Rules, *supra* note 83, at 35).

112. LOUIS D. BRANDEIS, OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT 47 (1914).

113. No. 17-md-02777, 2019 WL 2554232, at *1 (N.D. Cal. May 3, 2019) (granting final approval of the class settlement and attorneys' fees).

Diesel" Marketing, Sales Practices, and Products Liability Litigation[114] (*Volkswagen Clean Diesel II*) case, with very similar allegations involving emissions systems that cheated the emissions testing. It involved 100,000 vehicles.[115] Only three objections were filed by the April 15, 2019, deadline, and none was from an ugly objector.[116]

The second encouraging sign is from the *In re Foreign Exchange Benchmark Rates Antitrust Litigation*.[117] In what may be the first case applying amended FRCP 23 governing ugly objectors, the court was asked to approve a payment to an objector by class counsel of $300,000 (to be paid from counsel's attorney's fees) in exchange for the objector's dismissal of an appeal raising the objection.[118] While recognizing that legitimate objectors can perform a valuable service, the court noted that the objection at issue "does little more than benefit Objector's counsel and 'perpetuate[] a system that can encourage objections advanced for improper purposes.'"[119] The court further noted that "the amount of the award had nothing to do with the Objector's objection."[120] And it noted that approval of such a request "would serve only to encourage objectors or their attorneys to extract this type of payment, and make a living [as ugly objectors] simply by filing frivolous appeals and thereby slowing down the execution of settlements."[121] Thus, the court declined to approve the requested payment.[122]

Third, in *Rougvie v. Ascena Retail Group, Inc.*,[123] although the court found that the 2018 amendments to FRCP 23 did not apply to settlements approved in 2017, it expressed optimism about the amended rule: "This amendment should prove to facilitate objections by good-faith objectors often not represented by counsel while discouraging bad-faith or professional objectors represented by counsel seeking fees."[124]

It is too soon to know whether the amended rule will substantially deter ugly objectors. Obviously, the rule depends on all counsel acting with integrity. Nothing can be done if unethical counsel are willing to state (falsely) that no side payments were made for dismissal of an objection when in fact payments were made "under the table." In that regard, class counsel should report to the court any requests by ugly objectors to violate the amended rule. Moreover, when the parties comply with the rule and seek

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114. 895 F.3d 597 (9th Cir. 2018).

115. *In re Chrysler-Dodge-Jeep*, 2019 WL 2554232, at *10.

116. Declaration of Professor Robert H. Klonoff Relating to Class Action Settlement Fairness at 6, *In re Chrysler-Dodge-Jeep*, 2019 WL 2554232 (No. 17-md-02777), ECF No. 555-1.

117. 334 F.R.D. 62 (S.D.N.Y. 2019).

118. *Id.* at 63.

119. *Id.* (quoting FED. R. CIV. P. 23(e)(5) advisory committee's note to 2018 amendment).

120. *Id.* at 64.

121. *Id.* (quoting *In re* Polyurethane Foam Antitrust Litig., 178 F. Supp. 3d 635, 639 (N.D. Ohio 2016)).

122. *Id.* at 63.

123. No. 15-724, 2019 WL 944811 (E.D. Pa. Feb. 21, 2019).

124. *Id.* at *17.

approval of a side payment, courts must be vigilant in rejecting side payments absent a showing that the objections resulted in actual benefits to the class.

2. Appeal Bonds

Under the Federal Rules of Appellate Procedure (FRAP), "[i]n a civil case, the district court may require an appellant to file a bond or provide other security in any form and amount necessary to ensure payment of costs on appeal."[125] Third Circuit Chief Judge D. Brooks Smith and Professor John Lopatka propose a rule change to expand the use of appeal bonds as a way of addressing ugly objectors.[126] Their approach "would presumptively require that *any* objecting nonnamed member of a Rule 23(b)(3) class post as a condition of appeal a bond calibrated to deter extortion."[127] Even without a rule change, a number of courts have required such bonds in situations in which they view the objections as being frivolous.[128]

