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I. INTRODUCTION

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 individuals to "hold out" and disrupt collective action.[2] The holdout 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 appeal 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]

Class members have to be fairly savvy to take advantage of this scheme. But the large stakes involved in big class action settlements have drawn just those savvy class members. Like class actions themselves, objector blackmail is generally lawyer driven. Some

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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, 438–42 (providing a summary of several scholarly and judicial commentaries on objector "blackmail").

2. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 124–25 (2004) (discussing holdout problem in the context of eminent domain).

3. *See, e.g.*, Vaughn v. Am. Honda Motor Co., Inc., 507 F.3d 295, 300 (5th Cir. 2007) ("In some circumstances objectors may use an appeal as a means of leveraging compensation for themselves or their counsel."); PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.08 (Proposed Final Draft, Apr. 1, 2009) (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 holdout phenomenon in class action litigation as objector "blackmail."

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 may object in the settling actions in order to share in the fee awards.[5]

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 numerous 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] 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 current practice among class action lawyers that neutralizes much of the blackmail threat, a practice known as "quick pay." As far as I am aware, this practice has never been acknowledged by any court nor any commentator. The practice works as follows: With the consent of the defendants, class counsel insert provisions into class action settlements that permit counsel to receive whatever fees district courts award them as soon as those courts approve the settlements, regardless of whether the settlements are appealed. If the settlements or fee awards are reversed 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 "holdout tax" that blackmail objectors can

5. *See infra* text accompanying notes 68–70.

6. Barnes v. FleetBoston Fin. Corp., No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at *3–4 (D. Mass. Aug. 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 58–62.

8. *See infra* notes 63–67.

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

10. *See infra* text accompanying notes 75–76, 110–25.

extract in class action litigation. Quick-pay provisions are not only already in use, but they are already in wide use. Drawing on an original dataset I created consisting of all class action settlement agreements approved by federal district courts in 2006,[11] I show that over one-third of all settlements in 2006 included quick-pay provisions, including almost 80 percent of securities cases.

In my view, there is little doubt that the quick-pay provision is a better solution to the blackmail problem than those solutions proposed by courts and commentators. 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 may actually do more good than harm to class members. Moreover, compared to the alternative mechanisms that have been proposed 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.

Nonetheless, quick-pay provisions have several serious limitations that make them an incomplete solution to the blackmail threat. For example, even with quick-pay provisions, class counsel still have an incentive to pay objectors to avoid the expense of litigating the appeal. Moreover, when the amount of fees is large enough and the probability of the appeal's success is greater than zero, risk aversion might likewise lead class counsel to pay objectors despite quick-pay provisions. In addition, quick-pay provisions do not prevent objectors from blackmailing class action defendants in those cases in which delaying the settlement may be costly to them. Finally, quick-pay provisions do not prevent class action defendants from demanding a premium from class counsel in exchange for their consent to such provisions. Thus, although quick-pay provisions may reduce the "tax"

11. This dataset is described in more detail in my forthcoming article, Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and their Fee Awards* (Univ. of S. Cal. Law Sch., Conf. on Empirical Legal Stud., Working Paper 2009) (on file with author).

that objectors can collect from class counsel, they cannot eliminate it altogether.

There is, however, a complete solution to the blackmail problem: an inalienability rule that prohibits objectors from selling their right to appeal to class counsel or the defendant. That is, a complete solution to the blackmail problem would prohibit objectors from settling their appeals. Inalienability rules have been discussed in the property scholarship for many decades as a way to deal with the inefficiencies caused by holdouts and blackmail.[12] The virtue of such rules is that parties no longer have an incentive to acquire a right for the purpose of holding out or for blackmail if they cannot sell the right.[13] That is, in the face of a rule that barred settling appeals, class action objectors would not bother to appeal a settlement unless they thought the appeal had some merit and were interested in seeing its eventual resolution. Thus, not only should an inalienability rule completely solve the blackmail problem, but because it does not chill class members from taking legitimate appeals, it does not suffer the drawbacks of either quick-pay provisions or the blackmail solutions proposed by courts and commentators.

Inalienability rules usually come at the price of prohibiting some efficient transactions from taking place. In the litigation context, for example, it is often thought socially desirable that parties settle even meritorious suits because they can save litigation costs.[14] Thus, in the normal litigation context, prohibiting settlement of every case would be a steep price to pay for the benefits of an inalienability rule. In the context of class action settlements, however, it is usually not socially desirable to settle nonfrivolous objections. These objections inevitably affect more class members than those who brought the objections; thus, permitting class counsel to buy off these objectors prevents other class members from reaping the benefits of the objection. This is why the Federal Rules of Civil Procedure were amended in 2003 to prohibit class members from withdrawing their

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12. *See, e.g.*, Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 55 (1999); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1001 (1972); Michael Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1201–02 (1999); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403, 1441–47 (2009).

13. *See* Fennell, *supra* note 12, at 1412 (noting one reason for "blocking the A to B transfer would be to alter the upstream course of events by influencing whether and how parties initially acquire . . . the entitlement").

14. *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 403 (2004) ("[A] mutually beneficial settlement exists as long as the plaintiff's estimate of the expected judgment does not exceed the defendant's estimate by more than the sum of their costs of trial.").

objections to class action settlements before the settlements were approved by district courts.[15] In my view, a similar rule should be adopted to prohibit settlement of objections once they have been appealed.

In Part II of this Article, I describe the role of class action objectors in the settlement process. Part III recounts 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 IV, I bring to light a practice that, as far as I am aware, has never been discussed by courts or commentators: quick-pay provisions. I argue that although the provisions have many virtues, they also have many limitations. Part V then compares quick-pay provisions to measures that have been proposed by courts and commentators to mitigate objector blackmail: ex post sanctions and large appellate bonds. I argue that, despite their limitations, quick-pay provisions are superior to these other measures because these other measures will inevitably chill legitimate objections to class action settlements. Nonetheless, drawing on property law scholarship, I contend that there is an even better solution to the blackmail problem, one that neither suffers from the limitations of quick-pay provisions nor the risk of chilling of legitimate objections: an inalienability rule that prohibits objectors from settling their appeals unless they made modifications to the underlying class action agreement—modifications that would have to be approved by a federal judge who could ensure that other class members were enjoying the same benefits that the settling objector seeks to enjoy.

