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The End Of Objector Blackmail?

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Abstract: Courts and commentators have long decried a practice in class action litigation known as "objector blackmail." Objector blackmail occurs when individual class members delay the final resolution of class action settlements by filing meritless appeals therefrom in the hope of inducing class counsel to pay them a side settlement to drop their appeals. Class counsel pay these side settlements, it is thought, because they cannot receive their fee awards until all appeals from the settlement are resolved. In this Article, I suggest that some of the concern over objector blackmail may be exaggerated. Drawing on an original data set I created of all class action settlements approved by federal judges in 2006, I show that class counsel have quietly devised a way around objector blackmail: class action settlement provisions that permit them to receive their fees even before appeals from the settlements are resolved. Over one-third of all settlements already have these provisions, including the vast majority of securities settlements. I suggest that these provisions may mitigate much of the blackmail threat and render largely unnecessary—and, indeed, undesirable—the other blackmail countermeasures developed by courts and commentators.

For many years, courts and commentators have been concerned about a phenomenon in class action litigation referred to as objector "blackmail."[1] The term "blackmail" is used figuratively rather than literally; so-called objector "blackmail" is simply a specific application of the general concern with legal regimes that permit one or more

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[1] *See, e.g.*, Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403 (2003).

individuals to "hold out" and disrupt collective action.[2] The "hold out" problem in class action litigation stems from the following series of events: When a class action is settled, class members who do not like the proposed settlement are permitted to file objections with the federal district court that must approve it. If the district court nonetheless approves the settlement, the class members who filed objections have the right to file appeals from the district court's approval. If objectors appeal the settlement, however, the final resolution of the settlement will be delayed during the time it takes the court of appeals to decide the appeal, which can be years. Not only does the appeal delay final resolution of the settlement, but, more importantly for the blackmail problem, it also delays the point at which class counsel can receive their fee awards, which are contingent upon the settlement. As class counsel are eager to receive these fees, they are willing to pay objectors out of their own pockets to drop the appeals. This, it is thought, has led class members to file wholly frivolous objections and appeals for no other reason than to induce these side payments from class counsel.[3] These appeals are what courts and commentators refer to as objector "blackmail."[4]

It is true that class members would have to be fairly savvy to take advantage of this scheme. It is thought that, like class actions themselves, objector blackmail is generally lawyer driven. Some lawyers are said to be "professional objectors" who travel from settlement to settlement seeking class members on behalf of whom they can object. In other instances, objections are filed in furtherance of rivalries between lawyers seeking to control class action litigation; lawyers representing class members in competing actions are said to sometimes object in the settling actions in order to share in the fee awards.[5]

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[2] *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 124-25 (2004).

[3] *See, e.g.*, Vaughn v. American 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."); A.L.I. Principles of Aggregate Litigation Tentative Draft No. 1, § 3.08 (approved May 2008) (expressing concern with "fees paid to objectors' counsel not because of valid objections but because objectors have threatened to prolong the process by appealing the settlement . . . thereby delaying distributions to . . . class counsel"); *id.* (listing citations to commentators who have discussed "the improper role that objectors sometimes play in holding up legitimate settlements").

[4] Although the term is figurative, I will follow the conventional terminology and refer to the hold-out phenomenon in class action litigation as objector "blackmail."

[5] *See infra* text accompanying notes 63-65.

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,[6] and it has been decried in countless court opinions[7] and scholarly commentaries.[8] As one commentator has put it, class action objectors are "the least popular parties in the history of civil procedure."[9] Indeed, the blackmail concern has led courts and commentators to propose a variety of measures designed to mitigate the threat of objector blackmail. Perhaps the most draconian among these measures is the recent practice by some district courts to require objectors to post bonds under Federal Rule of Appellate Procedure 7 for hundreds of thousands or even millions of dollars in order to appeal class action settlements, something few objectors, no matter what their motivations, are in a position to do.[10]

In this Article, I bring to light a practice that has quietly developed among class action lawyers that may neutralize much of the blackmail threat. As far as I aware, this practice has never been discussed by any court nor any commentator. Yet, the practice suggests that the concern over objector blackmail may be exaggerated. The practice to which I refer is known among class action lawyers as "quick pay." The way in which the practice works is as follows: With the consent of the defendants, class counsel insert provisions into class action settlements that permit them to receive whatever fees district courts award them as soon as those courts approve the settlements, regardless of whether the settlements are appealed. If something happens to the settlements on appeal, then class counsel agree to refund the fees to the defendants. The virtue of the quick-pay provision is that objectors who bring meritless appeals can no longer delay the point at which class counsel receive their fees. Thus, class counsel have little incentive to pay objectors a premium to avoid this delay. As such, quick-pay provisions can reduce the "hold-out tax" that blackmail objectors can extract in class action litigation.

In order to assess how ubiquitous these quick-pay provisions have become, I drew upon an original dataset I created consisting of all

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[6] Barnes v. FleetBoston Fin. Corp., 2006 U.S. Dist. LEXIS 71072, at *3-*4 (D. Mass. Augg. 22, 2006) ("[P]rofessional objectors can levy what is effectively a tax on class action settlements, a tax that has no benefit to anyone other than to the objectors.").

[7] *See infra* notes 53-57.

[8] *See infra* notes 58-62.

[9] Brunet, *supra* note 1, at 472.

[10] *See infra* text accompanying notes 75-77, 113-128.

class action settlement agreements approved by federal district courts in 2006. I found that over one-third of all settlements included quick-pay provisions, but that a wide variation existed between non-securities and securities settlements. In almost 80% of securities cases, class counsel inserted quick-pay provisions into the settlement agreements, whereas class counsel did so in only 5% of non-securities settlements. These findings raise the question whether objector blackmail is still a problem in securities fraud cases. To the extent class members have the ability to use meritless appeals to extract premiums from class counsel for delay, the threat may be largely confined to non-securities cases. But, even in these cases, there may be little to prevent a more widespread adoption of quick-pay provisions besides greater education among class counsel and defendants to the virtues of these provisions.

In my view, the best solution to objector blackmail may be to encourage broader use of quick-pay provisions. Although one might object to quick-pay provisions on the ground that they are utterly self serving—they have, after all, transformed class action lawyers into something that had been previously unknown in the law: contingency-fee lawyers that get paid before their clients—I argue that they pose little harm to class members and may actually benefit them. Moreover, compared to the alternative mechanisms for mitigating blackmail—sanctioning objections later deemed to be frivolous or requiring objectors to post Rule 7 bonds for hundreds of thousands or millions of dollars—quick-pay provisions clearly seem more desirable. *Ex post* sanctions and large Rule 7 bonds will inevitably chill legitimate objectors from making their views known to the district court. That is a steep price to pay when the only adversarial testing of class action settlements comes from objectors. Moreover, these measures effectively permit district courts to decide how insulated their own decisions should be from appellate review. It is easy to see why district courts might overuse that power. In my view, there is little reason to run these risks of chilling legitimate objections and insulating bad settlements from review given that quick-pay provisions can neutralize much of the blackmail threat without any such collateral damage. At the very least, these more draconian and less tailored solutions should be limited to class action settlements that, for whatever reason, were written *without* quick-pay provisions (or those for which there is reason to believe that quick-pay provisions might be ineffective).

In Part I of this Article, I describe the role of class action objectors in the settlement process. In Part II, I recount the oft-expressed concern by courts and commentators that class members are able to blackmail class counsel into paying side settlements by filing frivolous objections and appeals. In Part III, I bring to light a practice that, as far as I am aware, has never been discussed by courts or commentators—quick-pay provisions—and suggest that the concern with objector blackmail may be exaggerated. Finally, in Part IV, I argue that quick-pay provisions have been a positive development, and that they should be encouraged in lieu of the more draconian and less tailored measures that have been proposed to mitigate objector blackmail.

I. The Role Of Class Action Objectors At Settlement

The vast majority of cases that are certified as class actions and not dismissed on motions to dismiss or summary judgment are terminated by settlement.[11] In federal court, which is the focus of this Article,[12] these settlements are negotiated by defendants and lawyers appointed by district court judges to represent class members, and, before these settlements can take effect, they must be approved by those judges as well.[13] In addition, because class counsel are appointed rather than retained by class members themselves,[14] district court judges must also set the fees class action lawyers receive for their work.[15] Class action lawyers are compensated on a contingency

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[11] *See, e.g.*, ROBERT H. KLONOFF & EDWARD K.M. BILICH, CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION: CASES AND MATERIALS 362 (2002) (noting that only "a handful" of class actions under Rule 23 have ever been tried to conclusion); Tom Baker & Sean J. Griffith, *How the Merits Matter: D&O Insurance and Securities Settlements* 20 (2008), *available at* http://ssrn/com/abstract=1101068 (noting that, with respect to securities fraud class actions, "[t]rial . . . is virtually unheard of").

[12] I chose to focus on federal class action settlements both because most of the commentary regarding objector blackmail has been in reference to federal settlements and because it is much easier to gather data on federal litigation.

[13] *See* FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.").

[14] *See* FED. R. CIV. P. 23(g)(1) ("Unless a statute provides otherwise, a court that certifies a class must appoint class counsel.").

[15] *See* FED. R. CIV. P. 23(h) ("In a certified class action, the court may award reasonable attorney's fees . . . ."). In securities fraud class actions filed after the Private Securities Litigation Reform Act of 1995, some courts have begun to presume that the fees they award should be based on the arrangement struck between class counsel and the lead (usually

basis, and their fees often come from the settlement they negotiated for the class (usually as a percentage of the settlement), or, less commonly, from the defendant pursuant to a fee-shifting statute (usually in the form of a lodestar award).[16] In either case, federal district court judges have considerable discretion to determine the fees of class action lawyers.[17]

There has long been concern that the interests of class counsel diverge in several respects from the interests of class members, and, accordingly, there has long been concern that any given class action settlement might not be in the best interests of class members.[18] It is for this reason, after all, that district court judges are required to approve class action settlements.[19] It is also for this reason that class

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institutional) plaintiff. *See, e.g.*, *In re* Cendant Corp. Litigation, 264 F.3d 201, 282 (3d Cir. 2001) ("We therefore believe that, under the PSLRA, courts should accord a presumption of reasonableness to any fee request submitted pursuant to a retainer agreement that was entered into between a properly-selected lead plaintiff and a properly-selected lead counsel.").

[16] *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 31 (2004).