Certainly, appeal bonds can play a useful role, particularly when the court is clear that the anticipated appellate argument is specious. The problem with appeal bonds, however, is that they may discourage not only bad and ugly objections but also good ones. Smith and Lopatka recognize the argument that their approach might deter legitimate objections, but their response is unpersuasive. They note that "a large appeal bond will not *always* deter an appeal."[129] But the concern is not that *all* meritorious appeals will be deterred but that *some* will be, and even that is a high price to pay. Indeed, it is virtually certain that some pro se objectors, even those with sound objections, will be unlikely to pursue an appeal if they must come up with expensive appeal bonds. Smith and Lopatka focus only on ugly objectors (which they define as those who object "merely to obtain payoffs from class counsel"[130]), but their approach is certain to impact good objectors as well.[131]

As an example of the danger of appeal bonds, in the *Fraley v. Facebook, Inc.*[132] litigation, class counsel sought to impose an appeal bond of $32,000

125. FED. R. APP. P. 7.

126. Lopatka & Smith, *supra* note 79, at 927–28.

127. *Id.* at 909 (emphasis added).

128. *See, e.g.*, Hill v. State St. Corp., No. 09-12146, 2015 WL 1734996, at *3 (D. Mass. Apr. 16, 2015) (imposing an appeal bond of $75,300, finding that the arguments that the objectors were likely to make on appeal were frivolous and that the objectors were ugly objectors, with the sum being based on attorneys' fees and expenses of $35,000, $40,000 in other administrative costs, and $300 in taxable costs under FRAP 39); *In re* Pharm. Indus. Average Wholesale Price Litig., MDL No. 1456, 520 F. Supp. 2d 274, 278 (D. Mass. 2007) (finding an appeal bond proper where the "one-sentence written objection was inadequate to preserve [the] objection on appeal").

129. Lopatka & Smith, *supra* note 79, at 923 (emphasis added).

130. *Id.* at 874.

131. Moreover, as Professor Fitzpatrick notes, "[b]lackmail-minded objectors motivated only by delay might be able to cause that delay even in the face of [appeal] bonds simply by appealing the orders requiring them to post the bonds at the same time they appeal the class action settlements!" Fitzpatrick, *End of Blackmail*, *supra* note 99, at 1656.

132. No. C 11–1736, 2014 WL 806072 (N.D. Cal. Feb. 27, 2014).

against Public Citizen Litigation Group,[133] which was planning to appeal after the district court rejected its objection to a class settlement. Public Citizen is clearly not an ugly objector; as noted, it has participated as an objector in numerous class actions[134] and has never been accused of seeking a side payment from class counsel to dismiss an appeal. In the *Facebook* case, Public Citizen vehemently opposed the request for an appeal bond, arguing that "[t]he availability of an appeal is particularly important for class action objectors, who play a crucial role in the settlement process by speaking for absent class members and ensuring adversarial presentation of issues."[135] According to Public Citizen, "[t]he use of appeal bonds to chill the pursuit of legitimate, good-faith appeals is a practice that this Court should emphatically discourage."[136] The court ultimately denied the appeal bond.[137]

As noted, appeal bonds are a useful remedy for ugly objectors and, at times, for frivolous objections by bad objectors. But unless such appeal bonds are limited to situations in which an objection is frivolous, setting such bonds almost certainly would discourage meritorious objections. The Ninth Circuit, for example, has expressed concern that imposing high appeal bonds "where the appeals *might* be found frivolous risks 'impermissibly encumber[ing]' appellants' right to appeal."[138] That caution is warranted. A court should hesitate to impose an appeal bond if it has doubts about whether the objection is frivolous.

3. Disgorgement

When a payment has been made to an objector (either by class counsel or the defendant) in exchange for dismissal of the objection, a potential remedy is disgorgement of the payment. In *Pearson v. Target Corp.*,[139] the Seventh Circuit held that disgorgement was a proper remedy when the defendant and class counsel each contributed to pay three objectors a total of $130,000 to dismiss their objections.[140] Normally, the class would have obtained the disgorged funds, but in *Pearson*, it would not have been economically feasible to distribute the funds directly to class members because of the high administrative costs involved.[141] Thus, the court approved distribution of those funds to a cy pres recipient, a research and education foundation.[142] Of course, if FRCP 23(e)(5), as amended in 2018, works as expected, no

133. Notice of Motion & Motion for Posting of Appeal Bond by Objectors at 8, 13–14, *Fraley v. Facebook, Inc.*, 2014 BL 181506 (N.D. Cal. June 30, 2014) (No. 11-cv-01726), ECF No. 434.