II. 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.[16] In federal court, which is the focus of this

15. *See* FED. R. CIV. P. 23(e)(5) ("Any class member may object to the proposal if it requires court approval under this subdivision . . . the objection may be withdrawn only with the court's approval."); FED. R. CIV. P. 23(e)(4)(B) 2003 advisory committee's note (revised and renumbered as 23(e)(5)).

16. *See, e.g.*, Emery Lee & Thomas E. Willing, *Impact of the Class Action Fairness Act on the Federal Courts: Preliminary Findings from Phase Two's Pre-CAFA Sample of Diversity Class Actions* 11 (Federal Judicial Center 2008) ("Every case in which a motion to certify was granted, unconditionally or for settlement purposes, resulted in a class settlement."); 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, 755 U. PA. L. REV. (forthcoming, 2009), *available at* http://papers.

Article,[17] these settlements are negotiated by defendants and lawyers appointed by district court judges to represent class members. Before these settlements can take effect, they must also be approved by those judges.[18] In addition, because class counsel are appointed rather than retained by class members themselves,[19] district court judges must set the fees class action lawyers receive for their work.[20] Class action lawyers are basically compensated on a contingency 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).[21] In either case, federal district court judges have considerable discretion to determine the fees of class action lawyers.[22]

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ssrn.com/sol3/papers.cfm?abstract_id=1101068# (noting that, with respect to securities fraud class actions, "[t]rial . . . is virtually unheard of").

17. 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.

18. *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.").

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

20. *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 institutional) plaintiff. *See, e.g., In re* Cendant Corp. Litig., 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.").

21. *See* Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 31–32 (2004) [hereinafter Eisenberg & Miller, *An Empirical Study*] (discussing the fee percentage and lodestar methods of awarding attorneys' fees in the context of class action settlements).

22. 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 percent 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 percent, "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, *An Empirical Study*, *supra* note 21, at 31 ("Under the lodestar method, . . . courts multiply the reasonable number of hours expended by counsel by a reasonable hourly rate

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.[23] It is for this reason, after all, that district court judges are required to approve class action settlements.[24] It is also for this reason that class members are given an opportunity to participate in the district court's review of these settlements.[25] 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.[26] Indeed, in light of the fact that class counsel and defendants, by definition, support class action settlements, 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.[27]

Nonetheless, class members do not take advantage of the opportunity to object to settlements in great numbers. One empirical study found that the median number of objections to a settlement was

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and then adjust the product for various factors."). The discretionary multiplier gives district courts considerable latitude to set fees even in these cases.

23. *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).

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

25. *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) [hereinafter Eisenberg & Miller, *The Role of Opt Outs*] ("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.").

26. 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 attorneys' 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.").

27. *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).

three—well less than one-tenth of one percent of class members.[28] The small number of objections is usually attributed to the fact that class members often have little at stake individually in a settlement, making it economically irrational for many of them to go through the trouble of filing objections.[29] When they do file objections, the objections can be as informal as a few comments scrawled on a piece of loose-leaf paper[30] 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.[31] 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.[32] It is rare, however, for district courts to reject proposed class action settlements on the basis of objections;[33] only somewhat more frequently do district courts award fees less lucrative than those sought by class counsel.[34]

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28. Eisenberg & Miller, *The Role of Opt Outs*, *supra* note 25, at 1546 (reviewing 236 state and federal class action settlements).

29. *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").

30. *See, e.g.*, *In re* Pharm. Indus. Average Wholesale Price Litig., 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' ").

31. *See* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.643 (2004) (providing a summary of the rights of an objector in a class action to seek discovery, introduce expert testimony, and file motions (including motions to intervene) as part of the objection).

32. *See id.* at § 21.641 ("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 . . . .").

33. *See* Leslie, *supra* note 29, 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").

34. *See* Michael A. Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?* 1, 59 (St. John's Legal Studies Research Paper No. 08-0135, 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.").

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. It is around this question that the threat posed by objector blackmail has coalesced. Before the Supreme Court's 2002 opinion in *Devlin v. Scardelletti*,[35] 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.[36] The formal parties included the defendant, the class members named as the representative plaintiffs, class counsel (who can appeal matters concerning their fee awards), and any class members who successfully moved for intervention under Federal Rule 24.[37] As noted above, given that the defendant, the representative plaintiffs, and class counsel almost always support the class action settlement (lest there be no settlement),[38] the formal view typically meant only class members who went through the trouble of intervention could appeal. This was an exceedingly small group.[39] The second school of thought (which 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.[40] 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

35. 536 U.S. 1 (2002).

36. *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, 874 (7th Cir. 1998); Shults v. Champion Int'l Corp., 35 F.3d 1056, 1061 (6th Cir. 1994); Gottlieb v. Wiles, 11 F.3d 1004, 1008–09 (10th Cir. 1993); Croyden Assocs. v. Alleco, Inc., 969 F.2d 675, 678–80 (8th Cir. 1992); Guthrie v. Evans, 815 F.2d 626, 628–29 (11th Cir. 1987).

37. *See Devlin*, 536 U.S. at 15 (Scalia, J., dissenting) (stating that "the 'parties' to a judgment are those named as such – whether as the original plaintiff or defendant in the complaint giving rise to the judgment, or as 'one who [though] not an original party . . . becomes a party by intervention . . . '" and "the class representatives").

38. 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, 583 (3d Cir. 1999).

39. *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).

40. *See In re* PaineWebber Inc. Ltd. P'ships Litig., 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).

view.[41] 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, it nonetheless concluded that class members who filed objections should be considered "parties" solely for the purposes of appealing settlements.[42] Thus, since 2002, any class action objector—no matter how informal the objection—has been able to appeal from the approval of a class action settlement or the attorneys' fees awarded by the district court pursuant to that settlement.[43] Although the *Devlin* rule made it easier for class members to appeal settlements, it also made it easier for class members to engage in what many courts and commentators refer to as objector "blackmail."[44] Indeed, both the litigants[45] and Justice Scalia's dissent[46] in *Devlin* warned that the Court's decision would lead to such a phenomenon.

III. THE CONCERNS OVER OBJECTOR "BLACKMAIL"

This concern over objector "blackmail" is a specific application of the more general concern with rent-seeking by "holdouts."[47] When

41. *See Devlin*, 536 U.S. at 14 (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").

