VANDERBILT Law School

12-AP-F

August 22, 2012

The Honorable Jeffery S. Sutton
Chair, Advisory Committee on Appellate Rules
260 Joseph P. Kinneary U.S. Courthouse
85 Marconi Boulevard
Columbus, OH 43215

Re: Proposed Amendment to Appellate Rule 42

Dear Judge Sutton:

We are writing to urge the Advisory Committee on the Appellate Rules to consider an amendment to Appellate Rule 42. The amendment would bar class action objectors from dropping their appeals of district court approvals of class action settlements and fee awards in exchange for money from class counsel or the defendant. As has been documented by courts and commentators, the prospect of receiving this money has encouraged class members to file non-meritorious objections and appeals to delay settlements until it becomes rational for class counsel and the defendant to pay them to go away. This practice is known as "objector blackmail." *See* Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 Vand. L. Rev. 1623 (2009). Objector blackmail not only financially taxes class counsel and defendants without reason, but it also tarnishes legitimate objectors and delays the distribution of settlement proceeds to class members. Our proposed amendment would bar these side payments to objectors from class counsel and the defendant. District courts would continue to exercise their authority to

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compensate counsel for class members when their objections created value for the class. The text of our proposed amendment is appended to this letter.

Class members who object legitimately to settlements and fee petitions serve a vital role in class action litigation. Because both class counsel and the defendant, by definition, support class settlements, the only adversarial testing in either the district court or the court of appeals of settlements and fee petitions usually comes from objections litigated by absent class members. For this reason, it is important to ensure that class members who wish to improve settlements and cause closer scrutiny of fee awards have the means and opportunity to do so through objections.

But we now know that some class members and their counsel file objections not because they want to improve settlements or reduce extravagant fee awards, but, rather, because they want to delay settlements and extract private benefit for themselves. Objectors can cause delay because they have the right to file appeals in the courts of appeals when district courts overrule their objections and approve class action settlements and fee awards. These delays impose costs on class members, class counsel, and the defendant. Not only does it take time and money to file briefs even in frivolous appeals, but even frivolous appeals can significantly postpone the distribution of settlements to class members, the distribution of fee awards to class counsel, and the finality for which the defendant has agreed to pay. These costs and delays can become so significant that it becomes rational for class counsel (most commonly) or the defendant to pay the objectors to drop their appeals. In essence, current law permits one class member to hold everything up for everyone else, and, thereby, extract money from those affected by the delay.

The prospect of these side deals has encouraged, we are told, ever more class members to file objections and appeals to collect the blackmail payments. As a result, the Federal Judicial Center has warned judges to "[w]atch out . . . for canned objections filed by professional

objectors" and to "be wary of self-interested professional objectors who often present rote objections to class counsel's fee requests and add little or nothing to the fee proceedings." Barbara J. Rothstein & Thomas E. Willging, *Managing Class Action Litigation: A Pocket Guide for Judges*, at 15, 31 (Federal Judicial Center, 2d ed. 2009), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/classgd2.pdf/$file/classgd2.pdf. Many courts have also commented on the blackmail problem. *See, e.g.*, *Vaughn v. Am. Honda Motor Co., Inc.*, 507 F.3d 295, 300 (5th Cir. 2007) ("In some circumstances objectors may use an appeal as a means of leveraging compensation for themselves or their counsel."); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 6 (1st Cir. 2001) (noting that appeals from objections can become "extortive legal proceedings"); *Vollmer v. Publishers Clearing House*, 248 F.3d 698, 709 (7th Cir. 2001) (noting that class members sometimes appeal "solely to enable themselves to receive a fee"); *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (noting "objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests"); *Barnes v. FleetBoston Fin. Corp.*, 2006 U.S. Dist. LEXIS 71072, at *3 (D. Mass. Aug. 22, 2006) (noting that blackmail-minded objectors "can levy what is effectively a tax on class action settlements"); *Snell v. Allianz Life Ins. Co.*, 2000 WL 1336640, at *9 (D. Minn. Sept. 8, 2000) (noting objectors who "maraud proposed settlements—not to assess their merits—but in order to extort the parties").

A number of solutions to this problem have been tried, but all of them, in our view, have failed. These failed efforts have been catalogued in Fitzpatrick, *supra*, and we will not repeat here what was said there. Suffice it to say that the other potential solutions—sanctions for frivolous objections and appeals, requiring objectors to post appellate bonds, and provisions in settlement agreements that accelerate the payment of fees for class counsel—are either

incomplete solutions to the problem or create cures that are worse than the disease because they chill legitimate objectors as well as blackmail-minded ones (or, in some cases, *only* legitimate objectors and *not* blackmail-minded ones).

What is needed is a way to clearly separate class members who file objections for the purpose of improving settlements from class members who file objections for the purpose of collecting side deals. We believe the best way to do this is the proposal made in Fitzpatrick, *supra*: to prohibit objectors from unilaterally dropping their appeals in exchange for something of value from class counsel or the defendant. With such a rule, only objectors who actually care about the merits of their objections and appeals will file objections and appeals; objectors who are in it only for the side deals will no longer bother. In short, such a rule will effectively screen out blackmail-minded objectors but preserve access for objectors with legitimate bases for an appeal.