134. *See supra* note 10 and accompanying text.

135. Opposition to Motion for Posting of Appeal Bond at 15, *Fraley*, 2014 BL 181506 (No. 11-cv-01726), ECF No. 436.

136. *Id.* at 17.

137. *Fraley*, 2014 BL 181506, at *2.

138. Azizian v. Federated Dep't Stores, Inc., 499 F.3d 950, 961 (9th Cir. 2007) (quoting *In re* Am. President Lines, Inc., 779 F.2d 714, 717 (D.C. Cir. 1985)).

139. No. 19-3095, 2020 WL 4519053 (7th Cir. Aug. 6, 2020).

140. *Id.* at *8.

141. *Id.*

142. *Id.*

payments will be made in the first place because courts will refuse to approve payments to objectors whose objections did not benefit the class.

4. Summary Affirmance and Expedited Appellate Review

As discussed below, one option that can potentially be utilized by parties facing objections on appeal is to seek accelerated appeals, either by requesting summary affirmance or expedited review. Because this approach is at times sensible for good, bad, *and* ugly objections, it is discussed in Part IV, below.

5. More Active Enforcement by the Courts and the Bar

It is astonishing that some ugly objectors, despite repeatedly being sanctioned, continue to practice law and file objections. Christopher Bandas and John Pentz, for example, have been condemned by numerous judges for filing frivolous objections to secure payoffs.[143] Yet in 2020, both of them continued to appear as counsel for objectors in major class actions.[144] Attorneys who have been repeatedly condemned for such misconduct should not be allowed to practice in any federal or state court, let alone continue to file objections to class action settlements.

Courts need to have a ready means of identifying ugly objectors and prohibiting them from continuing to litigate objections in other cases. One option would be a central repository, perhaps managed by the Federal Judicial Center, in which ugly objectors are identified and records are kept of specific instances in which sanctions have been ordered. Such sanctions would trigger notification of the attorney's state bar and would provide a database for class counsel to seek to prohibit a repeat offender from appearing on behalf of an objector.[145] A database from an objective source would be far more valuable and useful to courts than the serialobjector.com website, which is kept by a plaintiffs' law firm.

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143. *See supra* notes 85–86 and accompanying text.

144. *See, e.g.*, *In re* Equifax Inc. Customer Data Sec. Breach Litig., MDL No. 2800, No. 17-md-2800, 2020 WL 256132, at *41 (N.D. Ga. Mar. 17, 2020) (identifying Bandas as a "serial objector"), *appeal filed*, No. 20-10249 (11th Cir. Feb. 11, 2020); Reply Brief of Appellant Cleo Miller, *In re* Nat'l Football League Players Concussion Inj. Litig., 814 F. App'x 678 (3d Cir. 2020) (No. 18-2249) (appellant represented by John Pentz); *see also* McKnight v. Uber Techs., Inc., No. 14-cv-05615, 2019 WL 3804676, at *5 (N.D. Cal. Aug. 13, 2019) (identifying Bandas and Pentz as "serial objectors").

145. The Supreme Court's practice provides a good analogy. The Court keeps abreast of state disciplinary actions and follows up on those that raise concerns. For example, in connection with the Monica Lewinsky affair and the ensuing impeachment proceedings, President Bill Clinton voluntarily agreed to be suspended from the Arkansas bar for five years. Thereafter, he was suspended from the Supreme Court bar and was given forty days to oppose disbarment. He chose instead to resign from the Supreme Court bar. Dan Evon, *Bill Clinton Was Fined, Disbarred Over the Monica Lewinsky Scandal*, SNOPES (July 29, 2016), https://www.snopes.com/fact-check/bill-clinton-fined-and-disbarred-over-the-monica-lewinsky-scandal [https://perma.cc/ZDN5-NHXH].