42. *See id.* at 7–9 (acknowledging that "only parties to a lawsuit . . . may appeal an adverse judgment" (citing Marino v. Ortiz, 484 U.S. 301, 304 (1988)) 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").

43. 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. *See, e.g.*, *In re* Synthroid Mktg. Litig., 325 F.3d 974, 976–77 (7th Cir. 2003).

44. *See, e.g.*, Brunet, *supra* note 1, at 429 (arguing that "*Devlin* may have raised the ante for class action objectors by legitimizing their efforts to appeal from district court approvals of settlements").

45. *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*, 536 U.S. 1 (arguing that if objectors are permitted to appeal a settlement some class members will attempt "to simply extract a fee by lodging generic, unhelpful protests" (quoting Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000))).

46. *See Devlin*, 536 U.S. at 22 n.5 (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*, 91 F. Supp. 2d at 973–74 & n.18)).

47. *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").

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 appeals 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,[48] and this delay in finalizing settlements can also delay when class counsel receive their fee awards (which are almost always contingent on the settlements).[49] With attorneys' fees in class actions now running as high as hundreds of millions of dollars in a single settlement,[50] 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, "The very threat of an appeal can give . . . objectors a major weapon. They now possess substantial leverage when negotiating with the counsel seeking to secure an approved settlement."[51] Delay is not, of course, the only reason class counsel might be willing to settle an appeal brought by an objector; they also settle such appeals in order to avoid adverse results and to

48. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *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."); Brunet, *supra* note 1, 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.").

49. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *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 objectors can "forc[e] the class attorneys to pay them to go away lest the class attorneys' own fee be held up through appeals").

50. *See, e.g.*, Allapattah Servs., 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. Sec. and "ERISA" Litig., No. 02-5575, 2006 WL 3057232, at *2 (S.D.N.Y. Oct. 25, 2006) (awarding $147,500,000); *In re* Royal Ahold N.V. Sec. & ERISA Litig., 461 F. Supp. 2d 383, 387 (D. Md. 2006) (awarding $130,647,868); Spartanburg Reg'l Health Servs. Dist., Inc. v. Hillenbrand Indus., Inc., No. 03-2141, slip op. at 11 (D.S.C. Aug. 15, 2006) (awarding $117,157,800).

51. Brunet, *supra* note 1, at 429.

avoid litigation expenses.[52] The "blackmail" concern has arisen from the premiums class counsel are willing to pay objectors beyond the expected value of their appeals—i.e., premiums to avoid delay, and, to a lesser extent, to save litigation expenses and avoid risk.[53] These premiums have encouraged class members to file objections without any merit simply to collect side settlements from class counsel.[54] Courts and commentators characterize the "blackmail" problem as one that arises when class counsel pay a premium to objectors whose appeals have no merit in order to avoid the delays and other complications those appeals will cause in the disbursement of their fee awards.[55]

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.[56] Nonetheless, class action settlements do not always provide for interest pending appeal.[57] 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 meritless appeals out of their own pocket in order, among other things, 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.

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52. *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).

53. *See supra* notes 48–49.

54. *See, e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 3, § 3.08 cmt. a (noting that class members file objections that are "insubstantial" or "not objectively reasonable" in order to extract a "side deal").

55. *See supra* notes 48–49 and *infra* notes 57–67.

56. *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 . . . .").

57. *See, e.g.*, Vaughn v. Am. 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 the appeals [were] concluded").

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 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.[58]

Many 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"[59] 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."[60] Courts of appeals likewise warn that "objectors may use an appeal as a means of leveraging compensation for themselves or their counsel"[61] and refer to objector appeals as "extortive legal proceedings."[62]

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.[63] According to the authors

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58. Barnes v. FleetBoston Fin. Corp., No. 01-10395, 2006 U.S. Dist. LEXIS 71072, at *3–4 (D. Mass. Aug. 22, 2006).

59. Shaw v. Toshiba Am. Info. Sys., Inc., 91 F. Supp. 2d 942, 973–74 & n.18 (E.D. Tex. 2000).

60. Snell v. Allianz Life Ins. Co., No. 97-2784, 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'" (quoting O'Keefe v. Mercedes-Benz USA, LLC, 214 F.R.D. 266, 295 n.26 (E.D. Pa. 2003))); *In re* Holocaust Victim Assets Litig., 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*, 214 F.R.D. at 295 n.26 (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" (quoting *Shaw*, 91 F. Supp. 2d at 973)).

61. *Vaughn*, 507 F.3d at 300.

62. Duhaime v. John Hancock Mut. Life Ins. 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").

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

of the A.L.I. project, class action objectors often "threate[n] to . . . appeal[] the settlement[s] on insubstantial grounds, thereby delaying distributions to . . . class counsel," which "often place[s] class counsel in a compromised position in which the failure to pay off objectors could delay . . . settlement . . . ."[64] 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"[65] and that objectors often "just want to hold up the settlement to extract a commission."[66] Like judges, commentators are not afraid to refer to this practice as "blackmail" and "extortion."[67]

What kind of class members would be savvy enough to take advantage of these holdout 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 make objections.[68] Others worry

64. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *supra* note 3, § 3.08 cmt. a.

65. Rubenstein, *supra* note 49, at 1449.

66. 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").

67. 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 29, 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"); Miller & Singer, *supra* note 49, 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"); 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"); 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).

68. *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.

about lawyers who object to settlements as part of a rivalry 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.[69] This is just one of many different ways firms compete with one another over class action largesse.[70]

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.[71] Indeed, given that class counsel and defendants by definition support class action settlements, objectors typically provide the only adversarial testing of class action settlements.[72]

But there are blackmail-minded objectors, too, and courts and commentators have proposed countermeasures to the blackmail threat. Commentators, for example, have proposed punishing with sanctions class members who make objections that are later deemed by district courts to have been insubstantial.[73] A more draconian proposal 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.[74] 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

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69. *See, e.g.*, Brian Anderson, Remarks from Panel 2: Tools for Ensuring that Settlements Are "Fair, Reasonable, and Adequate," at the FTC Workshop on Protecting Consumer Interests in Class Actions (Sept. 13, 2004), *in* 18 GEO. J. LEGAL ETHICS 1197, 1204 (2005) (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").