[17] The prevailing method for determining the appropriate fee to award class counsel from a settlement they negotiated (*i.e.*, so-called "common fund" cases) is to select a percentage of the settlement based on a multi-factor test, *see, e.g.*, Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 250 (D.N.J. 2005) (listing seven "standards" to use "[i]n awarding attorneys' fees using the percentage-of-recovery method in a common fund class action"), which, as with most multi-factor tests, leaves courts with a great deal of discretion. Some courts of appeals have tried to confine this discretion somewhat by adopting a presumption that 25% is an appropriate award in common-fund cases. *See, e.g.*, Staton v. Boeing Co., 327 F.3d 938, 968 (9th Cir. 2003) ("This circuit has established 25% of the common fund as a benchmark award for attorney fees."); Camden I Condo. Ass'n, Inc. v. Dunkle, 946 F.2d 768, 771 (11th Cir. 1991) (establishing "bench mark" percentage of 25%, "which may be adjusted up or down based on the circumstances of each case"). In cases where fees are paid directly by defendants and in common-fund cases where district courts do not use the percentage-of-the-settlement approach, district courts reward class counsel using the fee "lodestar" enhanced by a discretionary multiplier. *See* Eisenberg & Miller, *supra* note 16, at 31 ("Under the lodestar method, . . . courts multiply the reasonable number of hours expended by counsel by a reasonable hourly rate and then adjust the product for various factors."). The discretionary multiplier gives district courts considerable latitude to set fees even in these cases.

[18] *See, e.g.*, John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371-72 (2000) (acknowledging the "standard depiction" of a class action attorney "as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest"); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883-84 (1987) (stating that "[i]t is no secret that substantial conflicts of interest between attorney and client can arise in class action litigation" and then detailing some of the ways in which these conflicts manifest themselves).

[19] *See, e.g.*, Christopher R. Leslie, *A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation*, 49 UCLA L. REV. 991, 1065 (2002) ("Congress required judicial approval of class action settlements precisely because the class

members are given an opportunity to participate in the district court's review of these settlements.[20] This opportunity is mandated by the Federal Rules of Civil Procedure, which require that class members receive notice of proposed settlements and attorney fee awards, and that class members have an opportunity to file objections thereto.[21] Indeed, in light of the fact that class counsel and defendants, by definition, support class action settlements it is thought that it is especially important that class members be given the opportunity to object to settlements; without objectors there would be no adversarial testing of class action settlements at all.[22]

Nonetheless, class members do not take advantage of the opportunity to object to settlements in great numbers; one empirical study found that the mean number of objections to a settlement was 138 (1.1% of class members) and the median was only 3.[23] The small number of objections is usually attributed to the fact that class members often have little at stake individually in a settlement and it would be economically irrational for many of them to go through the trouble of filing objections.[24] When they do file objections, the objections can be as informal as a few comments scrawled on a piece

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counsel might make agreements that maximize their personal gain at the expense of absent class members.").

[20] *See, e.g.*, Theodore Eisenberg & Geoffrey P. Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1531 (2004) ("In theory, the right to object to a settlement provides a check on reasonableness: the court can look to the views of class members as a counterweight to the views of counsel and the representative parties, who may be biased in favor of approval.").

[21] FED. R. CIV. P. 23(e) ("The court must direct notice [of a proposed settlement] in a reasonable manner to all class members who would be bound by the proposal. . . . Any class member may object to the proposal if it requires court approval under this subdivision (e) . . . ."); FED. R. CIV. P. 23(h) ("Notice of the motion [for an award of attorney's fees] must be served on all parties and, for motions by class counsel, directed to class members in a reasonable manner. A class member, or a party from whom payment is sought, may object to the motion.").

[22] *See* Brunet, *supra* note 1, at 439-43 (noting that many courts have commented on the important role objectors can play in class action settlements).

[23] *See* Eisenberg & Miller, *supra* note 20, at 1546 (reviewing 236 state and federal class action settlements).

[24] *See, e.g.*, Christopher R. Leslie, *The Significance of Silence: Collective Action Problems and Class Action Settlements*, 59 FLA. L. REV. 71, 73 (2007) ("For individual class members, objecting does not appear to be cost-beneficial. Objecting entails costs, and the stakes for individual class members are often low."); *id.* at 91 (noting that "even those class members who believe that the proposed settlement is inadequate may remain silent because they (correctly) calculate that the costs of objecting exceed the expected benefits of doing so").

of loose-leaf paper[25] or as formal as filings by lawyers representing one or more class members, accompanied by expert testimony and motions to intervene and to take discovery.[26] In theory, district courts review these objections, along with arguments supporting the settlement from class counsel and defendants, when deciding whether settlements and the fees sought by class counsel are in the best interests of the class.[27] It is rare, however, for district courts to reject proposed class action settlements on the basis of objections;[28] it is only somewhat more common for district courts to award fees less lucrative than those sought by class counsel.[29]

Once the district court has rejected class members' objections and approved the settlement, the question becomes who, if anyone, may appeal the district court's judgment, and this has been where the concerns regarding the blackmail threat posed by objectors has arisen. Before the Supreme Court's 2002 opinion in *Devlin v. Scardelletti*,[30] there were two schools of thought on this question. The first school, adopted by a number of courts of appeals, was that only the formal parties to the class action litigation could appeal the approval of the settlement.[31] The formal parties included the defendant, the class

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[25] *See, e.g.*, *In re* Pharmaceutical Industry Average Wholesale Price Litigation, 520 F. Supp. 2d 274, 278 (D. Mass. 2007) (describing "one-sentence" objection); Brief for Respondents at 31, Devlin v. Scardelletti, 536 U.S. 1 (2002) (No. 01-417) (citing examples of objectors who "file a piece of paper containing some variant of 'I object' or 'This is a terrible deal'").

[26] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.643 (2004).

[27] *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.641 (2004) ("In evaluating the settlement, the court should take into account not only the presentations of counsel, but also information from other sources, such as . . . presentations by objections . . . .").

[28] *See* Leslie, *supra* note 24, at 114 ("[C]ourts rarely reject proposed settlements in response to objections."); Thomas E. Willging, Laural L. Hooper & Robert J. Niemec, *An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges*, 71 N.Y.U. L. REV. 74, 140-41 (1996) (reporting that, out of all class actions filed in four federal district courts over a two-year period, "about half of the settlements that were the subject of a [settlement approval] hearing generated at least one objection" and that "[a]pproximately 90% or more of the proposed settlements were approved without changes in each of the four districts").

[29] *See* Michael A. Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?* 59 (May 2008), *available at* http://ssrn.com/abstract=1133995 ("In more than half the cases [out of 687 studied], judges award plaintiffs' attorneys precisely the fee they requested. When judges do award less than what was requested, those downward departures tend to be quite small. On average, judges awarded plaintiffs' attorneys 90% of the fees they requested.").

[30] 536 U.S. 1 (2002).

[31] *See* Scardelletti v. Debarr, 265 F.3d 195, 208-10 (4th Cir. 2001); Cook v. Powell Buick, Inc., 155 F.3d 758, 761 (5th Cir. 1998); Felzen v. Andreas, 134 F.3d 873 (7th Cir. 1998); Gottlieb v. Wiles, 11 F.3d 1004, 1008-09 (10th Cir. 1993); Croyden Associates v. Alleco, Inc.,

members named as the representative plaintiffs, class counsel (with respect to their fee awards), and any class members who successfully moved for intervention under Federal Rule 24.[32] As noted above, given that the defendant, the representative plaintiffs, and class counsel almost always supported the class action settlement (lest there would be no settlement),[33] the formal view typically meant only class members who went through the trouble of intervention could appeal, and this was an exceedingly small group.[34] The second school of thought, what might be called the "informal" one, also adopted by a number of courts of appeals, was that any class member who filed an objection to the settlement—whether they formally intervened or not—could also take an appeal from the approval of the settlement.[35] The second school, of course, opened appeals up to a much bigger group of class members.

In *Devlin*, the Supreme Court was asked to decide which school of thought was the correct one, and the Court sided with the informal view.[36] Although the Court acknowledged that, typically, only "parties" to the final judgment could take appeals, and that class members other than the representative plaintiffs were not usually considered "parties" to class action judgments, the Court nonetheless concluded that class members who filed objections should be considered "parties" solely for the purposes of appealing settlements.[37] Thus, since 2002, any class action objector—no matter how informal the objection—has been able to take an appeal from the approval of a

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969 F.2d 675 (8th Cir. 1992); Guthrie v. Evans, 815 F.2d 626, 628-29 (11th Cir. 1987); Shults v. Champion Int'l Corp. 35 F.3d 1056, 1061 (6th Cir. 1994).

[32] *See Devlin*, 536 U.S. at 15 (Scalia, J., dissenting).

[33] This, of course, is not true with respect to the fee award, which class counsel will sometimes appeal. Moreover, on rare occasions, the representative plaintiffs will oppose the settlement negotiated on their behalf. *See, e.g.*, Lazy Oil Co. v. Witco Corp., 166 F.3d 581 (3d Cir. 1999).

[34] *See, e.g.*, Guthrie v. Evans, 815 F.2d 626, 628-29 (11th Cir. 1987) (holding that "non-named[] class members do not have standing to appeal" if they do not intervene).

[35] *See In re* PaineWebber Inc. Ltd. Partnerships Litigation, 94 F.3d 49, 53 (2d Cir. 1996); Carlough v. Amchem Prods., Inc., 5 F.3d 707, 710 (3d Cir. 1993); Marshall v. Holiday Magic, Inc., 550 F.2d 1173, 1176 (9th Cir. 1977).

[36] *See* Devlin v. Scardelletti, 536 U.S. 1, 14 (2002) (holding that "nonnamed class members . . . who have objected in a timely manner to approval of the settlement at the fairness hearing have the power to bring an appeal without first intervening").

[37] *See id.* at 7-9 (acknowledging that "only parties to a lawsuit . . . may appeal an adverse judgment" but explaining that an objector "will only be allowed to appeal that aspect of the District Court's order that affects him—the District Court's decision to disregard his objections").

class action settlement or the attorneys' fees awarded by the district court pursuant to that settlement.[38]

II. The Concerns Over Objector "Blackmail"

Courts and commentators have been concerned for years that *Devlin* has empowered class members to "blackmail" class counsel into paying them to drop the appeals filed from their objections.[39] Indeed, both the litigants[40] and Justice Scalia's dissent[41] in *Devlin* warned that the Court's decision would lead to such a phenomenon.

The blackmail concern is a specific application of the more general concern with "rent-seeking" by "holdouts."[42] When class members object to settlements and file appeals therefrom, they can prevent the settlements from becoming final for other class members and for class counsel. If their objections have merit, appeals by objectors can lead courts of appeal to reverse the approvals of settlements and fee awards. But even if their objections do not have merit, appeals by objectors can disrupt settlements by requiring class counsel to expend resources fighting appeals, and, more importantly, by delaying the point at which settlements become final. It can take "months or even years" for courts of appeals to rule on civil appeals,[43]

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[38] Although *Devlin* was technically a case involving an appeal only from a settlement and not an award of attorneys' fees, its holding has been extended to appeals from fee awards too. *See, e.g.*, *In re* Synthroid Marketing Litigation, 325 F.3d 974, 976-77 (7th Cir. 2003).

[39] *See, e.g.*, Brunet, *supra* note 1, at 429 (arguing that "*Devlin* may have raised the ante for class action objectors").