IV. THE OVERARCHING APPROACH: MORE FREQUENT REQUESTS FOR EXPEDITED APPEALS

Regardless of whether an objector is good, bad, or ugly, there must be a mechanism for prompt appellate review of objections in appropriate cases. Consider first a good objection. If there are arguments that could well prevail on appeal, those arguments should ideally be heard promptly so that a new settlement can be formulated by the parties on remand or the case can be litigated in court. This is especially true if class members have an urgent need for recovery (for instance, to pay medical bills for injuries at issue). If an objection is bad or ugly, there is even more reason for the appeal to be heard quickly. By definition, the objection will ultimately be rejected. Yet the appellate process—which might include not just a federal court of appeals review but also an attempt at Supreme Court review—could hold up the implementation of the settlement for months or even years.

The *In re National Football League Players Concussion Injury Litigation*[146] case provides an example of a federal circuit that was attentive to the need to move quickly. The settlement involved a variety of medical benefits and compensation to retired football players who allegedly suffered injuries from concussions.[147] Players with serious illnesses, such as ALS, Parkinson's disease, and Alzheimer's, had to await the appellate process to recover their portions of the settlement.[148] In some instances, players died while waiting for a final judgment, including one of the class representatives, who was suffering from ALS.[149]

The Third Circuit worked quickly at multiple points during the litigation. In the first such instance, the district court preliminarily approved a proposed class settlement on July 7, 2014.[150] On July 21, 2014, several objectors filed an FRCP 23(f) petition for appeal to the Third Circuit.[151] On September 11, 2014, the Third Circuit issued an order denying leave to appeal, stating that the court of appeals would "issue an Opinion in this matter at a later time."[152] In that opinion, which was filed on December 24, 2014, the Third Circuit explained that its holding turned on the court's appellate jurisdiction under FRCP 23(f): "Because the District Court's order was not an 'order granting or denying class-action certification' under the plain text of [Rule 23(f)]," the court dismissed the petition.[153] After the district court granted final approval

146. 821 F.3d 410 (3d Cir. 2016).
147. *Id.* at 422.
148. *See id.* at 423–24.
149. Billy Witz, *C.T.E. and a Loved One's Death Haunt a Clemson Player's Family*, N.Y. TIMES (Jan. 11, 2020), https://www.nytimes.com/2020/01/11/sports/nolan-turner-clemson.html [https://perma.cc/9FDU-M443].
150. *In re* Nat'l Football League Players Concussion Inj. Litig., 301 F.R.D. 191, 194–95 (E.D. Pa. 2014).
151. *In re* Nat'l Football League Players Concussion Inj. Litig., 775 F.3d 570, 574 (3d Cir. 2014).
152. *Id.* at 572 n.1.
153. *Id.* at 571–72 (quoting FED. R. CIV. P. 23(f)).

of the settlement on April 22, 2015,[154] the Third Circuit acted expeditiously once again. When objectors appealed the settlement approval, the Third Circuit processed the appeal within one year from when the notice of appeal was filed, even though no request for expedited review was filed.[155] Unfortunately, the appellate process was not complete when the Third Circuit ruled, because various objectors then unsuccessfully sought Supreme Court review, wasting several more months.[156] Thus, although the settlement was approved on April 22, 2015, there was no final judgment until (after all appeals were exhausted) December 12, 2016.[157]

The *In re Equifax*[158] case (on appeal as of this writing) provides another illustration of the need for prompt appellate review. After a data breach that impacted more than 147 million class members, a class action settlement requires Equifax to spend $1 billion to improve its security systems and to provide free credit monitoring to qualified class members who request that option.[159] Because the class members are victims of stolen information, it is in their interest to have those protections in place as quickly as possible. Yet, the objection process can slow down, perhaps by years, the implementation of the settlement, leaving class members without the protections provided under the settlement.

There are two possible approaches to expedite the appellate process. The first is summary affirmance. Under that approach, the appellees (typically the plaintiffs and the defendant) can seek a prompt resolution, without full briefing or oral argument, when the appeal is plainly meritless.[160] Such a motion would be especially compelling if the appeal involves known ugly objectors. In that circumstance, appellees can point out this fact, citing as support serialobjector.com or judicial opinions critical of the particular objector. Summary affirmance is an option only in the case of bad or ugly objectors. The whole point is that the appeal is insubstantial and thus can (and should) be decided summarily. Summary affirmance thus should not be used when an appeal has plausible merit. Although this approach will increase the up-front work of the appellate court (most likely the motions panels), it will result in an overall decrease in the appellate court's workload. When the court identifies an insubstantial appeal that can be decided on a motion, and without full briefing, this process will avoid having judges read

154. *In re* Nat'l Football League Players Concussion Inj. Litig., 307 F.R.D. 351 (E.D. Pa. 2015).

