

GUIDELINES AND BEST PRACTICES  
IMPLEMENTING 2018 AMENDMENTS TO  
RULE 23 CLASS ACTION SETTLEMENT PROVISIONS  
BOLCH JUDICIAL INSTITUTE, DUKE LAW SCHOOL

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**CHAPTER 2**

**PROCEDURES AND STANDARDS FOR OBJECTIONS AND RESOLUTION OF OBJECTIONS UNDER  
RULE 23(e)(5)**

“Professional” or “serial” objectors are raising meritless objections in a growing number of proposed class-action settlements, hoping to use potential delay to extract large payments in return for dismissal of the objections. “Although [such] payment may advance class interests in a particular case, allowing payment perpetuates a system that can encourage objections advanced for improper purposes.”<sup>1</sup> These payments can reduce the funds distributed to class members, delay settlement distributions to innocent class members, and bring disrepute on the administration of justice. The purpose of the amended rule is to institute an effective procedure discouraging this recent pernicious practice.

There is virtually unanimous consensus that objecting class members can play a critical role in the settlement-approval process and can provide a valuable service to the entire class. Accordingly, amended Rule 23(e) is intended to facilitate the assertion and consideration of

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<sup>1</sup> FED. R. CIV. P. 23(e)(5)(B) committee's note to the proposed 2018 amendment.

goodfaith objections made to protect or advance the collective interests of some or all class members, while at the same time deterring “professional objectors” from holding up class settlements in bad faith.<sup>2</sup> Separate and apart from protecting the rights and interests of the objecting class member, the court has an independent duty to ensure that the Rule 23(a), (b) and (e) criteria are satisfied.

**GUIDELINE 6:** A court should interpret the language of Rule 23(e)(5) broadly and liberally to accomplish its stated intent to avoid perpetuating a system that facilitates objections advanced for improper purposes.

Rule 23(e)(5) is designed to reduce the financial incentive for professional objectors to object solely for personal financial gain by subjecting them to greater judicial scrutiny. The amended rule does this without compromising the ability of a class member to file a good-faith objection, which might assist the court in evaluating or improving a proposed settlement. In many cases, a good-faith objector is primarily interested in improving a settlement agreement and welcomes judicial scrutiny. Vigorous judicial enforcement of the amended rule will strengthen the ability of good-faith objectors to pursue meritorious actions, while curtailing abusive professionalobjector tactics.

The parties may consider whether there are other means of discouraging bad-faith objectors. For example, the parties could: (1) include in the settlement agreement a provision that prohibits the parties from paying an objector to dismiss an appeal; (2) seek an order from the district court enjoining objectors from dismissing appeals in exchange for payment or other consideration; or (3) include a “quick-pay clause,” providing that class counsel receives attorney

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<sup>2</sup> See, e.g., Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623, 1625 (2009) (“Courts and commentators believe that objector blackmail is a serious problem. Objector blackmail is often seen as something of a ‘tax’ that class action lawyers must pay in order to settle class action litigation, and it has been decried in numerous court opinions and scholarly commentaries.”) (footnotes omitted).

fees even if an appeal is taken and before the class is paid, but requiring counsel to return the fees paid if the award is reversed on appeal.<sup>3</sup> Eliminating the possibility of extortionate payments to bad-faith objectors before any appeals are filed will discourage bad-faith objectors from filing appeals.

Amended Rule 23(e)(5)(A):

(A) In General. Any class member may object to the proposed settlement if it requires court approval under this subdivision (e); ~~the objection may be withdrawn only with the court's approval.~~ 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.

Comments to the Committee raised concerns that the amendments to Rule 23(e)(5) could invite objections on behalf of others and that the objector should be required to “satisfy something like Rule 23(a)(4) (on adequacy of representation) to represent anyone else.” The Committee rejected these concerns because the rule already provides that any class member may object: “It does not cabin what objections they make, and courts must consider those objections.”<sup>4</sup> The following best practice recognizes these considerations but also acknowledges the Committee’s determination that the court should consider all “cogent” objections, “whether or not the objector has a direct stake in the resolution of the objection.”<sup>5</sup>

**BEST PRACTICE 6A:** A court may consider any objection raised by a class member, even if the objector has nothing personally at stake in regard to the matter raised by the objection.