[40] *See* Brief for Citibank (South Dakota), N.A., as Amicus Curiae supporting Respondents at 18, Devlin v. Scardelletti, 536 U.S. 1 (2002) (No. 01-417) (arguing that, if permitted to appeal settlements, objectors may "attempt to take personal advantage" of the "delay" caused by the appeal, and thereby create "great pressure" to "pay substantial amounts of 'ransom' to such objectors"); Brief for Respondents at 31, Devlin v. Scardelletti, 536 U.S. 1 (2002) (No. 01-417) (arguing that, if objectors are permitted to appeal a settlement, then some class members will attempt "to extract a fee by lodging generic, unhelpful protests").

[41] *See* Devlin v. Scardelletti, 536 U.S. 1, 15 (2002) (Scalia, J., dissenting) (warning of "'canned' objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests" (quoting Shaw v. Toshiba America, 91 F.Supp.2d 942, 973-74 & n.18 (E.D. Tex. 2000)).

[42] *See, e.g.*, SHAVELL, *supra* note 2, at 124-25 (noting the problem as a justification for eminent domain: "In the building of a road, for example, the ability of essentially any individual on its planned path to prevent the project from going forward could cause serious bargaining problems for a government agency that must acquire land through purchases.").

[43] A.L.I., *supra* note 3, § 3.08 cmt. b ("A baseless objection, followed by an appeal after the objection is rejected, can delay the finalization of a settlement for months or even years.");

and this delay in finalizing settlements can also delay when class counsel receive their fee awards (which are almost always contingent on the settlements).[44] With attorneys' fees in class actions now running as high as hundreds of millions of dollars in a single settlement,[45] it can be very expensive indeed for class counsel to wait an extra one or two years to receive their fee awards.

It should therefore come as no surprise that class counsel are willing to dip into their own pockets to pay objectors to drop their appeals. As one commentator has noted, "[t]he very threat of an appeal can give . . . objectors a major weapon"; "[t]hey now possess substantial leverage when negotiating with the counsel seeking to secure an approved settlement."[46] Although there are many reasons why class counsel might be willing to pay to settle objector appeals—to avoid an adverse result, to avoid litigation expenses,[47] and to avoid delay—the "blackmail" concern has arisen primarily from the considerable premiums class counsel are willing to pay objectors to avoid delay.[48] These premiums have encouraged class members to file objections without any merit simply to collect side settlements from class counsel.[49] Thus, most courts and commentators characterize the

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Brunet, *supra* note, at 429 ("The ability to appeal after filing an objection in the district court—now firmly established after *Devlin*—slows down the class action's progress considerably.").

[44] *See* A.L.I., *supra* note 3, § 3.08 cmt. a (noting that objectors who appeal class action settlements "delay[] distributions to . . . class counsel"); Geoffrey P. Miller & Lori S. Singer, *Nonpecuniary Class Action Settlements*, 60 LAW & CONTEMP. PROBS. 97, 120 n.64 (1997) (explaining that objectors "can appeal the settlement . . . and during the appeal process, the settlement will be in limbo. Class counsel will not be paid and class members will not receive their benefits. The prospect of delaying a settlement for months or years by taking an appeal is the realistic threat that objectors hold over the heads of the settling parties."); William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 UCLA L. REV. 1435, 1449 (2006) (noting that "the class attorneys' own fee [will] be held up through appeals").

[45] *See, e.g.*, Allapattah Services Inc. v. Exxon Corp., 454 F.Supp.2d 1185, 1239-43 (S.D. Fla. 2006) (awarding $333,719,569); *In re* AOL Time Warner, Inc. Securities and "ERISA" Litigation, 2006 WL 3057232, at *2 (S.D.N.Y. Oct. 25, 2006) (awarding $147,500,000); *In re* Royal Ahold N.V. Securities & ERISA Litigation, 461 F.Supp.2d 383, 387 (D. Md. 2006) (awarding $130,647,868); Spartanburg Regional Health Services District, Inc. v. Hillenbrand Industries, Inc., No. 03-2141, slip op. at 11 (D.S.C. Aug. 15, 2006) (awarding $117,157,800).

[46] Brunet, *supra* note 1, at 429.

[47] *See* SHAVELL, *supra* note 2, at 403 (setting forth the conventional settlement theory that litigants decide to settle litigation based on their "estimate[s] of the expected judgment" and their costs of litigating).

[48] *See supra* notes 43-44.

[49] *See, e.g.*, A.L.I., *supra* note 3, § 3.08 cmt. a (noting that class members file objections that are "baseless" or "not valid" in order to extract a "side deal"). Although the willingness

"blackmail" problem as one that arises when class counsel pay off objectors whose appeals have no merit in order to avoid the delays those appeals will cause in the receipt of their fee awards.[50]

It should be noted that class counsel may not be entirely uncompensated for the delays caused by appeals. Sometimes settlement agreements provide that class counsel can earn interest on their fee awards while any appeal is pending; it is not uncommon for the agreement to require defendants to place the corpus of the settlement and attorneys fees in an escrow account so that it earns interest for both class members and class counsel.[51] Nonetheless, class action settlements do not always provide for interest pending appeal,[52] and, even when they do, the rate of interest in an escrow account is often not very lucrative; class counsel can often generate a better return on their money, whether by investing it in another class action case or somewhere else. Thus, one way to understand the blackmail phenomenon is as a willingness on the part of class counsel to settle out of their own pocket meritless appeals in order to receive their fees and put them to higher uses during the "months or years" they would otherwise wait for the appeals to be resolved.

As such, objector blackmail is often seen as something of a "tax" on the settlement of class action litigation. As one district court recently put it:

> [O]bjectors to class action settlements can make a living simply by filing frivolous appeals and thereby slowing down the execution of settlements. The larger the settlement, the more cost-effective it is to pay the objectors rather than suffer the delay of waiting for an appeal to be resolved (even an expedited appeal). Because of these economic realities, professional objectors can levy what is effectively a tax

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by class counsel to settle appeals in order to avoid litigation expenses might also encourage class members to file meritless objections and appeals simply to collect a side settlement, the sums class counsel are willing to pay to settle for these reasons are relatively trivial compared to the sums they are willing to pay to avoid delay. For example, if a $1 million fee award is delayed for one year and class counsel could have earned a 10% return on that money by investing it in another class action, class counsel would be willing to pay an objector as much as $100,000 to settle the objection, which is probably an order of magnitude greater than the amount of money class counsel would spend defending a meritless appeal.

[50] *See supra* notes 43-44 and *infra* notes 52-62.

[51] *See, e.g.*, Stipulation of Settlement at 8, New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc., 234 F.R.D. 627 (W.D. Ky. 2006) (No. 98-99) ("The [Settlement Fund] shall be transferred by the Defendants' insurers . . . to the Escrow Agent within ten (10) days following the entry by the Court of an Order . . . preliminarily approving this settlement . . . .").

[52] *See, e.g.*, Vaughn v. American Honda Motor Co., 507 F.3d 295, 299 (5th Cir. 2007) (noting that the settlement agreement in that case "ma[de] no provision for the payment of pre-judgment interest . . . and [did] not become effective . . . until any appeals are concluded").

> on class action settlements, a tax that has no benefit to anyone other than to the objectors. Literally nothing is gained from the cost: Settlements are not restructured and the class, on whose behalf the appeal is purportedly raised, gains nothing.[53]

Many other courts and commentators believe objector blackmail is a serious problem. District court judges routinely complain of objectors "who seek out class actions to simply extract a fee by lodging generic, unhelpful protests"[54] and who "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."[55] Courts of appeals likewise warn that "objectors may use an appeal as a means of leveraging compensation for themselves or their counsel"[56] and refer to objector appeals as "extortive legal proceedings."[57]

Commentators, too, have expressed these concerns. A good source for the conventional scholarly wisdom on class action objectors is the current draft of the American Law Institute's Principles of the Law of Aggregate Litigation, which is authored by some of the most prominent class action scholars in America.[58] According to the authors of the A.L.I. project, class action objectors often "threaten[] to . . . appeal[] settlement[s] on insubstantial grounds, thereby delaying distributions to . . . class counsel," which, the authors go on to say, "often places class counsel in a compromised position in which the

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[53] Barnes v. FleetBoston Fin. Corp., 2006 U.S. Dist. LEXIS 71072, at *3-*4 (D. Mass. Augg. 22, 2006).

[54] Shaw v. Toshiba America, 91 F.Supp.2d 942, 973-74 & n.18 (E.D. Tex. 2000).

[55] Snell v. Allianz Life Ins. Co., 2000 WL 1336640, at *9 (D. Minn. Sept. 8, 2000). *See also, e.g.*, Varacallo v. Mass. Mut. Life Ins. Co., 226 F.R.D. 207, 240 (D.N.J. 2005) (noting that "'[f]ederal courts are increasingly weary of professional objectors'"); *In re* Holocaust Victim Assets Litigation, 311 F. Supp. 2d 363, 365 (E.D.N.Y. 2004) (characterizing notice of appeal as "an unsuccessful attempt to extort a significant cash award from the settlement fund"); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 216 F.R.D. 197, 218 n.52 (D. Me. 2003) (complaining of "professional objectors" in class action litigation); O'Keefe v. Mercedes-Benz, USA, LLC, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003) (noting that "some of the objections were obviously canned objections filed by professional objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests").

[56] Vaughn v. American Honda, 507 F.3d 295, 300 (5th Cir. 2007).

[57] Duhaime v. John Hancock Mutual Life Insurance Co., 183 F.3d 1, 6 (1st Cir. 1999). *See also, e.g.*, Vollmer v. Publishers Clearing House, 248 F.3d 698, 709 (7th Cir. 2001) (characterizing appeal by objectors as one "solely to enable themselves to receive a fee").

[58] The reporters of the A.L.I. project are Professors Samuel Issacharoff, Robert Klonoff, Richard Nagareda, and Charles Silver.

failure to pay off objections could delay . . . settlement . . . ."[59] Other commentators concur, asserting that "[o]bjectors can bring strike-suit-like objections, forcing the class attorneys to pay them to go away lest the class attorneys' own fees be held up through appeals"[60] and that objectors often "just want to hold up the settlement to extract a commission."[61] Commentators, too, are not afraid to refer to this practice as "blackmail" and "extortion."[62]

What kind of class members would be savvy enough to take advantage of these hold-out opportunities? It is thought that, like class actions themselves, objector blackmail is usually lawyer driven. For example, many courts and commentators worry about "professional objectors" who travel from settlement to settlement looking for class members on whose behalf they can challenge the settlement.[63] Others worry about lawyers who object to settlements as part of a rivalry

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[59] A.L.I., *supra* note, § 3.08 cmt. a.

[60] Rubenstein, *supra* note 44, at 1449.

[61] Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 635 (2003). *See also* Richard A. Nagareda, *Administering Adequacy in Class Representation*, 82 TEX. L. REV. 287, 375 (2003) (noting "the current phenomenon of 'professional objectors'—a term used colloquially to describe plaintiffs' law firms that threaten objections largely as a means to obtain side payments for themselves in exchange for their agreement either to drop the objections or not to raise them in the first place").