70. *See* Nagareda, *supra* note 66, at 342–47.

71. *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).

72. *See id.*

73. *See, e.g.*, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, *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 . . . .").

74. *See infra* text accompanying notes 111–19.

administering the settlement fund.[75] Courts can require these bonds regardless of 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.[76] 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.

Despite the concern paid to objector blackmail by courts and commentators, the pervasiveness of this practice has never been clear. Although class counsel often settle appeals filed by objectors[77] (and sometimes for very significant amounts of money[78]), it has never been clear how often objectors file appeals and how many of them might be of the "blackmail" variety.[79] In order to assess how pervasive objector blackmail is, I consulted an original dataset I created consisting of the 304 class action cases that settled in federal district court during 2006.[80] Although it would be difficult to examine the merits of each of these cases and make a determination of how often class members

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75. *See id.*

76. *See infra* note 120.

77. *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").

78. *See, e.g.*, 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); Brunet, *supra* note 1, at 429–30 (noting that "[t]he size of these fees [extracted by objectors] can be considerable" and discussing one million dollar fee extracted by objectors in class action suit against Louisiana-Pacific).

79. 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. 2002) ("[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.").

80. This dataset is described in more detail in a forthcoming article, *An Empirical Study of Class Action Settlements and their Fee Awards*. Fitzpatrick, *supra* note 11. 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. In order to obtain a list of non-securities cases and to catch any securities cases that might have been missed by RiskMetrics, I supplemented its list with several broad Westlaw searches, three reporters of class action settlements—*BNA Class Action Litigation Report*, *Mealey's Jury Verdicts and Settlements*, and *Mealey's Litigation Report*—and a web site that maintains an impressive collection of class action settlements, *Class Action World*. I also obtained a list from the Administrative Office of Courts of all district court cases coded as class actions that terminated by settlement in 2006. To my knowledge, this dataset is the most comprehensive set ever compiled of federal class action settlements in any given year.

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. Because objector blackmail cannot occur without an appeal,[81] 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 percent of all settlements saw any appeal brought by class members.[82]

TABLE 1. APPEALS TAKEN BY CLASS MEMBERS FROM FEDERAL CLASS ACTION SETTLEMENTS IN 2006

Settlements	*Appeals filed*	*Settlements with at least one appeal*
304	41 (0.13/settlement)	27 (8.9%)

The percentage of cases in which objectors tried to blackmail class counsel was therefore only some fraction of 10 percent. These numbers raise the question whether objector blackmail is as serious a problem as courts and commentators have long thought it has been. On the other hand, perhaps blackmail-minded objectors have been deterred from filing appeals in recent years in light of the aforementioned countermeasures. Or perhaps they have been deterred for the reasons set forth in the next Part.

IV. THE HIDDEN RESPONSE TO BLACKMAIL: QUICK-PAY PROVISIONS

The countermeasures to objector blackmail developed by courts and commentators overlook an important development in class action litigation. This development is known among class action lawyers as the "quick pay" provision. In this Part, I first explain how quick-pay

81. 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 the district court. *See, e.g.*, Brunet, *supra* note 1, at 426–27 & n.98; Woolley, *supra* note 67, at 618. 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. *See* FED. R. CIV. P. 23(e)(5); FED. R. CIV. P. 23(e)(4)(B) 2003 advisory committee's note (revised and renumbered as 23(e)(5)). Although it is theoretically possible that class counsel could pay off class members even *before* they file their objections with the district court, this strikes me as somewhat implausible.

82. 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.

provisions work to mitigate objector blackmail and then consult my dataset to show how prevalent these provisions have already become. Because these provisions are in such wide use but apparently are unknown to courts and commentators, it is worth evaluating whether the provisions are as good for class members as they are for class action lawyers. Although I conclude that quick-pay provisions are a benign effort to solve the blackmail problem, I argue that the provisions are not a panacea; they suffer from several significant limitations that undermine their effectiveness.

A. What Are Quick-Pay Provisions?

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.[83]

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. If class counsel have already received their fee 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. In this regard, quick-pay provisions may discourage objectors from filing meritless appeals in the first place because the provisions increase the ability of class counsel to credibly threaten to ride an appeal out to fruition. Of course, counsel may still be willing to pay objectors with meritless appeals a relatively small sum to avoid

83. Stipulation and Agreement of Compromise, Settlement and Release of Sec. Action, at 22–23, *In re* Aspen Tech., Inc. Sec. Litig., No. 04-12375 (D. Mass. Feb. 27, 2006).

the expense of defending against the appeal.[84] Moreover, if the appeals have some merit, then class counsel will still be willing to pay objectors in proportion to the probability of an adverse result,[85] and if the fee award is large enough and firm capitalization small enough,[86] they may even be willing to pay a premium over the expected value of the appeal on account of risk aversion.[87] I discuss these limitations on the effectiveness of quick-pay provisions in greater detail later in this Part.[88] Nonetheless, quick-pay provisions certainly have the potential to reduce the holdout tax considerably.[89]

B. How Prevalent Are Quick-Pay Provisions?

In order to assess how ubiquitous quick-pay provisions have already become, I again consulted my dataset of all class action cases settled in federal district court during 2006. I sought the settlement agreements[90] approved by the district court for each of the 304

84. *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) (emphasis omitted).

85. *See id.*

86. Although some class action firms are very well capitalized, not all of them are. *See, e.g.*, 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"); Stephen Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183, 210–11 (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").

87. *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.").

88. Interestingly, there is a similar practice in eminent domain proceedings known as "quick take," which permits governments to take property before the condemnation litigation has concluded. *See, e.g.*, Declaration of Taking Act, 40 U.S.C.A. § 3114(a); 6 JULIUS L. SACKMAN, NICHOLS ON EMINENT DOMAIN ¶ 24.10[2] (2008). Quick-take laws serve a similar purpose as quick-pay provisions: preventing holdouts from using delay to extract premiums above the fair market value of their property. *See, e.g.*, MODEL EMINENT DOMAIN CODE Art. VI, Refs & Annos, prefatory cmt. (1) (2002).

89. 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 23–24 and accompanying text.