Our proposed rule would prohibit even legitimate objectors with meritorious objections from dropping their appeals for something of value for themselves. Although at first blush it might seem strange to prevent someone who has brought a meritorious appeal from settling it, in the special context of class-action objections, private settlements that are kept secret and not presented to judges for approval are never socially beneficial. Any meritorious objection brought by a class member should, if vindicated, benefit not only the objector but other class members as well; if an objector is permitted to settle the objection in a side deal, however, only the objector benefits—none of the similarly-situated class members do. *See, e.g., Holmes v. Continental Can Co.*, 706 F.2d 1144, 1148 (11th Cir. 1983) (indicating that similarly-situated class members should be treated alike unless "rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations"). That is, the

positive benefits to other class members that may have been derived from the objections and appeals are lost. For example, if an objector objects to the manner in which a settlement is allocated among class members, all class members who are similarly situated to the objector stand to benefit from the objection. *See, e.g, Klier v. Elf Atochem North America, Inc.*, 658 F.3d 468 (5th Cir. 2011) (settlement objection litigated to final judgment benefited all similarly situated class members). But only the objector will benefit if the appeal is dropped in a side deal. For this reason, some commentators believe that private settlements with objectors are unethical as a general matter. *See* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 Hofstra L. Rev. 129, 132 (2001); Katherine Ikeda, Note, *Silencing the Objectors*, 15 Geo. J. L. Ethics 177, 203-04 (2001). Thus, nothing is lost—and, indeed, much gained—when even class members with legitimate objections cannot drop their appeals in exchange for payments from class counsel or the defendant.

In 2003, in response to some of these concerns, Federal Rule of Civil Procedure 23 was amended to require district courts to approve the withdrawal of any objections to class action settlements. *See* Rule 23(e)(5). When this amendment was under consideration, the Civil Rules Advisory Committee considered extending it to require district court approval even if an objection was dropped on appeal. *See* Civil Rules Advisory Committee Meeting Minutes, October 2000, at 9. But the extension was dropped over concern that the district court no longer had jurisdiction over such matters once an appeal was filed. *See* Report of the Civil Rules Advisory Committee, May 20, 2002. As a result, a loophole was created: objectors who wish to blackmail class counsel or the defendant simply wait for the appeal. For this reason, we are asking you to revise Federal Rule of Appellate Procedure Rule 42 to do for objector appeals what Civil Rule 23(e)(5) does for objections before the district court: require permission before a class

member can withdraw. Moreover, in light of what we now know about both the lack of benefit of any settlement in the special context of class-action objections as well as what we are told is the ever-growing blackmail tax levied on class members, class counsel, and defendants, we further believe that Appellate Rule 42 should make clear that no court should grant permission to withdraw unless the objector and counsel for all the parties certify that they have neither given nor received anything of value in return.

We will close by noting that we do not believe that class members who file objections should *never* receive any compensation that other class members do not. Class members who file legitimate objections often must hire lawyers to do so, and, like any other counsel, these lawyers need some economic incentive to participate in the litigation. As such, we believe class members with legitimate objections ought to be able to recoup their attorney's fees. But we further believe that, when objectors recoup these fees, it should only be for successful objections that have created value for other class members (not objections that have failed or were never considered), and it should only come by way of district court approval (not by way of a secret side deal with class counsel or the defendant). Federal courts already widely recognize the authority of district courts to award objectors attorney's fees when their objections create value for the class—for example, when an objection causes the district court to reduce class counsel's fee request or when an objection causes class counsel and the defendant to revise the terms of the settlement—by compensating them from the settlement proceeds or class counsel's fee award. *See, e.g.*, *Rodriguez v. Disner*, --- F.3d ----, 2012 WL 3241334, at *9 (9th Cir., Aug. 10, 2012). Nothing in our proposed amendment would change this authority.[1]

[1] A district court can exercise this authority even when class counsel and the defendant renegotiated a settlement on account of an objection only after the district court approved the settlement and the settlement is on appeal. In this circumstance, the objector-appellant could use Civil Rule 62.1 and Appellate Rule 12.1 to hold the appeal of the original settlement in abeyance while the district court considers the new settlement. If the original settlement was

Although our proposal will mean that only litigated objections will be permissible, we do not believe that this will create more work for federal courts. Quite the contrary. Class members with legitimate objections already pursue their objections in adversary litigation. The objections that concern us are those that are blackmail minded, and those objections will be eliminated by our proposal because they will no longer be profitable, saving the time and resources of both district courts and the courts of appeals alike.

Thank you for your consideration.

Sincerely,

Brian T. Fitzpatrick, Vanderbilt Law School

Brian Wolfman, Georgetown University Law Center

Alan B. Morrison, George Washington University Law School

thereafter vacated by the district court and the new settlement approved to the satisfaction of the objector, the objector could then dismiss its original appeal under our proposed Appellate Rule 42 and apply to the district court for an award of attorney's fees for improving the settlement.

PROPOSED AMENDED APPELLATE RULE 42
(new language underlined)

Rule 42. Voluntary Dismissal

(a) Dismissal in the District Court.

Before an appeal has been docketed by the circuit clerk, the district court may dismiss the appeal on the filing of a stipulation signed by all parties or on the appellant's motion with notice to all parties.

(b) Dismissal in the Court of Appeals.

The circuit clerk may dismiss a docketed appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. But no mandate or other process may issue without a court order. An appeal may be dismissed on the appellant's motion on terms agreed to by the parties or fixed by the court.

(c) Dismissal of Class Action Appeals.

No appeal from a judgment approving a class action settlement or awarding attorney's fees and expenses to class counsel may be dismissed without approval by the court of appeals. The court of appeals may not approve the dismissal unless the appellant and counsel for all parties have certified that neither they nor any other person will give or receive anything of value in exchange for dismissing the appeal.