[62] Brunet, *supra* note 1, at 409, 426, & 429. *See also*, *e.g.*, MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.643 (2004) ("Some objections . . . are made for improper purposes, and benefit only the objectors and their attorneys (e.g., by seeking additional compensation to withdraw even ill-founded objections)."); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 155 (2001) ("[O]bjectors . . . are often motivated not by the chance to protect the class from a sellout settlement but by the prospect of being paid off by class counsel and/or the defendant to drop their objections and walk away."); Leslie, *supra* note 44, at 129 n.353 (noting that "[i]t is . . . possible that a class member objects to a proposed settlement . . . because she is trying to extort a more profitable side deal from the defendants"); Patrick Woolley, *Rethinking the Adequacy of Adequate Representation*, 75 TEX. L. REV. 571, 618 (1997) (explaining that, "[b]y filing or threatening to file an objection to the settlement, a class member may be able to 'extort' a settlement that represents a disproportionate amount of the settlement fund," but noting that such extortion may be justified in some cases); Miller & Singer, *supra* note 44, at 120 (noting that "objectors have become a major force in class action settlements, . . . in part because [they] sometimes earn a great deal of money by intervening"); Richard B. Schmitt, *Objecting to Class Action Pacts Can Be Lucrative for Attorneys*, WALL ST. J., Jan. 10, 1997, at B1 (describing the practice of objecting to class action settlements in order to extract a sizeable fee from class counsel).

[63] *See, e.g.*, Brunet, *supra* note 1, at 437 n.150 (describing "professional objectors" as "attorneys in private practice who have a specialty in filing objections in class action cases, usually after a proposed settlement has emerged, and always to collect a fee"). It may be easier for professional objectors to operate in securities fraud class actions because they can team up for this purpose with individuals or entities that buy small numbers of shares of stock in a number of publicly traded companies.

between firms to control class action suits. For example, lawyers representing class members in competing actions might use objections to force class counsel in the settling cases to share fee awards with them.[64] This is just one of many different ways firms compete with one another over class action largesse.[65]

To believe that class action objectors have the power to blackmail class counsel is not, of course, to say that all objections are an attempt to do so. Courts and commentators note that objectors can serve a very positive role in class action settlements by bringing attention to flaws in those settlements.[66] Indeed, given that class counsel and defendants by definition support class action settlements, objectors typically provide the only adversarial testing of class action settlements.[67]

Although it is clear that class action objectors file appeals, and that these appeals are often settled by class counsel[68] (and sometimes for very significant amounts of money[69]), it has never been clear what fraction of these appeals are thought to be of the "blackmail" variety.[70] In order to assess how pervasive objector blackmail might be, I consulted an original dataset I created consisting of all class action

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[64] *See, e.g.*, *FTC Workshop--Protecting Consumer Interests in Class Actions, September 13-14, 2004*, 18 GEO. J. LEGAL ETHICS 1197, 1204 (2005) (transcript of remarks by Brian Anderson) (noting that, "as is often the case when we have multiple class actions filed around the country on the same issue," class counsel can be blackmailed by "lawyers who are prosecuting other lawsuits and have been left out of the settlement tent, often because their fee demands were exorbitant").

[65] *See* Nagareda, *supra* note 61, at 342-47.

[66] *See* Brunet, *supra* note 1, at 439-43 (noting that many courts have commented on the important role objectors can play in class action settlements).

[67] *See id*.

[68] *See, e.g.*, Alan B. Morrison, *Must the Interests of the Client Always Come First?*, 53 ME. L. REV. 471, 479 (2001) (noting that class counsel "believe it is proper to buy off these objectors because they think the settlement is a good settlement, and the class is going to get the money sooner that way").

[69] *See, e.g.*, Brunet, *supra* note 1, at 429-30 (noting that "[t]he size of these fees [extracted by objectors] can be considerable" and discussing $1 million fee extracted by objectors in class action suit against Louisiana-Pacific); Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1, 2 (1st Cir. 1999) (noting that objectors settled their appeal on "very, very good" terms).

[70] Professor Brunet seems to believe the number is small, *see* Brunet, *supra* note 1, at 437 ("[T]he quantum of attorney-led free-riding objection activity . . . is probably a low percentage of all class action objections."), but he notes that others believe differently, *see id.* at 437 & nn.151-53; *see also* 5 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 15:37 (4th ed.) ("[O]bjections in 'boilerplate' form filed by 'professional objectors' often delay and unnecessarily complicate class proceedings by requiring court review of purported issues with no colorable merit.").

cases settled in federal district court during 2006.[71] There were 300 class actions that settled during this year. Although it would be difficult to examine the merits of each of these cases and make a determination of how often class members took meritorious versus blackmail-minded appeals from these settlements, it is possible to determine how often class members took any appeal at all. This information is available in the docket entries made in PACER for each of the cases that settled in 2006. Because objector blackmail cannot occur without an appeal,[72] the total number of appeals can be used to establish an upper bound on how often blackmail might be occurring. As Table 1 shows, fewer than 10% of all settlements saw any appeal at all brought by class members.[73] This suggests that objector blackmail may not be a very pervasive problem in class action litigation after all.

Table 1: The number of appeals taken by class members from 2006 federal class action settlements

Number of settlements	*Number of appeals filed from settlements*	*Number of settlements with at least one appeal*
300	41 (.136/settlement)	27 (9.3%)

[71] This dataset is described in more detail in a forthcoming article, *An Empirical Study of Class Action Settlements and their Fee Awards*. The dataset includes all class actions settled in 2006, as measured by the date of the district court's written order granting final approval of the settlement. As there is no single repository of all federal class action settlements, I consulted a variety of sources to identify these settlements. For securities fraud cases, there is a list of settlements generally regarded as comprehensive maintained by Risk Metrics, a for-profit organization that assists institutional investors in making claims in such settlements. For non-securities cases, I also consulted three reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, and *Mealey's Litigation Report*—as well as a web site that maintains an impressive collection of class action settlements, *Class Action World*. Finally, I obtained a list from the Administrative Office of Courts of all district court cases coded as class actions that terminated by settlement between 2006. To my knowledge, this dataset is the most comprehensive set ever compiled of federal class action settlements in any given year.

[72] Prior to 2003, objector blackmail may have occurred even before the appellate stage because class counsel could pay class members to withdraw their objections from before the district court. Although class counsel can technically still do so, in order to discourage such side settlements, the Rules of Civil Procedure were amended in 2003 to require disclosure of these payments to the court.

[73] Besides class members, settlements were occasionally appealed by class counsel unhappy with the fees awarded by the district court and by non-settling defendants concerned about the effect the settlement with the other defendants would have on their cases.

Nonetheless, the concern over blackmail has persisted, and courts and commentators have proposed solutions to the problem. Commentators, for example, have proposed punishing with sanctions class members who make objections that are later deemed by district courts to have been insubstantial.[74] A more draconian proposal, one developed by district courts, is to require class action objectors who wish to appeal settlements or attorneys' fees to post large bonds under Rule 7 of the Federal Rules of Appellate Procedure. As I explain in more detail in Part IV, although Rule 7 has been thought to permit courts to require security for only the most mundane expenses (such as photocopying and binding appellate briefs), courts have begun to include many other expenses when it comes to class action objectors.[75] These expenses include things like the attorneys' fees class counsel and defendants project they will incur on appeal as well as expenses associated with the delay in administering the settlement fund.[76] These bonds can be required whether or not the district court believes the appeal is frivolous, and some of these bonds have totaled hundreds of thousands or even millions of dollars.[77] It goes without saying that few objectors are in a position to pay such amounts, and, if this practice becomes pervasive, it may have the effect of undoing *Devlin* altogether.

III. Another Response To Blackmail: Quick-Pay Provisions

As widespread as the concern over objector blackmail is among courts and commentators, the concern overlooks an important development in class action litigation. The development is what is known among class action lawyers as the "quick pay" provision. As far as I aware, this development has never been discussed by any court nor any commentator. Yet, this development suggests that much of the concern over objector blackmail may be exaggerated. Indeed, in securities fraud settlements, which make up over 40% of the number and the vast majority of the amount of money involved in all federal

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[74] *See, e.g.*, A.L.I., *supra* note 3, § 3.08(d) & cmt. a ("If the court concludes that objectors have lodged objections that are insubstantial and not reasonably advanced for the purpose of rejecting or improving the settlement, the court should consider imposing sanctions against objectors or their counsel . . . .").

[75] *See infra* text accompanying notes 114-122.

[76] *See infra* text accompanying notes 114-122.

[77] *See infra* note 123.

class action settlements,[78] quick-pay provisions have become so ubiquitous that they raise the question whether objector blackmail is still even a problem in these cases.

The quick-pay provision is special wording inserted by class counsel, with the consent of the defendants, into class action settlement agreements. These provisions permit class counsel to receive the fees awarded to them by district courts as soon as those courts approve the class action settlements, *regardless of whether the settlements or fees are appealed*. These provisions deal with the possibility of appeals by obligating class counsel to *repay* the fees if the settlements or their fees are later overturned or modified. An example of one of these provisions is the following:

> Attorneys' fees and expenses awarded by the Court shall be payable from the Settlement Fund upon award, notwithstanding the existence of any timely filed objections thereto, or potential for appeal therefrom, or collateral attack on the Settlement or any part thereof, subject to Lead Plaintiffs' Lead Counsel's obligation to make appropriate refunds or repayments to the Settlement Fund plus accrued interest at the same net rate as is earned by the Settlement Fund, if and when, as a result of any appeal and/or further proceedings on remand, or successful collateral attack, the fee or cost award is reduced or reversed.[79]

The purpose of quick-pay provisions is to greatly reduce the leverage objecting class members have over class counsel by removing the ability of their appeals to delay the point at which class counsel receive fee awards. The thought is that if class counsel have already received their fees awards, then there is no reason for them to pay a premium to objectors with meritless appeals merely to avoid the delay caused by their appeals. They may still be willing to pay objectors with meritless appeals a relatively small sum to avoid the expense of defending against the appeals,[80] but they should feel no compunction to pay the much more considerable premium for avoiding delay. Of course, if the appeals may have some merit to them, then class counsel will still be willing to pay objectors in proportion to the probability of

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[78] *See* Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards* (forthcoming).

[79] Stipulation and Agreement of Compromise at 22-23, Settlement and Release of Securities Action, *In re* Aspen Technology, Inc. Securities Litigation, No. 04-12375 (D. Mass. Feb. 27, 2006).

[80] *See* SHAVELL, *supra* note 2, at 403 (setting forth the conventional settlement theory that litigants decide to settle litigation based on their "estimate[s] of the expected judgment" and their costs of litigating).

an adverse result,[81] and, if the fee award is large enough and firm capitalization small enough,[82] they may even be willing to pay a premium over the expectation value of the appeal on account of risk aversion.[83] These are limitations on the effectiveness of quick-pay provisions that I discuss in greater detail at the end of this Part. With respect, however, to the paradigmatic cases of "blackmail"—payments made to avoid the delay caused by frivolous appeals—quick-pay provisions have the potential to reduce the hold-out tax.[84]

In order to assess how ubiquitous quick-pay provisions have become, I again consulted the aforementioned dataset I created consisting of all class action cases settled in federal district court during 2006. I attempted to obtain the settlement agreements approved by the district court for each of the 300 settlements included in the dataset.[85] I sought these agreements on PACER, from class counsel who negotiated the settlements, and, as a last resort, from the district courts themselves. Three settlements occurred in cases brought by firms or public interest groups that did not seek fee awards, and I was unable to obtain the settlement agreements in four other cases. For the remaining 293 settlements in which I could obtain the settlement agreements and in which counsel sought fees, Table 2 reports the ubiquity of quick-pay provisions.