90. 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.

settlements on PACER, from class counsel who negotiated the settlements, and, as a last resort, from the district courts themselves. Four 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 296 settlements in which I could obtain the settlement agreements and in which counsel sought fees, Table 2 reports the ubiquity of quick-pay provisions.

TABLE 2. NUMBER AND FREQUENCY OF DIFFERENT PAYMENT PROVISIONS IN FEDERAL CLASS ACTION SETTLEMENTS IN 2006

Type of Provision	*Number*	*Frequency*
Traditional	111	37.50%
Quick Pay	105[91]	35.47%
None	52	17.57%
Other	28	9.46%

The quick-pay provision appeared in over one-third of all class action settlement agreements, most of them following the same boilerplate found in the agreement quoted above.[92] Quick-pay provisions were only slightly less common than the provision setting forth the traditional practice for the payment of lawyers who, like class counsel, work on contingency: class counsel received their fees only once all possible appeals were exhausted. I call these provisions "traditional" in Table 2, and they 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

91. In some 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* Settlement Agreement at 4, 32–33, Smith v. Flanagan, No. 03-2895 (D. Md. Feb. 17, 2006); Stipulation of Settlement with Ernest & Young LLP at 16–17, 19–20, *In re* Cendant Corp. Litig., No. 98-1664 (D.N.J. Aug. 15, 2000).

92 On occasion, courts will postpone the award of all or (more commonly) a portion of attorneys' fees until the settlement proceeds have actually been distributed to class members (a process that can take several months or years). It is unclear how quick-pay provisions would interact with postponed fees; presumably, quick-pay provisions would apply only to the portion of fees that is not postponed by the court.

> 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.[93]

In most of the remaining settlements (almost one-fifth of the total), the agreements said nothing at all about when class counsel 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, class counsel probably received their fees in these cases only once any appeals to the settlements or fees had been exhausted. 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 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.[94]

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93. Amended Stipulation of Settlement at 8–9, 22–23, *In re* DVI, Inc. Sec. Litig., No. 03-5336 (E.D. Pa. Nov. 17, 2006).

94. In fifteen 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, Ohio Public Employees Retirement Sys. 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-C-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 nineteen 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 nine 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 nine settlements.

Thus, although quick-pay provisions were not included in the majority of class action settlements, they were nonetheless well represented. They were even better represented, however, in securities fraud class actions, appearing in nearly 80 percent of these settlement agreements. Indeed, as Table 3 shows, quick-pay provisions are the near-exclusive province of securities fraud class actions: although four-fifths of securities fraud settlements included quick-pay provisions, only one-twentieth of non-securities class action settlements did so.

TABLE 3. FREQUENCY OF DIFFERENT PAYMENT PROVISIONS BY TYPE OF CASE IN FEDERAL CLASS ACTION SETTLEMENTS IN 2006

Type of Provision	*Securities Cases (n=118)*	*Non-Securities Cases (n=178)*
Quick Pay	79.66%	6.18%
Traditional	11.02%	55.06%
None	4.24%	26.40%
Other	5.08%	12.36%

The fact that class counsel do not use quick-pay provisions more often in non-securities cases is interesting. Although objector blackmail may be less of a problem in such cases (perhaps because professional objectors find it more difficult to operate there[95]), it is still hard to see why class counsel would not use the provisions. From their perspective, these provisions would seem to have little downside (receiving fees earlier would always seem preferable to later), and as far as I am aware, courts have never discouraged (or even scrutinized) the provisions.

A few possible hypotheses may explain this dramatic divide between securities and non-securities cases. One hypothesis is that quick-pay provisions were invented by securities class action lawyers—perhaps, again, because objector 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. Another hypothesis is that defendants are less inclined to go along with these provisions in non-securities cases than in securities cases. Although defendants are often indifferent to when class counsel is paid because they can be asked to place settlement

95. *See supra* note 68.

proceeds, including attorneys' fees, in escrow accounts at the time settlements are approved by district courts,[96] it is possible that defendants would balk at quick-pay provisions in at least two circumstances. First, they may balk when they are concerned that the thin capitalization of class counsel makes it uncertain whether the fee award could be repaid should something happen to the settlement on appeal. It is possible that the non-securities class action bar may be less well capitalized than the securities class action bar.[97] Second, defendants may resist quick-pay provisions when they can benefit from delays caused by appeals—e.g., when settlements do not involve the transfer of cash from defendants to class members but only injunctive or in-kind relief. My dataset suggests that these circumstances arise more often in non-securities cases: although all of the 2006 securities settlements included cash relief, a substantial minority of non-securities settlements did not.

Nonetheless, whatever the reason quick-pay provisions have not been more widely adopted, they are still, undoubtedly, the most prevalent countermeasure to objector blackmail in use today.

C. Are Quick-Pay Provisions Good for Class Members?

Despite the prevalence of quick-pay provisions, they are apparently unknown to courts and commentators, and, as such, they have never been scrutinized. It is therefore worth assessing whether quick-pay provisions are good, not only from the perspective of class counsel, but also from the perspective of class members and society as a whole.

At first blush, quick pay provisions can 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

96. 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 . . . .").

97. Indeed, 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.

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

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 that are not governed by a fee-shifting statute—one of the bases for awarding attorneys' fees in the first place 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 benefited to pay the class action lawyers.

Nonetheless, quick-pay provisions may not be entirely self-serving; class members may benefit from the provisions as well. For one thing, insofar as these provisions reduce the holdout tax that can be assessed against class counsel, they 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, class members may benefit from quick-pay provisions because the provisions so suppress the holdout 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 settled for smaller sums), then there may be more cases in which no appeals at all are filed; fewer appeals means more cases in which class members can be paid sooner. That is, it is possible that quick-pay provisions will accelerate settlement payments to class members.

At the same time, insofar as quick-pay provisions are valuable to class counsel, one might expect that the defendants who must agree to the provisions would be able to extract something in return—perhaps a smaller total settlement amount. If this is the case, then class members might be harmed by the provisions to some extent. Moreover, quick-pay provisions are not without risks to class members even if class counsel do not trade away some portion of their recoveries: if class counsel are, for some reason, unable to repay the attorneys' fees they have received early, class members may be left without any way to recover them. For these reasons, it cannot be said with certainty that quick-pay provisions are a net benefit to class members.

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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, 657 (1991).