155. *In re* Nat'l Football League Players Concussion Inj. Litig., 821 F.3d 410 (3d Cir. 2016) *cert. denied*, 137 S. Ct. 591 (2016).

156. *Id.*

157. *Id.* at 423–24.

158. MDL No. 2800, No. 17-md-2800, 2020 WL 256132 (N.D. Ga. Mar. 17, 2020), *appeal filed*, No. 20-10249 (11th Cir. Feb. 11, 2020).

159. *Id.* at *1, *3.

160. *See, e.g.*, 3D CIR. R. 27.4(a) (allowing a party to move for summary affirmance when "no substantial question is presented"); Lopatka & Smith, *supra* note 79, at 902 n.159; *see also* Christopher S. Perry, *Summary Disposition on Appeal*, APP. PRAC. J., Winter 2010, at 1, 1–2 (citing various circuits' local rules and noting that appellate counsel must be mindful of how favorably a given circuit looks upon summary affirmance).

additional full-length briefs and hold oral arguments. Moreover, because the approach suggested is limited to insubstantial appeals, this approach should not burden motions panels with summary affirmance requests in situations in which a potentially meritorious attack on a settlement is raised.[161]

An example of the use of summary affirmance in the class settlement process is *Dunn v. Wells Fargo Bank, N.A.*[162] In that case, the district court approved a class settlement, finding that a putative objector was not a member of the class and thus lacked standing to object.[163] The putative objector appealed, challenging the district court's ruling on standing, and the plaintiffs moved for summary affirmance.[164] The Seventh Circuit granted the plaintiffs' motion, finding that "any issues which could be raised are insubstantial and that further briefing would not be helpful to the court's consideration of the issues."[165] Quoting prior Seventh Circuit law, the court noted that "[s]ummary disposition is appropriate 'when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists.'"[166]

The Ninth Circuit has also granted summary affirmance to address ugly objectors. In *Dennings v. Clearwire Corp.*,[167] the district court approved a class settlement after overruling all objections.[168] When the objectors appealed, the plaintiffs moved for summary affirmance because the "canned objections" at issue were "unsupported by the record" and brought by objectors, represented by Christopher Bandas, who were unable in a deposition to "testify as to why the Settlement was objectionable."[169] The Ninth Circuit granted plaintiffs' motion, noting simply that "[a] review of the record, the motion for summary affirmance, and the opposition and reply thereto, demonstrates that the questions raised in this appeal are so insubstantial as not to require further argument."[170]

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161. Federal courts are experienced in determining whether arguments are frivolous. For instance, federal courts may permit plaintiffs to bring lawsuits without paying fees if they submit an affidavit demonstrating their inability to pay. 28 U.S.C. § 1915(a)(1). The court, however, "shall dismiss" such an action, inter alia, if it "is frivolous or malicious." *Id.* § 1915(e)(2)(B)(i); *see also* Allen v. Zavaras, 568 F.3d 1197, 1203 (10th Cir. 2009) (affirming dismissal because of petitioner's failure to address the "problem obvious from the face of his pleadings" that he had not exhausted state court remedies); Gladney v. Pendleton Corr. Facility, 302 F.3d 773, 774 (7th Cir. 2002) (affirming dismissal when the complaint alleged "copycat allegations" from another case that were "obviously and knowingly false").

162. No. 20-1080, 2020 WL 1066008 (7th Cir. Feb. 25, 2020).

163. Prather v. Wells Fargo Bank, N.A., No. 17-cv-00481 (N.D. Ill. Dec. 10, 2019), ECF No. 128 (minute entry overruling objection and granting motion for final approval of class action settlement).

164. *Dunn*, 2020 WL 1066008, at *1.

165. *Id.*

166. *Id.* (quoting Williams v. Chrans, 42 F.3d 1137, 1139 (7th Cir. 1995)).

167. 928 F. Supp. 2d 1270 (W.D. Wash. 2013).