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[81] *See* ID.

[82] Although some class action firms are very well capitalized, not all of them are. *See, e.g.*, Stephen Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 211 (2001) (noting that the "securities bar . . . is an outlier in terms of . . . . financial capital" because it has "sufficiently deep capital to withstand the expectable procedural motions and the duration of discovery, including the ability to finance credible experts, and the financial and transactional sophistication to create elaborate settlements"); Jeffrey L. Rensberger, *Asbestos and the Limits of Litigation*, 44 S. TEX. L. REV. 1013, 1018 (2003) (noting that "at the end of the twentieth century," the plaintiffs' bar "had the intellectual and financial capital to inflict bankruptcy or a near-equivalent on a major industry").

[83] *See* SHAVELL, *supra* note 2, at 406 ("When we introduce risk aversion into the basic model, we see that it leads to a greater likelihood of settlement.").

[84] One might argue that quick-pay provisions may not reduce the blackmail threat because, even with these provisions, class counsel will still desire to buy off meritless objector appeals in order to accelerate the final resolution of the settlement for the benefit of class members. Given, however, that blackmail bounties come from the pockets of class counsel and not from those of class members, one making this argument would have to believe that class action lawyers are willing to impoverish themselves in order to enrich their clients. Many commentators believe that this is a naively magnanimous view of class action lawyers. *See supra* notes 18-19 and accompanying text.

[85] The relevant language indicating when class counsel received their fees was almost always found only in the settlement agreements themselves; only occasionally was it found in the court orders.

Table 2: The number and frequency of the different payment provisions in 2006 federal class action settlements

Type of Provision	*Number*	*Frequency*
Traditional	111	37.88%
Quick Pay[86]	103	35.15%
None	51	17.41%
Other	28	9.56%
Total	293	100%

The quick-pay provision appeared in over one-third of all class action settlement agreements, most of them following the same boilerplate as was found in the agreement quoted above. This was only slightly less common than the provision setting forth the traditional practice for the payment of lawyers who, like class counsel, work on contingency. These provisions stated that class counsel were to receive their fees only once all possible appeals were exhausted. These provisions, which I call "traditional" in Table 2, usually read something like the following:

> Such attorneys' fees, expenses and costs as are awarded by the Court shall be paid from the Settlement Fund pursuant to the direction of Lead Counsel, but payment shall not be made before . . . the occurrence of the later of: (a) if there are no appeals, then the expiration of the time for the filing or noticing of any appeals from the Order of Final Judgment and Dismissal; or (b) if there is an appeal, the date on which the Order of Final Judgment and Dismissal which has not been materially altered, amended or modified in any respect by any Court without express consent by all parties, is no longer subject to any further judicial review or appeal whatsoever, whether by reason of affirmance by a court of last resort, lapse of time, voluntary dismissal of the appeal or otherwise. For purposes of this Paragraph, an "appeal" shall include any request for reargument or reconsideration, a petition for a writ of certiorari or other writ that may be filed in connection with approval or disapproval of this Settlement.[87]

In most of the remaining settlements (almost one-fifth of the total), the agreements said nothing at all about when class counsel

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[86] In two of these settlements, the quick-pay terms did not execute automatically, but were left to the option of the class action defendants once the settlement was approved. *See* Stipulation of Settlement with Ernest & Young LLP at 19-20, P. Schoenfeld Asset Management LLC v. Cendant Corp., No. 98-4734 (D.N.J. July 25, 2006); Settlement Agreement, Smith v. Flanagan at 4, 32-33, No. 03-2895 (D. Md. Feb. 17, 2006).

[87] Amended Stipulation of Settlement at 8-9, 22-23, *In re* DVI, Inc. Securities Litigation, No. 03-5336 (E.D. Pa. Nov. 17, 2006).

would receive their fees. It is unclear when class counsel would have received their fees in these settlements, although, in light of the traditional practice that contingency-fee lawyers receive their fees only once their clients recover, class counsel probably received their fees in these cases only once any appeals to the settlements or fees had been exhausted.[88] In the rest of the settlements (less than one-tenth of the total), the agreements said something more complicated than the foregoing, and I have labeled these agreements as "other" in Table 2. Although it is somewhat unclear when class counsel would have received their fees in these other cases, it appears that in many instances savvy class members would have been able to structure their objections in a way to delay the receipt of fee awards until appeals from those objections had been resolved.[89]

Thus, although quick-pay provisions were not included in the majority of class action settlements, they were nonetheless well

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[88] *See also In re* Diet Drugs Products Liability Litig., 2000 WL 1665134, at *3 (E.D. Pa. Nov. 6, 2000) ("[T]he consequences of an appeal from approval of a class action settlement may be similar to a stay [of the judgment approving the settlement].").

[89] In 15 settlements, the agreements set forth the traditional practice that class counsel were to receive their fees only once the settlement became "final" and all appeals were exhausted, but the agreements went on to define "final" in a way that seemed to exclude appeals that challenged *only* the fees awarded to class counsel. *See, e.g.*, Stipulation of Settlement of Securities Action at 7, 18-19, Ohio Public Employees Retirement System v. Freddie Mac, MDL No. 1584 (S.D.N.Y. Oct. 26, 2006) ("Any attorneys' fees and expenses awarded by the Court . . . shall be paid . . . to Lead Counsel . . . within three (3) days after the Judgment becomes Final . . . . Any appeal or proceeding seeking subsequent judicial review pertaining solely to the Court's approval of . . . the award of attorney's fees or expenses shall not affect the time set forth above for the Judgment to become Final.). In four agreements, class counsel were permitted to receive early any portion of their fee awards that were not challenged on appeal. *See, e.g.*, Stipulation of Settlement at 6-7, 18-21, Levitan v. McCoy, No. 00-5096 (N.D. Ill. Mar. 16, 2006) ("If a Class Member or other Person appeals the Fee Award, payment of any uncontested amount shall not be stayed, but instead shall be paid as provided herein as if no appeal had been taken. The contested amount shall remain in the Settlement Fund, but shall not be paid to anyone until and unless a final order is issued by the Court in relation to any contest. To the extent such appeal is unsuccessful, any attorney's fees, costs or expenses found to have been properly awarded but not yet paid shall immediately be paid, but not before the Effective Date."). In these 19 settlements, it seems fairly clear that class members could structure their objections in a way to delay the distribution of fees to class counsel.

This is less clear in the remaining 9 settlements. The agreements in these settlements set forth a date certain on which class counsel would receive their fees and did not address what might happen to that date if appeals were filed. *See, e.g.*, Stipulation and Agreement of Settlement at 14-15, Hanley v. Warburg Pincus Capital Co., L.P., No. 96-390 (D. Ariz. Apr. 24, 2006) ("Attorneys' fees . . . shall . . . be advanced by the Settling Defendants to Plaintiffs Lead Counsel within ten (10) days of Court approval of the Settlement and the award of counsel fees and expenses . . . ."). It is not clear whether class members could have delayed the distribution of fee awards to class counsel in these 9 settlements.

represented. They were even better represented, however, in securities fraud class actions. As Table 3 shows, quick-pay provisions are, in fact, the near-exclusive province of securities fraud class actions; almost four-fifths of securities fraud settlements included quick-pay provisions, but only one-twentieth of non-securities class action settlements did so.

Table 3: The frequency of the different payment provisions in 2006 federal class action settlements

Type of Provision	*Securities Cases (n=118)*	*Non-Securities Cases (n=175)*
Quick Pay	79.66%	5.14%
Traditional	11.02%	56.00%
None	4.24%	26.29%
Other	5.09%	12.57%
Total	100%	100%

Table 3 raises the question whether objector blackmail is still much of a problem in securities fraud class actions. Although, as I discuss below, there is a set of cases in which objectors with meritless appeals might still be able to collect premiums for delay even when quick-pay provisions are included in settlement agreements, these cases are probably rare. To the extent objector blackmail is still a great concern, it may be only in non-securities cases.

It is interesting that class counsel do not use quick-pay provisions more often in non-securities cases. Although it is possible that objector blackmail is less of a problem in such cases (perhaps because it is more difficult for professional objectors to operate there[90]), it is still hard to see why class counsel would not use the provisions. From their perspective, there would seem to be little downside to these provisions (it would always seem better to receive fees earlier rather than later), and, as far as I aware, courts have never discouraged (or even scrutinized) the provisions.

It strikes me that there are a few possible hypotheses to explain this dramatic divide between securities and non-securities cases. The first hypothesis is that quick-pay provisions were invented by securities class action lawyers—perhaps, again, because objector

[90] *See supra* note 63.

blackmail was more prevalent in the securities area given the relative ease with which professional objectors can operate there—and that knowledge of these provisions simply has not spread to the class action lawyers who bring non-securities cases. Given that this article is the first published work drawing attention to these provisions, to the extent the provisions have spread at all, it has probably been by word of mouth, by one firm examining another firm's settlements as a template for its own, or by working alongside another firm in a particular case. The informality of this process, combined with the fact that firms tend to specialize in a given type of class action work—with the firms that do securities class actions perhaps the most concentrated and insular of all[91]—makes it easy to imagine quick-pay provisions becoming well known among securities class action lawyers while remaining relatively unknown among other class action lawyers. A quick look at information in my dataset, however, casts some doubt on this hypothesis. Although the ten law firms that handled the greatest number of securities cases in 2006 used quick-pay provisions in 85% of the 85 securities cases in which they were involved, *these same firms* used quick-pay provisions in only 12.5% of the 16 non-securities cases in which they were involved.

The other hypotheses posit that it is not class counsel but defendants who are responsible for the relative dearth of quick-pay provisions in non-securities cases. It is not obvious why defendants would be more reluctant to agree to quick-pay provisions in non-securities cases than in securities cases: defendants can be asked to place settlement proceeds, including attorneys' fees, in escrow accounts at the time settlements are approved by district courts,[92] and, therefore, they should often be indifferent in either type of case as to whether class counsel are paid from the escrow account earlier or later. Moreover, insofar as quick-pay provisions make objector blackmail

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[91] *See, e.g.*, Stephen Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 211 (2001) (noting that the "securities bar" is "dominated by a handful of firms"); John C. Coffee, Jr., *Litigation Governance: A Gentle Critique of the Third Circuit Task Force Report*, 74 TEMP. L. REV. 805, 806 & n.6 (2001) (noting that "[t]he plaintiff's bar in securities class actions is extremely concentrated and growing more so").