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<sup>3</sup> See *In re Whirlpool Corp. Front-loading Washer Prod. Liab. Litig.*, 2016 WL 5338012, at \*21 (N.D. Ohio Sept. 23, 2016) (noting that quick-pay clauses are increasingly common and the “essential purpose of a quick-pay clause is to disincentivize lawyers who are ‘professional objectors’”). Some argue the optics appear bad with class counsel being paid before class members. And there may be unforeseen consequences of obliging counsel to repay fees if the settlement is upset. On the other hand, courts have found that the “quick pay” provision “serves the socially-useful purpose of deterring serial objectors.”

<sup>4</sup> FED. R. CIV. P. 23(e)(5)(A) committee's note to the proposed 2018 amendment.

<sup>5</sup> *Id.*

An objection must state whether it applies only to the objector, to a specific subset of the class, or to the entire class. There is no intent to cabin any cogent objection. But requiring an objector to identify who benefits from the objection can shed light on the objector's motivations and provide the court useful information to evaluate whether payment for withdrawing the objection is justified. Although helpful objections can be made by an objector having no personal stake in the outcome, the court should take into account this factor in determining whether the objection was made for an improper purpose.

**GUIDELINE 7:** A class member objecting to a proposed settlement must state with specificity the grounds for objection sufficient to enable the parties to respond to them and the court to evaluate them.

The amended Rule 23(e)(5)(A) introduces a new burden on objectors to specify the grounds for their objection. A general statement that a settlement is “unfair” without more will usually be insufficient to meet this new requirement. In construing the specificity requirements, a court should not apply Rule 9’s more rigorous “heightened” pleading standard and its associated jurisprudence, which require allegations of fraud or mistake to be stated with particularity. Instead, the objections are sufficiently asserted if they enable the parties to respond to them and assist the court to evaluate them. Requiring specificity will crystallize the issues for decision, narrow the scope of review, and frustrate “professional” objectors who would be required to carefully analyze the settlement agreement before objecting and who are generally unwilling to invest the substantial time and effort to improve the settlement agreement.

**BEST PRACTICE 7A:** An objection should identify the specific settlement term or structure that is being challenged and the reasons for such challenge.

An objector should identify the specific settlement term or structure that is being challenged and the reasons for such challenge, the specific holding in the preliminary approval order or other

court order being challenged and the reasons for such challenge, or the class certification requirements or other Rule 23 criteria the objector claims are not satisfied. Objectors need not cite to a section or paragraph number provided they describe the settlement terms or court order in a manner that permits the court and parties to identify what is being challenged. This requirement would also be satisfied if objectors identify a settlement structure that they contend is unfair.

In adjudicating objections, the court “should take care, however, to avoid unduly burdening class members who wish to object, and to recognize that a class member who is not represented by counsel may present objections that do not adhere to technical legal standards.”<sup>6</sup> Many nonlawyer class members are unaware of the Federal Rules of Civil Procedure and can make wrong assumptions. For example, an unrepresented class member may wrongly interpret the requirement that an objector state whether their objection “applies to the objector” or to a “specific subset of the class” to mean that the objector should state whether she is “speaking” for another objector or representing other members of the class.

In determining whether a class member satisfied the specificity requirements, the court should consider whether and how the class members were notified of these requirements in the class notice. In an appropriate circumstance, deposition of the objector may be necessary for the parties to respond to the objection. Depositions should not be used to harass an objector.

**GUIDELINE 8:** No payment or other consideration for forgoing or withdrawing an objection or forgoing, dismissing, or abandoning an appeal can be provided unless a court approves payment after holding a hearing.

Amended Rule 23(e)(5)(B):

- (B) Court Approval Required For Payment to an Objector or Objector’s Counsel.  
Unless approved by the court after a hearing, no payment or other consideration may be provided to an objector or objector’s counsel in connection with:
- (i) forgoing or withdrawing an objection, or

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<sup>6</sup> FED. R. CIV. P. 23(c)(5)(A) committee's note to the proposed 2018 amendment.

- (ii) forgoing, dismissing, or abandoning an appeal from a judgment approving the proposal.

Rule 23(e)(5)(B) puts in place procedures whereby the court must closely evaluate any agreement to pay an objector to withdraw an objection. Objections may be withdrawn without court approval, but a hearing is required if an objector is paid for forgoing or withdrawing an objection or forgoing, dismissing, or abandoning an appeal. Although separate hearings can be held solely for this purpose, a court should consider ruling on all such requests along with other objections at the final Rule 23(e)(2) fairness hearing held to approve the proposed settlement. At the hearing, objectors should be provided an opportunity to address the court and the parties should be given an opportunity to respond.