168. Settlement Order & Final Judgment at 4, *Dennings*, 928 F. Supp. 1270 (No. 10-cv-01859), ECF No. 99.

169. Plaintiff-Appellees' Motion for Summary Affirmance at 6, Dennings v. Clearwire Corp., 2013 WL 12233931 (9th Cir. Apr. 22, 2013) (No. 13-35038), ECF No. 6.

170. *Dennings*, 2013 WL 12233931, at *1. *But see* Order at 1, Briseno v. Conagra Foods, Inc., No. 19-56297 (9th Cir. July 24, 2020) (refusing to grant summary affirmance in an appeal

The second option for accelerating an appeal is expedited appellate review. Under that option, the court could establish an accelerated schedule for briefing and oral argument (or perhaps dispense with oral argument altogether). As noted, such review would be appropriate when there is a critical need to distribute recovery to class members as soon as possible. It might also be appropriate for insubstantial appeals, although, in general, insubstantial appeals should be addressed through summary affirmance.

A motion for expedited review can explain that the objection leading to the appeal is insubstantial and that the settlement is being held up as a result.[171] Alternatively, it can explain why the appeal is time sensitive and needs to be decided on a fast track. Unlike a motion for summary affirmance, an expedited schedule might make sense for a meritorious appeal as well as for one that is insubstantial. For instance, if it is likely that an objection will unravel a settlement, there may be a reason for the court to decide the appeal promptly so that the parties can either negotiate a new settlement or proceed on a trial track.

There is substantial existing authority for seeking summary or expedited review, although the ultimate decision rests within the sole discretion of the appellate court. FRAP 2 provides: "On its own or a party's motion, a court of appeals may—to expedite its decision or for other good cause—suspend any provision of these rules in a particular case and order proceedings as it directs, except as otherwise provided in Rule 26(b)."[172] The courts of appeals have exercised the authority under FRAP 2, in part, "as a mandate to adopt measures for dealing with appellate docket pressures."[173] Most, but not all, circuits authorize these procedures by local rule.[174] But FRAP 2 provides a basis for requesting an expedited ruling even when no local rule exists.

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of class settlement and noting that appellant's arguments were "sufficiently substantial to warrant further consideration by a merits panel").

171. Lopatka & Smith, *supra* note 79, at 901–02 ("Because the cost of extortionate behavior is a function of delay in implementing the settlement, speeding up the resolution of a professional objector's appeal is a possible solution.").

172. FED. R. APP. P. 2.

173. 16A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 3948 (5th ed. 2019); *see also, e.g.*, Joshua v. United States, 17 F.3d 378, 380 (Fed. Cir. 1994) ("Under the aegis of Rule 2, circuit courts have summarily disposed of appeals using similar but not always identical language . . . . We hold that summary disposition is appropriate, *inter alia*, when the position of one party is so clearly correct as a matter of law that no substantial question regarding the outcome of the appeal exists."); United States v. Stemm, 835 F.2d 732, 734 (10th Cir. 1987) ("We interpret [FRAP 2] to establish the basis of expedited proceedings in appropriate cases, excepting any action affecting appellate court jurisdiction.").

174. The First, Second, Third, Fourth, Eighth, Ninth, Tenth, and D.C. Circuits allow summary disposition by local rule. *See* 1ST CIR. R. 27.0(c) (summary disposition); 2D CIR. R. 27.1(d) (emergency or expedited relief); 3D CIR. R. 27.4 (motion for summary action); 4TH CIR. R. 27(f) (motion for summary disposition); 8TH CIR. R. 47A (summary disposition); 9TH CIR. R. 3-6 (summary disposition of civil appeals); 10TH CIR. R. 27.3 (summary disposition); D.C. CIR. R. 27(g) (dispositive motions). The First, Second, Third, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and D.C. Circuits allow expedited appeal by local rule. *See* 1ST CIR. R. 27.0(b) (emergency relief); 2D CIR. R. 27.1(d) (emergency or expedited relief); 3D CIR. R. 4.1 (motion to expedite); 4TH CIR. R. 27(e) (emergency motion); 5TH CIR. R. 27.2.8 (providing that a single appellate judge may rule on motions to expedite appeals); 5TH CIR. R.