[92] Indeed, sometimes they are required to do so even before the settlement has received final approval. *See, e.g.*, Stipulation of Settlement at 8, New England Health Care Employees Pension Fund v. Fruit of the Loom, Inc., 234 F.R.D. 627 (W.D. Ky. 2006) (No. 98-99) ("The [Settlement Fund] shall be transferred by the Defendants' insurers . . . to the Escrow Agent within ten (10) days following the entry by the Court of an Order . . . preliminarily approving this settlement . . . .").

less lucrative, they might discourage some appeals altogether,[93] and thereby accelerate the final resolution of settlements, something most defendants who have agreed to a settlement should favor.

There are two scenarios, however, in which defendants might rationally refuse to go along with quick-pay provisions, and it is possible that these scenarios are more prevalent in non-securities cases than in securities cases. One scenario might be when the attorneys' fee awards are so great that defendants are uncertain that class counsel will be able to repay the awards should something happen to the settlement on appeal. In this scenario, defendants may not be willing to run the risk of paying class counsel early through quick-pay provisions. Class action lawyers have reported to me that defendants occasionally demand such onerous terms to guarantee repayment (*e.g.*, letters of credit, etc.) that they sometimes drop their demand for quick-pay provisions. The trouble with this hypothesis, however, is that fee awards are usually much larger in securities fraud cases than in non-securities cases.[94] Indeed, in 2006, fee awards of $10 million or more were twice as prevalent in securities cases than non-securities cases—18% versus 9%.

A second scenario might be when defendants are able to benefit from delays caused by appeals. This might occur when settlements do not involve the transfer of cash from defendants to class members (*e.g.*, they involve only an injunction or in-kind relief, such as coupons). In these cases, there is no settlement corpus to put into an escrow account, and, as such, defendants can keep the sums awarded by the district court for attorneys' fees until any appeals are resolved. Defendants might be less inclined to agree to quick-pay provisions when they would otherwise keep the attorney's fees pending appeal, and it is true that class action settlements are cashless more often in non-securities cases than securities cases.[95]

It is also possible that some defendants may be put off by quick-pay provisions simply because they are disinclined to do anything that makes life easier for class counsel, and that such defendants are more likely to be found in non-securities cases. Corporate defendants, and especially their insurers (who are often the real parties in interest), are

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[93] Alternatively, quick-pay provisions might not lead to fewer appeals, but, rather, simply to less lucrative settlements of those appeals.

[94] See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards* (forthcoming).

[95] See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards* (forthcoming).

frequent class action defendants. When they agree to permit class counsel to receive fees early, they agree to increase these lawyers' effective compensation. Thus, either because they dislike class action lawyers as an emotional matter or because they do not want to increase the compensation of class counsel for fear that class counsel will invest the extra money in suits against them in the future, defendants and their insurers might be reluctant to agree to quick-pay provisions. It is possible that this reluctance is more prevalent among non-securities defendants than securities defendants because the securities fraud insurance industry is extremely concentrated,[96] and, therefore, much easier to acclimate to quick-pay provisions, than the much less concentrated general liability insurance industry. If this hypothesis is correct, then it suggests that the divide between securities and non-securities cases may be surmountable. If the greatest barrier to more frequent use of quick-pay provisions is lack of experience with these provisions on the part of non-securities defendants and their insurers, then the path to making them more prevalent may lie simply in educating defendants and insurers to the potential virtue of these provisions.

With all that said, it is important to note that, although quick-pay provisions may mitigate the hold-out tax that can be assessed by class action objectors who file meritless appeals, they may not be able to eliminate the tax altogether. Quick-pay provisions have at least three limitations, and some of the limitations are more significant than others. The first limitation is one I noted above: quick-pay provisions do not liberate class counsel from having to defend an appeal once it is filed; as such, objectors can still file frivolous appeals and collect a side payment from class counsel who do not wish to spend the money to file an appellate brief. Although this is certainly a limitation to quick-pay provisions, this limitation is not very significant. The cost to file an appellate brief, especially in the case of a frivolous appeal, will probably not be more than a few thousand dollars. This surely pales in comparison to the more significant premium class counsel are willing to pay to avoid the delay associated with appeals. Thus, this limitation notwithstanding, quick-pay provisions can still mitigate the

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[96] *See* Tom Baker & Sean Griffith, *Predicting Corporate Governance Risk: Evidence from the Directors' & Officers Liability Insurance Market*, 74 U. CHI. L. REV. 487, 493 (2007) ("[T]wo insurers (AIG and Chubb) together account for more than half of the market for [corporate directors' and officers'] insurance by premium volume.").

lion share of the hold-out tax that objectors can assess on class counsel.

This brings me to the second limitation: although quick-pay provisions may help class counsel avoid the costs of delay, they may *only* help class counsel. The conventional wisdom regarding objector blackmail has focused on the threat vis-à-vis class counsel, but it is possible that, in some cases, class action defendants might themselves be eager to buy off even meritless objector appeals in order to accelerate the final resolution of settlements. Although, as noted above, defendants often place the corpus of the settlement in an escrow account pending appeal, and, therefore, will not have access to the money whether or not the settlement is appealed, in some special cases, the fact that even meritless litigation is still pending may create difficulties for defendants for other reasons. The most obvious of these difficulties are those that could be created in the financial markets. Publicly-traded companies are required to report on their financial disclosures the potential losses associated with litigation so long as it is pending, and reports of especially large pieces of litigation might disrupt stock prices if the financial markets are unable to discriminate between settlements delayed by potentially meritorious appeals and settlements delayed by wholly meritless ones. Moreover, for similar reasons, class action litigation prolonged even on meritless grounds could possibly interfere with corporate merger and acquisition activities.[97] In either case, defendants might be willing to pay considerable premiums to settle class action litigation, quick-pay provisions notwithstanding. Again, although this consideration no doubt limits the effectiveness of quick-pay provisions in some cases, and this limitation might be a significant one because disruptions in the financial markets might be very expensive for defendants, it is not at all clear that defendants would have to worry about such disruptions very often. I would think it would be rare for an unresolved settlement to interfere with merger activity and perhaps only somewhat more common for one to disrupt stock prices.

The third limitation on the effectiveness of quick-pay provisions might occur when objector appeals may actually have some merit to them and the fee awards in the settlements are so large (and the

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[97] *See, e.g.*, Vanessa O'Connell, *Tobacco Firms Exposed to New $200 Billion Claim—Kraft Spinoff Faces Delay After 'Light Cigarette' Suit Gets Class Action Status*, WALL ST. J., Sept. 26, 2006, at A3 (reporting that pending $200 billion class action against Philip Morris "will delay an expected plan by Philip Morris USA parent Altria Group Inc. to spin off its Kraft Foods Inc. unit").

capitalization of the class action firms so small) that quick-pay provisions transform the premiums class counsel were willing to pay to avoid delay into premiums they are willing to pay to avoid risk. That is, if there is some chance class counsel might lose the appeal, class counsel might not feel free to place especially large fee awards into non-liquid or risky investments pending the resolution of the appeal; they might worry they could not repay the award should they lose. In these scenarios, class counsel are delayed not in the receipt of their fees, but in their ability to spend them as they would like. As such, class counsel might still be willing to pay a significant premium to objectors in order to avoid the risk of loss on appeal. It is true that the concern with objector blackmail has focused on frivolous appeals, but even appeals with small but non-zero probabilities of success can induce the payment of premiums on account of risk aversion.

Thus, although quick-pay provisions can mitigate the hold-out tax assessed by blackmail objectors, they cannot eliminate the tax altogether. Objectors even with meritless appeals may be able to extract a small sum from class counsel for the litigation nuisance their appeals cause. Moreover, in a small number of settlements, they may be to extract a large sum from either defendants or class counsel if the litigation is inconveniently timed or unusually large. Nonetheless, this still leaves a broad set of class action settlements in which quick-pay provisions can be a useful tool to neutralize much of the threat posed by objector blackmail.

IV. The Implications of Quick-Pay Provisions

The findings regarding quick-pay provisions in this Article raise two questions. First, although quick-pay provisions may have the virtue of mitigating objector blackmail, these provisions have also transformed class action lawyers into something that had been previously unknown in the law: contingency-fee lawyers who get paid before their clients. Is this a good thing? I argue that is, that quick-pay provisions are, on balance, a positive development that should not be discouraged. Second, courts and commentators have proposed a variety of measures to solve the problem of objector blackmail. Are quick-pay provisions superior to their proposals? I argue that they may very well be, that quick-pay provisions have the potential to mitigate objector blackmail without the collateral damage of the other approaches. In my view, the more draconian solutions proposed by

courts and commentators should, at the very most, be confined to class action settlements without quick-pay provisions or to those settlements where there is some reason to believe quick-pay provisions are ineffective.

A. Are Quick-Pay Provisions A Net Good?

At first blush, quick-pay provisions might appear entirely self serving on the part of class counsel. In an individual representation, it is hard to imagine any client who would agree to permit his contingency-fee lawyer to receive fees from the defendant months or years before he would be entitled to receive his own award.[98] To the extent either party is permitted to receive money early with the promise to pay it back should something occur on appeal, one might imagine the client demanding that privilege for himself. Moreover, in many class actions—those which are not governed by a fee-shifting statute—one of the bases for awarding fees in the first place to the lawyers is restitution: the lawyers have enriched the class and it would be unjust not to compensate them for doing so.[99] Before the appeals from the settlement are resolved, however, the class has not been enriched, and one would think there would be little injustice in waiting until the class has been enriched to pay the class action lawyers.

But quick-pay provisions may have some benefits for class members as well. For one thing, insofar as these provisions reduce the hold-out tax that can be assessed against class counsel, these provisions may make class action litigation more attractive to class counsel, and, thereby, increase the number of cases they file. This is, of course, a benefit to the class members they represent. Moreover, it is possible that class members benefit from quick-pay provisions because the provisions so suppress the hold-out tax that they discourage some objectors from filing meritless appeals in the first place. If quick-pay provisions lead to fewer appeals being filed in the first place (as opposed to the same number of appeals being filed but

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[98] It is common for class counsel to receive their fees before class members actually receive compensation from settlements because it can take many months or even years to distribute settlement proceeds to class members. But quick-pay provisions take this phenomenon several steps further by permitting contingency-fee lawyers to receive their fees even before their clients' cases are *over*; that is, before their clients are even legally entitled to receive compensation from defendants.

[99] *See* Charles Silver, *A Restitutionary Theory of Attorneys' Fees in Class Actions*, 76 CORNELL L. REV. 656 (1991).

settled for smaller sums), then there may be more cases in which no appeals at all are filed, which, of course, means more cases in which class members can be paid without waiting for appeals to be resolved. That is, it is possible that quick-pay provisions will accelerate settlement payments to class members.