**BEST PRACTICE 8A:** The parties must disclose the terms of all agreements between objector and the parties. What constitutes payment or other consideration to an objector for forgoing or withdrawing an objection or forgoing, dismissing, or abandoning an appeal should be broadly construed.

The Committee Notes recognize that there are good objections that may add value to the class. The rule provides for payment to objector's counsel in such situations based on the value that the objection provides to the class. At a minimum, the objector and the parties must disclose the terms of all agreements.

To ensure that objectors cannot evade judicial scrutiny by accepting some benefit other than a monetary payment, or directing the payment or other "consideration" to someone other than the objector or objector's counsel, the rule is broadly interpreted to include any kind of arrangement that benefits objector or counsel for an objector. The term "consideration" should be broadly construed and includes immediate and deferred or future benefits. Nonmonetary consideration, like preferred future business relationships or other financial commitments, are benefits and encompassed by the rule. Payments made to organizations affiliated with the objector are likewise proscribed absent judicial approval.

Although the amended rule should be broadly construed, a court may not consider as a benefit to the class members the time that would otherwise be spent addressing the withdrawn objection or appeal. The sole fact that the withdrawal of an objection or dismissal of an appeal will expedite distribution of the settlement funds does not justify payment to withdraw an improper objection or dismiss an improper appeal. Otherwise, every improper objection would be subject to compensation on these grounds. At the same time, counsel who withdraws an objection or appeal without any expectation of compensation may do so without court approval.

**BEST PRACTICE 8B:** A court should inquire into communications that class counsel may have had with individuals who decided not to pursue (forgo) objections.

The rule requires court approval to pay for withdrawing or forgoing an objection or forgoing, dismissing, or abandoning an appeal. Court approval is also required, however, to pay a “potential” objector who is merely “considering,” but who has not yet filed, an objection or appeal. The rule anticipates situations in which a professional objector informally or otherwise threatens to object unless the objector receives payment in return for assurances not to file the objection. The rule expressly proscribes paying an objector to “forgo” an objection or an appeal without court approval, and payment would clearly be inconsistent with the rule’s stated purpose to avoid perpetuating a system that encourages objections advanced for an improper purpose.

Under Rule 23(g), a court has a duty to see that class counsel live up to their obligation to protect the class they represent. In certain situations, this may require the court to get information from class counsel about conversations between counsel and class members who considered an objection and then ultimately decided not to object. The Committee Notes specifically state that objections can provide the court with important information bearing upon its determination as to whether to approve a proposal. Inquiry of the nature described in this paragraph may also provide important information to the court and will help ensure that class counsel has adequately

represented the class and has not put class counsel's interest above those of the individuals he or she represents.

BEST PRACTICE 8C: If the consideration involves a payment to counsel for an objector, the proper procedure to obtain a payment is by motion under Rule 23(h). The court should evaluate whether the objection added value to the class and therefore justifies the proposed payment.

In some circumstances, an objection may warrant payment of attorney's fees. The new rule makes clear that an objector who seeks payment of attorney's fees must follow the same procedures as class counsel, i.e., the filing of a motion for an award of attorney's fees pursuant to Rule 23(h). A court need not award a fee to an objector merely because the objection assisted the court in understanding or evaluating the settlement. However, if the objection actually enhanced the class recovery by improving the settlement or otherwise conferring a benefit to the class, an award of fees to the objector's counsel may be justified.<sup>7</sup>

The Committee received comments suggesting that the amendment should provide a concrete standard for the payment of fees to objectors. The Committee could not find a good way to articulate such a standard, and determined "that this is a place to 'let judges be judges.'"

Nonetheless, the Committee Note to Rule 23(h) sets out various factors the court can consider in evaluating a request for attorney's fees, including: (1) work which produced a beneficial result for the class; (2) work which actually achieved a result for class members; (3) settlement provisions that provide for future payment; and (4) nonmonetary provisions that provide actual value for class members. The court must determine that the objector's fee award is fair and reasonable in light of the benefit conferred to the class by the objection.

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<sup>7</sup> See, e.g., *In re Cendant PRIDES Litig.*, 243 F.3d 722, 743 (3d Cir. 2001) (observing that the district court has broad discretion to award fees to an objector who enhances the class's recovery); *In re Classmates.com Consol. Litig.*, 2012 WL 3854501, at \*8 (W.D. Wash. June 15, 2002) ("The court can award attorney fees to objectors, provided that the objectors prove that they "substantially enhanced the benefits under the settlement.") (internal citations and quotations omitted).