For similar reasons, it is also unclear whether quick-pay provisions are a net benefit from a broader 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 generally. 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). But there is no easy way to answer the question whether we should have more class actions or fewer. It is a highly contested question of public policy, and the answer depends on one's premises and empirical intuitions.[100] Because

100. For example, the predominant justification for class action litigation is the utilitarian goal of forcing defendants to fully internalize the costs of their activities. *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 105 (2006) ("There is but one true objective here—one valid normative measure by which to gauge any class action procedure or practice, or any proposed reform. All that matters is whether the practice causes the defendant-wrongdoer to internalize the social costs of its actions."); 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"). 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, *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.")—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 who, eager to avoid either the considerable costs of litigating, *see* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 559, 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"), or the risks of an outlier jury verdict, will settle cases for more than their expected value, *see In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298–99 (7th Cir. 1995) (noting that defendants in class actions can 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"). 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. *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

it is difficult to say whether we should have more class actions or fewer, it is 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. Better ways to alter compensation to class counsel exist than relying on bounties extracted by objectors. For example, courts, which have considerable discretion over the fees they are awarded,[101] are in a better position to decide whether class action lawyers should receive more or less money. As such, quick-pay provisions should not be the source of major concern from a broader social perspective.

D. The Limitations of Quick-Pay Provisions

Even if quick-pay provisions do not harm class members, they would not be a panacea. They have three significant limitations that permit objectors to continue to extract premiums unrelated to the merits of their appeals.

The first limitation on the effectiveness of quick-pay provisions stems from the fact that avoiding the delay in the receipt of fee awards is only one reason why class counsel are willing to pay objectors to drop their appeals. For example, 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. Of course, the cost to file an appellate brief, especially in the case of a frivolous appeal, would probably not be more than a few thousand dollars. This amount surely pales in comparison to the more significant premium class counsel are willing to pay to avoid the delay associated with appeals. Thus, although this is a limitation of quick-pay provisions, it is not an especially significant one.

But class counsel are willing to pay objectors more significant premiums that are not mitigated by quick-pay provisions. For example, quick-pay provisions do not eliminate the premiums class counsel are willing to pay objectors on account of class counsel's risk aversion. If an objector's appeal has a non-zero probability of success, and if class counsel's fee award is sufficiently large (and class counsel's capitalization sufficiently small), quick-pay provisions might transform the premiums class counsel were willing to pay to avoid

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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.").

101. *See supra* note 22.

delay into premiums they are willing to pay to avoid risk. If there is some chance class counsel might lose the appeal, class counsel might not place especially large fee awards into non-liquid or risky investments pending the resolution of the appeal because 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. And these premiums are rational even in the face of appeals that have very low probabilities of success, so long as the probabilities are greater than zero. Thus, at least for the class of settlements where fee awards are large and firm capitalization small, the effectiveness of quick-pay provisions is significantly limited.

The second limitation on the effectiveness of quick-pay provisions in ending objector blackmail stems from the fact that, although these provisions may help class counsel avoid the holdout tax, they may help *only* 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 regardless of whether 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 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; 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. For similar reasons, class action litigation prolonged even on meritless grounds could possibly interfere with corporate merger and acquisition activities.[102] In either case, defendants might be willing to pay considerable premiums to settle class action litigation, quick-pay provisions

102. *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").

notwithstanding. Although it is unclear how often class action litigation can cause these sorts of disruptions in the financial markets, defendants will undoubtedly be willing to pay handsomely to avoid them. Thus, at least in this class of cases, quick-pay provisions are, again, a severely limited response to objector blackmail.

The third and final limitation on the effectiveness of quick-pay provisions stems from the fact that, in order for quick-pay provisions to appear in settlement agreements, defendants must consent to them. Insofar as these provisions are valuable to class counsel because they save class counsel from paying blackmail to objectors, defendants could insist on receiving some portion of the savings for themselves before agreeing to include the provisions in settlement agreements. That is, quick-pay provisions may simply transfer the blackmail leverage from class action objectors to class action defendants. If this is the case, then quick-pay provisions might not reduce the blackmail tax so much as change to whom the tax is paid. This scenario obviously constitutes a very serious limitation on the effectiveness of quick-pay provisions. Indeed, it raises the question whether we should look for more effective responses to the blackmail problem.

V. ARE QUICK-PAY PROVISIONS THE BEST SOLUTION TO OBJECTOR BLACKMAIL?

In light of the significant limitations on quick-pay provisions discussed above, this Part analyzes whether there are better solutions to the blackmail problem. In my view, the solutions proposed by courts and commentators—sanctions and large appellate bonds—are not preferable to quick-pay provisions because they are likely to chill legitimate objectors along with blackmail-minded ones. Moreover, in light of the fact that objectors provide the only adversarial testing of class action settlements, it would be even worse to undo the Supreme Court's holding in *Devlin* and forbid objectors from appealing settlements altogether.

But this does not mean that we are left without a complete solution to the blackmail problem. Rather, drawing on property law scholarship, I argue that an inalienability rule that prohibits class action objectors from settling their appeals would be a complete solution to objector blackmail.[103]

103. Another potential solution to the blackmail problem might be to use expedited review of appeals brought by class members. But insofar as avoiding delay is only one of the reasons class counsel are willing to pay objectors to drop their appeals, this solution, like quick-pay provisions, would not completely solve the blackmail problem. Moreover, it is unclear whether appeals by

A. The Solutions Proposed by Courts and Commentators

Two other solutions to the blackmail problem have been proposed by courts and commentators. The first solution, proposed by commentators, is to sanction class members for raising objections later deemed insubstantial.[104] The second solution, 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.[105] In my view, these provisions are inferior to quick-pay provisions as solutions to objector blackmail.

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—challenges that are filed only to extract a premium for causing delay—from uninformed objections filed for less sinister reasons or 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 of unwieldy class litigation,[106] 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 percent.[107] There may be many questions for which there is a correct answer in the law, but the percentage of a settlement

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class members have any better claim to expedited treatment than other civil appeals that could also benefit from such treatment.

104. *See supra* note 73 and accompanying text.

105. *See supra* notes 74–76 and accompanying text.

106. *See, e.g.*, John C. Coffee, Jr., *Understanding The Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 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 & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1122–24 (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").