At the same time, it is also possible that quick-pay provisions will do the opposite. Quick-pay provisions take away some of the incentive on the part of class counsel to settle appeals quickly; as such it is possible that, when there are appeals, the litigation will drag on longer when the settlements include quick-pay provisions than when they do not. It should be noted, however, that it is not necessarily to the detriment of class members if quick-pay provisions prolong the appellate process. If the appeals may have some merit to them (*i.e.*, those appeals least likely to be discouraged altogether by quick-pay provisions), then it may be better for class members for appellate courts to hear them; most appeals from class action settlements can provide benefits not only to the objectors who bring them, but to other class members as well. For example, when an objector argues in a common-fund settlement that class counsel should have received only 25% of a settlement rather than the 30% awarded by the district court, every class member stands to benefit from a distribution of the disputed 5%. Much the same is true when an objector argues that the settlement allocation formula shortchanges some categories of class members versus others, or that class counsel accepted a low-ball settlement. It is for this reason that some commentators believe that class counsel should not be permitted to settle objector appeals at all.[100]

In light of these considerations, it is hard to see how quick-pay provisions threaten class members with much, if any harm; rather, it seems likely that the provisions will benefit them. Not only do quick-pay provisions increase the effective compensation of class counsel and thereby encourage them to take more class action cases in the first place, but the provisions may accelerate settlement payments to class members by discouraging meritless appeals from being filed altogether. Moreover, even to the extent the provisions may delay settlement payments to class members by discouraging class counsel

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[100] *See, e.g.*, Koniak & Cohen, *supra* note 62, at 132 ("Paying objectors and their counsel to drop their challenges to class settlements is, at best, legally questionable behavior and, at worst, evidence of collusion and inadequate representation."); Katherine Ikeda, Note, *Silencing The Objectors*, 15 GEO. J. LEGAL ETHICS 177 (2001).

from settling the appeals that are filed, class members may benefit from the delay when the appeals that are filed are not meritless.

Of course, just because quick-pay provisions are good for class members does not mean they are desirable from a social perspective. As I noted above, insofar as the provisions make the compensation to class action lawyers slightly more lucrative, they may lead to a greater number of class action filings. Thus, in one sense, the question whether quick-pay provisions are socially desirable cannot be separated from the question whether we should have more or fewer class action cases. And, in this regard, what is good from the perspective of potential future class members is bad from the perspective of potential future defendants (which, as I noted, may explain why these provisions are not ubiquitous despite their benefits for both class counsel and class members).

Unfortunately, there is no easy way in which to answer the question whether we should have more class actions or fewer. It is a highly contested question of public policy, the answer to which depends on one's premises and empirical intuitions. For example, the predominant justification for class action litigation is the utilitarian goal of forcing defendants to fully internalize the costs of their activities.[101] On this view, the fact that class action lawyers are not already fully incentivized to bring every possible class action—insofar as contingency-fee lawyers bear the full risk of the class action yet reap only a fraction of the settlement award[102]—might speak in favor of any measure—including quick-pay provisions—that makes class representation more lucrative. On the other hand, a utilitarian might worry that, despite the fact that class action lawyers are not fully incentivized, they still might be filing too many class action cases on account of the fact that they can extract a premium from defendants

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[101] *See, e.g.*, A.L.I., *supra* note 3, § 1.03 cmt. c (explaining that the primary purpose of aggregate litigation is to "forc[e] a potential tortfeasor or wrongdoer to internalize a cost that would otherwise be spread across a large group"); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 8 (1991) (explaining that "[i]n the absence of a class action device, [certain widespread, but small] injuries would often go unremedied because most individual plaintiffs would not themselves have a sufficient economic stake in the litigation to incur the litigation costs").

[102] *See, e.g.*, Alon Klement, *Who Should Guard the Guardians? A New Approach for Monitoring Class Action Lawyers*, 21 REV. LITIG. 25, 34 (2002) ("Class action attorneys bear all these costs [of litigation], yet enjoy only part of the returns.").

who, eager to avoid either the considerable costs of litigating[103] or the risks of an outlier jury verdict, will settle cases for more than their expected value.[104] A utilitarian might also worry that some causes of action, such as those which provide for extra-compensatory statutory damages, were not intended to be fully enforced; as such, further inducing class action lawyers to bring such cases might result in (even more) overdeterrence.[105] It is, accordingly, difficult to say whether we should have more class actions or fewer, and, therefore, difficult to say whether quick-pay provisions are socially desirable.

What can be said, however, is that, regardless of one's view of the level of class action litigation, quick-pay provisions are but a small contribution to either the solution or the problem. There are better ways to alter compensation to class counsel than by relying on bounties extracted by objectors; courts, which have considerable discretion over the fees they are awarded,[106] are in a better position to decide whether class action lawyers should receive more or less money. As such, there is little reason to discourage quick-pay provisions from a social perspective.

In sum, given that quick-pay provisions probably do not harm, and may very well benefit, the members of the classes in the settlements in which they are used, there would seem little reason to discourage them.

B. Are Quick-Pay Provisions The Best Solution To Objector Blackmail?

As I have noted, courts and commentators have proposed two measures to solve the problem of objector blackmail. The first

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[103] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. ---, 127 S. Ct. 1955, 1967 (2007) (noting in a class action case that "the threat of discovery expense [can] push cost-conscious defendants to settle even anemic cases").

[104] *See In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298-99 (7th Cir. 1995) (noting that defendants in class actions come under "intense pressure to settle" and might "be forced by fear of the risk of bankruptcy to settle even if they have no legal liability").

[105] *See* Richard A. Nagareda, *Aggregation and its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1878 (2006) ("[C]lass settlement pressure is most troubling when aggregation would not merely enable the enforcement of cost-prohibitive claims, but in addition, would distort the underlying remedial scheme. The most glaring of these situations arises when a class action would aggregate statutory damages that have been decoupled from claimants' actual losses specifically in order to enable individual litigation. Aggregation of statutory damages in this setting would make for a kind of double counting discordant with the underlying remedial scheme.").

[106] *See supra* note 17.

measure, proposed by commentators, is to sanction class members for raising objections later deemed insubstantial.[107] The second measure, adopted by some district courts, is to require class members who wish to appeal settlements or awards of attorneys' fees to post large bonds under Federal Rule of Appellate Procedure 7.[108] In my view, given that quick-pay provisions can greatly mitigate the blackmail threat, these measures are, at best, unnecessary, and, at worst, harmful.

The trouble with the use of *ex post* sanctions against class action objectors is that district courts may not be very good at separating frivolous objections that are filed only to extract a premium for causing delay, from uninformed objections filed for less sinister reasons, from objections that may have some merit depending on which judge is looking at them. Not only do district courts face docket pressures that may make them especially eager to discourage anything that might interfere with the termination unwieldy class litigation,[109] but they are naturally predisposed to see their own rulings as beyond reproach. Consider, for example, that some district courts have found objections to fee awards to be "frivolous" even when those awards are in excess of the median class action award of 25%.[110] There may be many questions for which there is a correct answer in the law, but the percentage of a settlement that should be awarded to class action attorneys is not one of them.[111] If challenging a fee award above the median can be frivolous, then any appeal from a class action settlement can be. Thus, it seems to me that *ex post* sanctions will inevitably chill some class members who would raise substantial

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[107] *See supra* note 74 and accompanying text.

[108] *See supra* notes 75-77 and accompanying text.

[109] *See, e.g.*, John C. Coffee, *Understanding The Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 714 n.121 (1986) ("Although the case law may require full and elaborate judicial review before a settlement is approved, it is doubtful that courts have much incentive to be very demanding. Their deferential attitude is probably best expressed by one recent decision which acknowledged that: 'In deciding whether to approve this settlement proposal, the court starts from the familiar axiom that a bad settlement is almost always better than a good trial.'"); Susan P. Koniak, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1122-23 (1996) (arguing that class actions "magnify" district courts' "strong disposition toward settlements" because "the alternatives—trying the class action or, worse yet, trying the multitude of suits that make up the class action individually—are particularly burdensome alternatives," and noting that a study by the Federal Judicial Center "shows that the average fairness hearing takes up about 40 minutes of court time").

[110] *See, e.g., In re* Heritage Bond Litig., 2005 WL 2401111, at *5 (C.D. Cal. Sept. 12, 2005) (noting that one argument on appeal would be "that the attorneys' fees in this case should have been capped at the 25% benchmark").

[111] *See supra* note 17.

objections from doing so. Given that there is typically no adversarial testing of class action settlements unless objectors appear to contest them,[112] and given that class counsel may be able to neutralize the blackmail threat just as well in many cases with quick-pay provisions, it is hard to see how sanctions are worth the risks. At the very most, sanctions should be available only in those settlements for which they might be able to make a difference: those which do not include quick-pay provisions or those special cases in which quick-pay provisions might be seriously ineffective.

This is doubly true for the requirement of posting large bonds in order to take appeals from settlements. These bonds have been required under Rule 7 of the Federal Rules of Appellate Procedure, which permits district courts to order "an appellant to file a bond or provide other security . . . to ensure payment of costs on appeal."[113] Although the word "costs" in Rule 7 has usually been understood to include only the mundane items provided for in Rule 39[114]—*e.g.*, the paltry expenses of photocopying and binding the appellate briefs and appendices, and the expense of obtaining the portions of the trial reporter's transcript that are necessary for the appeal[115]—courts have begun to require much more of class members who wish to appeal a settlement or fee award. Perhaps the most extreme example is found in the courts that have begun requiring objectors to post bonds to cover the increased expense in settlement administration caused by an appeal.[116] These expenses are derived from the fact that the

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[112] *See supra* note 22 and accompanying text.

[113] FED. R. APP. P. 7.

[114] *See, e.g.*, 16A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE & PROCEDURE § 3953, at 293 (3d ed. 1999) ("The costs secured by a Rule 7 bond are limited to costs taxable under Appellate Rule 39. They do not include attorney fees that may be assessed on appeal."); *In re* Am. President Lines, Inc., 779 F.2d 714, 716 (D.C. Cir. 1985) ("The costs referred to [in Rule 7] are simply those that may be taxed against an unsuccessful litigant under Federal Appellate Rule 39, and do not include attorneys' fees that may be assessed on appeal.").

[115] *See* FED. R. APP. P. 39.