The award of fees to counsel for the objector is usually paid from the fees awarded to class counsel. In a claims-made settlement, fees are paid separately by the defendant and are capped, so the only source of payment to the objector is the fees paid to class counsel. In a case with a settlement fund, the objector's counsel fee may be paid from the fees awarded to class counsel or may be paid directly from the fund if the total attorney's fees paid to class counsel and objector remain proportionate to relief paid to the class.

**GUIDELINE 9.** If approval to forgo or withdraw an objection has not been obtained before an appeal is docketed in the court of appeals, Appellate Rule 12.1 and Civil Rule 62.1 indicative-ruling procedures apply while the appeal is pending.

Amended Rule 23(e)(5)(C):

(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.

Although Rule 23(e)(3) already requires disclosure of any agreement made in connection with a settlement proposal, this provision is easily evaded by deferring execution of fee agreements until after a notice of appeal is filed and the court is divested of jurisdiction. Rule 23(e)(5)(B) requires both a hearing on and approval of any agreement to pay an objector. Rule 23(e)(5)(C), discussed below, provides a mechanism for the court to grant or deny the motion during the pendency of the appeal.

Rule 23(e)(5)(C) requires the district court to make an indicative ruling pursuant to Rule 62.1 of the Federal Rules of Civil Procedure. This rule allows for "indicative rulings" and applies when the district court lacks authority to grant [a motion] because of an appeal that has been docketed and is pending. Rule 62.1 permits a district court to take one of three actions on a motion pending before it during appeal: (1) defer consideration of the motion; (2) deny the motion; or (3)

state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue.<sup>8</sup>

**BEST PRACTICE 9A:** If the parties intend to settle with an objector, they should seek approval of the objection settlement prior to the filing of the appeal to avoid the delay of appeal.

Under the new rules, an appeal becomes a critical moment where the opportunity to end an objection in exchange for payment is diminished and the risk of protracted litigation is magnified. Post-appeal Rule 23(e)(5)(B) payments come with added risk that the district court will defer or deny ruling on the parties' motion while the case is on appeal, or that the appellate court will refuse to remand the case. In either of those situations, the parties are then forced to litigate their appeal — absent voluntary dismissal of the appeal — to its conclusion. This added expense and delay can be avoided by class counsel's and objectors' proactivity in resolving objections before an objector appeals.

**BEST PRACTICE 9B:** A court should hold a hearing and issue an indicative ruling once an appeal is filed and Rule 62.1 is in effect.

While a district court has the option to defer consideration of settlement of an objection under Rule 62.1, the court should issue an indicative ruling. Although the parties must still obtain Rule 23(e)(5)(B) approval from the district court before dropping an objection in exchange for compensation, the district court may lack authority to formally approve or deny any payments made to an objector once an appeal is filed. In this situation, Rule 23(e)(5)(C) requires the court to adhere to Rule 62.1 procedures, which gives the court three options on how to proceed. However,

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<sup>8</sup> While an appeal of the class action settlement is pending, a district court may still have supplemental jurisdiction permitting it to rule on an objector's motion for attorneys' fees. *See Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 200 (1988).

in the interest of judicial economy and case management efficiency, the district court should hold a hearing and issue an indicative ruling.

Issuing an indicative ruling removes a degree of uncertainty from the post-appeal settlement process by informing the appellate court what the district court's decision would be if the district court had jurisdiction. If the district court indicates that it would approve the settlement, the likelihood that the appellate court would remand for disposition is greatly increased.

Alternatively, an indicative ruling can alert the appellate court to a material issue that should be addressed by that court. In either event, judicial economy and efficiency are promoted. Absent an indicative ruling, the appellate court has no reason to remand for settlement approval and the parties must proceed through the entire appellate process, adding further expense and delay to a case that is otherwise capable of settlement.

**BEST PRACTICE 9C:** If the objector has filed a motion for attorney's fees, the district court may inquire into settlement discussions between the objector and the parties regarding the fee motion.

The parties may circumvent the amended rules by settling the objector's "fee motion" rather than the objector's "objection." For example, an objector may object to a settlement, the district court approves the settlement, and while the case is still pending in district court, the objector files a motion for attorney's fees. The objector then appeals the final approval of the settlement. On appeal the objector may settle the "fee motion." The Rule 23 amendments would arguably not apply to this settlement because the rules apply to settlement of "objections," not other motions. A district court should examine the parties' attempts to circumvent the rules.

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