107. *See, e.g.*, *In re* Heritage Bond Litig., No. MDL 02-ML-1475 DT, 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").

that should be awarded to class action attorneys is not one of them.[108] If challenging a fee award above the median can be frivolous, then any appeal from a class action settlement can be. Thus, ex post sanctions will inevitably chill some class members who would raise substantial objections from doing so. This sort of overdeterrence of objections to class action settlements is a serious concern because typically no adversarial testing of class action settlements occurs *unless* objectors contest them.[109] Moreover, even when an objector is not chilled, there is nothing to stop the objector from demanding a premium above the expected value of her objection to settle any appeal. That is, class counsel are willing to pay a premium to avoid delay, litigation expenses, and risk, even with appeals that have merit. Quick-pay provisions, by contrast, reduce this willingness for meritorious and non-meritorious appeals alike. Thus, it is not clear whether ex post sanctions would reduce the holdout tax any better than do quick-pay provisions. As such, the dubious marginal benefits of ex post sanctions do not seem worth the cost of chilling legitimate objections.

Requiring objectors to post large bonds to appeal settlements is an equally inferior solution to the blackmail problem. 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."[110] Although the word "costs" in Rule 7 has usually been understood to include only the mundane items provided for in Rule 39[111]—such as 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[112]—courts have begun to require much more of class members who wish to appeal a settlement or fee award. Perhaps the most extreme examples are courts that have begun requiring objectors to post bonds to cover the increased expense in settlement

108. *See supra* note 22 (discussing the methods used to award fees to class counsel and the discretion courts exercise under these methods).

109. *See supra* note 27 and accompanying text (noting role of objectors in providing adversarial testing of class action settlements).

110. FED. R. APP. P. 7.

111. *See, e.g.*, *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."); 16A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE & PROCEDURE § 3953 (4th ed. 2008) (surveying relevant case law and observing that Rule 7 costs are generally those taxable under Appellate Rule 39 but that circuits are split as to whether Rule 7 costs include attorney fees).

112. *See* FED. R. APP. P. 39 (setting forth rules for taxation of costs on appeal).

administration caused by an appeal.[113] These expenses result from the fact that the 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).[114] These expenses can be enormous.[115] 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 massive.[116] 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 38[117] or because the statute on which the class suit was originally based shifted attorneys'

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113. *See, e.g.*, *In re* Cardizem CD Antitrust Litig., 391 F.3d 812, 815, 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* Pharm. Indus. Average Wholesale Price Litig., 520 F. Supp. 2d 274, 279 (D. Mass. 2007) (including in Rule 7 bond "administrative costs attributable to delay in [settlement] distribution"); *In re* Compact Disc Minimum Advertised Price Antitrust Litig., No. MDL 1361, 2003 WL 22417252 (D. Me. Oct. 7, 2003) (granting Rule 7 appeal bond and taking into account plaintiffs' claim that appeal was frivolous and requests for reproduction costs, attorneys' fees, and various other administration costs); *In re* NASDAQ Market-Makers Antitrust Litig., 187 F.R.D. 124, 129 (S.D.N.Y. 1999) (including $50,000 in Rule 7 bond for "damages resulting from the delay and/or disruption of settlement administration").

114. *See NASDAQ Market-Makers*, 187 F.R.D. at 128 (citing plaintiffs' argument that distribution delays cause "waste" to settlement funds as "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").

115. *See, e.g.*, *id.* at 128 ("Plaintiffs aver that the disruption costs resulting from even a six-month shut-down of settlement administration would total approximately $526,100.").

116. *See, e.g.*, Barnes v. FleetBoston Fin. Corp., No. 01-10395-NG, 2006 U.S. Dist. LEXIS 71072, at *8–9 (D. Mass. Aug. 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., No. C 00-2810CW, 2006 U.S. Dist. LEXIS 96169, at *6, *11 (N.D. Cal. Aug. 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").

117. *See, e.g.*, *Compact Disc Minimum*, 2003 WL 22417252, at *1 (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. Am. Honda Motor Co., 627 F. Supp. 2d 738, 751 (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 295 (5th Cir. 2007); *cf. Cardizem*, 391 F.3d at 817 (affirming Rule 7 bond that included $50,000 in attorneys' fees because the state law on which the suit was based required plaintiffs to pay "damages" to defendants for filing frivolous litigation).

fees to prevailing plaintiffs.[118] At least one judge went even further: after adding up many of the foregoing expenses, the judge then doubled the required bond because he believed the class members were attempting to blackmail class counsel.[119] All told, the required bonds can reach hundreds of thousands or even millions of dollars.[120]

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).[121] 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.[122] Nonetheless, it is beyond the scope of this Article to assess whether

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118. *See, e.g., In re* Heritage Bond Litig., No. MDL 02-ML-1475 DT, 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,* 2007 WL 1340633 (9th Cir. May 8, 2007); *NASDAQ Market-Makers,* 187 F.R.D. at 128 (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").

119. *See Heritage Bond,* 2005 WL 2401111, at *5 ("[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,* 2007 WL 1340633 (9th Cir. May 8, 2007).

120. *See, e.g., Vaughn,* 627 F. Supp. 2d at 721 (requiring objector to post Rule 7 bond for $150,000); Allapattah Servs., Inc. v. Exxon Corp., No. 91-0986-CIV, 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,* 2006 U.S. Dist. LEXIS 71072, at *8–9 (requiring objector to post Rule 7 bond of over $645,000); *Conroy,* 2006 U.S. Dist. LEXIS 96169, at *11 (requiring objector to post Rule 7 bond of $431,167); *Heritage Bond,* 2005 WL 2401111, at *9 (requiring one set of objectors to post Rule 7 bond for $208,000 and another objector to do so for $228,000); Downey v. Mortgage Guar. Ins. Corp., No. Civ.A 100-108, 2001 WL 34092617 (S.D. Ga. Oct. 1, 2001) (requiring six objectors to post Rule 7 bond in the amount of $180,000).