[116] *See, e.g.*, *In re* Cardizem CD Antitrust Litig., 391 F.3d 812, 817 (6th Cir. 2004) (affirming Rule 7 bond that included "$123,429.00 in incremental administration costs" because the state law on which the suit was based required plaintiffs to pay "damages" to defendants for filing frivolous litigation); *In re* Pharmaceutical Industry Average Wholesale Price Litig., 520 F.Supp.2d 274, 279 (D. Mass. 2007) (including in Rule 7 bond "damages resulting from delay or disruption of settlement administration"); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 2003 WL 22417252 (D. Me. Oct. 7, 2003); *In re* NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 124, 128 (S.D.N.Y. 1999) (including $50,000 in Rule 7 bond for "the disruption costs resulting from [a] shut-down of settlement administration").

settlements are often distributed by for-profit companies, and these companies must be kept on retainer during an appeal (because they have already begun their work before the settlement is even approved).[117] These expenses can be enormous.[118] Other courts have required objectors to post bonds to cover any interest on the settlement (or attorneys' fees) that would have accrued during an appeal; these expenses, too, can be enormous.[119] Still other courts have required objectors to post bonds to cover the projected attorneys' fees class counsel and the defendant would expend defending the settlement on appeal, either on the theory than an appeal is frivolous and the court of appeals is likely to assess attorneys' fees as a sanction under Federal Rule of Appellate Procedure Rule 38[120] or because the statute on which the class suit was originally based shifted attorneys' fees to prevailing plaintiffs.[121] I have seen one judge go even further: after adding up many of the forgoing expenses, the judge then doubled the required bond because he believed the class members were attempting

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[117] *See In re* NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 124, 128 (S.D.N.Y. 1999) (noting that "'the processing of claims is interrupted and restarted, with additional expenses necessarily incurred in extending the leases on office space and the leases on equipment, extending insurance and website maintenance, picking up mail and answering inquiries about the status of claims administration during its hiatus, and rehiring and retraining of the claims administration staff'").

[118] *See, e.g.*, *In re* NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 124, 128 (S.D.N.Y. 1999) ("Plaintiffs aver that the disruption costs resulting from even a six-month shut-down of settlement administration would total approximately $526,100.").

[119] *See, e.g.*, Barnes v. FleetBoston Fin. Corp., 2006 U.S. Dist. LEXIS 71072, at *8-*9 (D. Mass. August 22, 2006) (including in Rule 7 bond "5.15% interest on a settlement of $12.5 million . . . for one year" or $643,750); Conroy v. 3M Corp., 2006 U.S. Dist. LEXIS 96169, at *11 (N.D. Cal. August 10, 2006) (including in Rule 7 bond "$239,667 in anticipated post-judgment interest to compensate for the delayed distribution of the $4.1 million cash portion of the settlement").

[120] *See, e.g.*, *In re* Compact Disc Minimum Advertised Price Antitrust Litig., 2003 WL 22417252, at *1 (D. Me. Oct. 7, 2003) (including attorneys' fees on appeal in Rule 7 bond because a "Rule 7 bond can cover damages assessed under Fed. R.App. P. 38"); Vaughn v. American Honda Motor Co., 2007 WL 2901666, at *10 (E.D. Tex. Sept. 28, 2007) (including attorneys' fees because "amount of bond should reflect the significant possibility that any objector's appeal will be subject to Fed. R.App. P. 38"), *rev'd by* 507 F.3d at 299. *Cf. In re* Cardizem CD Antitrust Litig., 391 F.3d 812, 817 (6th Cir. 2004) (affirming Rule 7 bond that included $50,000 in attorney's fees because the state law on which the suit was based required plaintiffs to pay "damages" to defendants for filing frivolous litigation).

[121] *See, e.g.*, *In re* Heritage Bond Litigation, 2005 WL 2401111, at *5 n.8 (C.D. Cal. Sept. 12, 2005) (including attorneys' fees on appeal in Rule 7 bond because the Private Securities Litigation Reform Act "permits attorneys' fees to a prevailing plaintiff"), *vacated by* 2007 WL 1340633 (9th Cir. 2007); *In re* NASDAQ Market-Makers Antitrust Litigation, 187 F.R.D. 124, 128 (S.D.N.Y. 1999) (including $50,000 in attorneys' fees on appeal in Rule 7 bond because the Clayton Act permits plaintiffs to recover the "'cost of suit, including a reasonable attorney's fee'").

to blackmail class counsel.[122] All told, the required bonds can reach hundreds of thousands or even millions of dollars.[123]

I am skeptical that Rule 7 permits district courts to require bonds in these amounts. I doubt, for example, that a statute that permits prevailing plaintiffs to recover attorneys' fees from defendants should be interpreted through the lens of Rule 7 to permit some prevailing plaintiffs (*i.e.*, class members who fully support the settlement) to recover attorneys' fees from other prevailing plaintiffs *(i.e.*, those class members who do not fully support it but who are nonetheless bound by it).[124] Moreover, the notion that class members should be required to post bonds for interest on the settlement or expenses related to delayed settlement administration appears to confuse costs bonds under Rule 7 with supersedeas bonds.[125] Nonetheless, it is not my objective here to assess whether district courts have the doctrinal authority to require such amounts of class members who seek to appeal settlements; courts are split on many of these issues.[126] Rather, my objective is to

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[122] *See In re* Heritage Bond Litigation, 2005 WL 2401111 (C.D.Cal. Sept. 12, 2005) ("[I]n full view of the frivolousness and disingenuous nature of the appeal . . . this Court finds that two times the requested amount, or $208,000, is appropriate."), *vacated on other grounds by* 2007 WL 1340633 (9th Cir. 2007).

[123] *See, e.g.*, Allapattah Services, Inc. v. Exxon Corp., 2006 WL 1132371, at *18 (S.D. Fla. Apr. 7, 2006) (requiring objector to post Rule 7 bond in the amount of $13,500,000 for "damages, costs and interest that the entire class will lose as a result of the appeal"); Carnegie v. Household Bank (N.D. Ill. Nov. 8, 2006) (requiring objectors to each post Rule 7 bonds of $1,479,295); Barnes v. FleetBoston Fin. Corp., 2006 U.S. Dist. LEXIS 71072, at *8-*9 (D. Mass. August 22, 2006) (requiring objector to post Rule 7 bond of over $645,000); Conroy v. 3M Corp., 2006 U.S. Dist. LEXIS 96169, at *11 (N.D. Cal. August 10, 2006) (requiring objector to post Rule 7 bond of $431,167); *In re* Heritage Bond Litigation, 2005 WL 2401111 (C.D. Cal. 2005) (requiring one set of objectors to post Rule 7 bond for $208,000 and another objector to do so for $228,000), *vacated by* 2007 WL 1340633 (9th Cir. 2007); Downey v. Mortgage Guaranty Ins. Corp., 2001 WL 34092617 (S.D. Ga. Oct. 1, 2001) (requiring six objectors to post Rule 7 bond in the amount of $180,000); Vaughn v. American Honda Motor Co., 2007 WL 2901666, at *10 (E.D. Tex. Sept. 28, 2007) (requiring objector to post Rule 7 bond for $150,000), *rev'd by* 507 F.3d at 299 (5th Cir. 2007).

[124] *See In re* Heritage Bond Litigation, 2007 WL 1340633 (9th Cir. 2007) (vacating bond for similar reasons).

[125] *See In re* Diet Drugs Products Liab. Litig., 2000 WL 1665134 (E.D. Pa. Nov. 6, 2000) (denying large bond on this basis).

[126] For example, on the question of whether class members can be required under Rule 7 to post a bond for projected attorneys' fees, *compare In re* Cardizem CD Antitrust Litig., 391 F.3d 812, 817 (6th Cir. 2004) (permitting the practice) *with* Vaughn v. American Honda Motor Co., 507 F.3d 295, 299 (5th Cir. 2007) (rejecting the practice) *and In re* Heritage Bond Litigation, 2007 WL 1340633 (9th Cir. 2007) (same). On the question of whether class members can be required under Rule 7 to post a bond for expenses related to a delay in settlement administration, *compare In re* Cardizem CD Antitrust Litig., 391 F.3d 812, 817 (6th Cir. 2004) (permitting the practice) *with In re* Diet Drugs Products Liab. Litig., 2000 WL 1665134 (E.D. Pa. Nov. 6, 2000) (construing Third Circuit case law to reject the practice).

question whether these large bonds serve any useful purpose in light of quick-pay provisions. To the extent that these bonds are ordered without any examination of whether the objectors are engaged in blackmail, there can be little doubt that these bonds discourage even appeals by class members with substantial objections because few objectors have the money to post such large bonds and even fewer have enough at stake individually in class actions to make it worth their while to do so. Moreover, even when large bonds are required only when district courts believe objectors are engaged in blackmail, as I noted above, permitting district courts to determine whether appeals from their own rulings are frivolous is not without peril. Indeed, permitting district courts to order large Rule 7 bonds effectively allows them to decide whether their own rulings can be challenged on appeal, and it is easy to imagine why they might overuse this authority. As one court of appeals has noted, "imposing too great a burden on an objector's right to appeal may . . . tend to insulate a district court's judgment in approving a class settlement from appellate review."[127] But perhaps worst of all, it may be that large Rule 7 bonds will deter appeals only by class members who are *not* blackmail minded. Blackmail-minded objectors motivated only by delay might be able to cause that delay even in the face of Rule 7 bonds simply by appealing the orders requiring them to post the bonds at the same time they appeal the class action settlements![128]

In any event, even if there is some benefit to requiring large Rule 7 bonds, in light of the fact that class counsel may be able to neutralize the blackmail threat in many cases with quick-pay provisions, it is hard to see how the serious risks of these bonds are worth that benefit. Quick-pay provisions mitigate the blackmail problem without the collateral damage to substantial objections posed by large bonds because the only appeals discouraged by quick-pay provisions are those motivated by delay. As such, if large Rule 7 bonds are used at all, they should, again, be used only in settlements where they might do some good: those that do not include quick-pay provisions or the

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Finally, on the question of whether class members can be required under Rule 7 to post a bond for interest that will accrue on the settlement or attorneys' fees, *compare* Barnes v. FleetBoston Fin. Corp., 2006 U.S. Dist. LEXIS 71072, at *8-*9 (D. Mass. August 22, 2006) (interpreting First Circuit case law to permit the practice) *with* Vaughn v. American Honda Motor Co., 507 F.3d 295, 299 (5th Cir. 2007) (rejecting the practice at least where the settlement agreement does not call for it).

[127] *See Vaughn*, 507 F.3d at 300.

[128] *See, e.g.*, *In re* Cardizem CD Antitrust Litigation, 391 F.3d 812 (6th Cir. 2004) (consolidating appeal from bond order with appeal from class action settlement).

unusual settlements in which there is some reason to believe the provisions might be seriously ineffective.

V. Conclusion

For many years, conventional wisdom has held that objectors to class action settlements had the ability to blackmail class counsel by filing meritless appeals that could delay the final resolution of settlements for months or years. It was thought that class counsel were eager to pay these objectors to drop their appeals in order to accelerate the receipt of fee awards. The implicit premise behind the conventional wisdom has been that class action lawyers are like other contingency-fee lawyers, that they receive their fees only once a settlement is concluded and all appeals exhausted.

In this Article, I have shown that class action lawyers are not like other contingency-fee lawyers. Class action lawyers are the first such lawyers who are able to receive their fees before their clients are. In over one-third of all class action settlements in 2006, class counsel inserted provisions into the settlements that permitted them to receive their fees before any appeal from the settlement was resolved. These provisions were found in nearly 80% of all securities fraud settlements.

These findings suggest that the conventional wisdom regarding objector blackmail may be exaggerated. These findings also suggest that the measures proposed by courts and commentators to solve the blackmail problem may be unnecessary, and, indeed, may actually be harmful to the interests of class members. In my view, these measures should be reconsidered, as should much of the conventional wisdom about objector blackmail.