Some have expressed skepticism about whether the appeal of class settlements warrants expedited consideration. Thus, Chief Judge Smith and Professor Lopatka have addressed both summary affirmance and expedited appeals as options for dealing with insubstantial class objections. They conclude that these two options are not viable. With respect to summary affirmance, they believe that this approach will rarely work because "few appeals will present no substantial legal question."[175] With respect to expedited review, they note that this option is almost never viable because that device requires an "exceptional reason that warrants expedition."[176] In their view, "one can hardly say that the stakes involved trump those presented by the range of other cases resolved by federal appellate courts."[177] And they note that "to give priority to frivolous appeals would be ironic."[178]

I respectfully disagree with this position. I believe that there will be numerous circumstances warranting summary affirmance or expedited review. Examples of cases warranting summary affirmance include:

- An appeal consisting of conclusory statements, in violation of FRCP 23(e)(5)(A)'s mandate that objections be stated "with specificity."[179]
- An appeal based on a demonstrably false assertion, such as claiming that a settlement's proceeds are coupons when in fact they are cash.
- An appeal premised on a proposition that has been clearly rejected by a controlling authority.
- An appeal in which objectors are unable to demonstrate their membership in the class.

Examples of cases warranting expedited review include:

- Cases like *In re National Football League Players*, in which class members need settlement recoveries to pay for ongoing medical expenses.
- Cases like *In re Equifax*, in which there is an urgent need to implement settlement remedies to prevent identity theft.
- Cases in which well-known ugly objectors, who have been barred from objecting in other courts, are counsel for appellants, signaling that the appeal is a bad faith attempt to hold up the settlement to extract side payments.
- Cases involving "situations where important public policy issues are involved or those where rights delayed are rights denied."[180]

27.5 (motion to expedite appeal); 6TH CIR. R. 27(f) (motion to expedite appeal); 7TH CIR. I.O.P. 1(c)(7) (listing motions to expedite briefing among "routine motions"); 9TH CIR. R. 27-3 (emergency motion); 10TH CIR. R. 8.2 (emergency motion); 11TH CIR. R. 27-1(d)(9) (motion to expedite appeal); D.C. CIR. R. 27(f) (request for expeditious consideration). The Eighth Circuit has no specific rule permitting emergency or expedited appeal but provides that "[a] panel of three judges will act in all other matters." 8TH CIR. R. 27A(c).

175. Lopatka & Smith, *supra* note 79, at 902.

176. *Id.* (quoting 3D CIR. R. 4.1).

177. *Id.* at 902–03.

178. *Id.* at 903.

179. *See supra* note 24 and accompanying text.

180. Groendyke Transp., Inc. v. Davis, 406 F.2d 1158, 1162 (5th Cir. 1969).

Examples of cases not warranting expedited review (but possibly warranting summary affirmance) include:

- Cases involving small individual payments to class members.
- Cases involving only issues of attorneys' fees and not any issue regarding class recovery.
- Cases that are so complicated that it would not be feasible to expect expedited review.

District courts can help appellate courts assess the appropriateness of expedited review by specifying objections they deem insubstantial and by identifying cases in which getting relief to class members is an urgent priority.[181] At bottom, however, class counsel (and in some instances, defendants) should be more proactive in seeking prompt appellate review in appropriate circumstances. Their reluctance to do so up until now is difficult to understand.

CONCLUSION

Although most of the attention among courts, commentators, and rulemakers has been on ugly objectors, there are three categories of objectors, each of which raises separate but important considerations. An understanding of all three categories is essential to reviewing any reform proposal. For instance, an approach designed to eliminate ugly objectors might well have the undesirable result of deterring good objectors as well and thus should be rejected on that basis. Understanding that there are three categories of objectors is also critical in recognizing the limitations of the December 2018 amendments to FRCP 23(e). Those amendments focus mainly on ugly objectors and thus will have less impact in connection with bad objectors. Ultimately, class counsel (and in some instances, defendants) need to be vigilant in seeking prompt appellate review when the circumstances warrant such relief.

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181. *See, e.g.*, *In re* Gen. Elec. Sec. Litig., 998 F. Supp. 2d 145, 155 (S.D.N.Y. 2014) (finding that "the Second Circuit is likely to conclude that [the objector's] appeal is frivolous").