121. *See In re* Heritage Bond Litig., 233 Fed. App'x 627, 631 (9th Cir. 2007) (vacating bond for similar reasons). The Federal Appellate Rules Standing Committee recently considered amending Rule 7 to make clear that its costs bonds should not include attorneys' fees. *See* Minutes of the Standing Committee on the Federal Rules of Practice and Procedure (Jan. 2008) (reporting that the Advisory Committee on the Federal Rules of Appellate Procedure had recommended such an amendment because of "the risk that large appeal bonds could chill meritorious appeals"). However, the Committee ultimately decided not to act on the amendment in light of disagreements over its potential effects and whether it should apply to both class and non-class litigation. *See id.* (Jan. 2009) (reporting that Advisory Committee had removed the amendment to Rule 7 from its agenda).

122. *See In re* Diet Drugs Prods. Liab. Litig., No. 99-20593, 2000 WL 1665134, at *2–3 (E.D. Pa. Nov. 6, 2000) (denying large bond on this basis).

district courts have such doctrinal authority; courts are split on many of these issues.[123]

Rather, this Article questions whether these large bonds are preferable to 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. Few objectors have the money to post such large bonds and even fewer have enough at stake individually in class actions to make it worthwhile 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."[124] But perhaps worst of all, large Rule 7 bonds may 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![125] Finally, as with ex post sanctions, nothing stops those objectors willing to post the bonds from then extracting a premium from class counsel to settle their appeals. As such, and despite the considerable costs of deterring meritorious appeals, it is not at all clear how much large Rule 7 bonds

123. 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*, 507 F.3d at 299 (rejecting the practice) and *Heritage Bond*, 233 Fed. App'x at 631 (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 *Cardizem*, 391 F.3d at 817 (permitting the practice) with *Diet Drugs*, 2000 WL 1665134, at *3–5 (construing Third Circuit case law to reject the practice). 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*, 2006 U.S. Dist. LEXIS 71072, at *8–9 (D. Mass. Aug. 22, 2006) (interpreting First Circuit case law to permit the practice) with *Vaughn*, 507 F.3d at 299 (rejecting the practice at least where the settlement agreement does not call for it).

124. *See Vaughn*, 507 F.3d at 300.

125. *See, e.g.*, *Cardizem*, 391 F.3d at 814–16 (consolidating appeal from bond order with appeal from class action settlement).

would reduce the holdout tax beyond the reductions achieved with quick-pay provisions.[126]

B. Undoing Devlin v. Scardeletti

Another potential solution to the blackmail problem is to undo the Supreme Court's ruling in *Devlin,* which permitted objectors to take appeals from the approval of class action settlements in the first place. Congress could undo that ruling by statute, or federal rulemakers could do so by amending the Federal Rules of Appellate Procedure. In my view, however, undoing *Devlin* is either unlikely to have much effect on the blackmail problem, or, if it does have an effect, it will only come at a very high cost of preventing class members with legitimate concerns from obtaining appellate review of settlements. Thus, undoing *Devlin* strikes me as a particularly poor solution to the blackmail problem.

In order to see why undoing *Devlin* is a poor solution, consider how it might be undone. One way to undo the decision is to change *Devlin*'s rule on which class members can appeal settlements from any class member who files an objection to any class members who files an objection *and* formally intervenes before the district court; this was the rule advocated by the federal government and the dissenting Justices in *Devlin.*[127] The trouble with this rule, however, is that it is unlikely to suppress much objector blackmail. Any class member savvy enough to understand the blackmail scheme will be savvy enough to file a motion to intervene in the litigation, especially in light of the fact that class members could be permitted to intervene even if only for the purpose of pursuing an appeal.[128] Although requiring objectors to jump through one more technical hoop to appeal makes taking appeals more costly, it is unlikely to deter even modestly lucrative blackmail opportunities. District courts might be able to deny intervention to class members who are blackmail minded,[129] but,

126. It should be noted that, although I believe ex post sanctions and large appellate bonds are inferior to quick-pay provisions as solutions to the blackmail problem, in settlements where defendants are unwilling to agree to quick-pay provisions, these solutions may be the only ones available to the district court. As such, it is possible that these solutions are preferable to doing nothing at all.

127. *See* Devlin v. Scardelletti, 536 U.S. 1, 11 (2002); *id.* at 22 (Scalia, J., dissenting).

128. *See id.* at 12 (noting that the federal government argued that "such a limited purpose intervention generally should be available to all those . . . whose objections at the fairness hearing have been disregarded").

129. In *Devlin,* the federal government argued that class members would be permitted to intervene as of right, *id.*, but Justice Scalia argued in his dissent that, even still, the district court might be able to serve a gate-keeping function by denying intervention to the most obvious

as noted above, when district courts exercise power in this context, they are essentially deciding whether to insulate their own rulings from appellate review—not to mention whether to resolve a major drain on their dockets. This does not create the best system of incentives. Moreover, as with requiring large appellate bonds, one wonders if the only objectors who would be affected by undoing *Devlin* in this manner would be those who are *not* blackmail minded: just as blackmail-minded objectors could hold up settlements by appealing the bond ordered by the district court, presumably they could do the same by appealing the district court's order denying their motion to intervene.[130]

A more potent way to undo *Devlin* would be to forbid objecting class members from appealing settlements altogether—regardless of whether or not they intervened. Although this would certainly end objector blackmail—if objectors cannot appeal, they cannot collect side settlements for dropping their appeals—it would come at a very steep price. As noted above, objectors typically provide the only adversarial testing of class action settlements; forbidding objectors from appealing would basically leave appellate review of class action settlements to those instances where class counsel was unhappy with the fees that the district court awarded. This would leave class action settlements with very little appellate scrutiny, and scrutiny in only one direction. In light of all of the agency problems that bedevil class action litigation, I can think of no reason why the resolution of this type of litigation should be subjected to lesser judicial scrutiny than other types of litigation; if anything, there should be more scrutiny of class action litigation, not less.

A middle course between a weak rule requiring class members to intervene before appealing and a harsh rule forbidding class members from appealing altogether would be a rule that permits class members to appeal settlements, but not to appeal them as of right. That is, a middle course might ask courts of appeals to screen whether a class member's appeal has sufficient merit to be heard with full appellate review. A similar process already exists under Rule 23 for taking an interlocutory appeal of the district court's decision to certify

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blackmail artists, *see id.* at 22 (Scalia, J., dissenting) (noting that the district court could rule on whether "the objections to the settlement were procedurally deficient, late filed, or simply inapposite to the case").

130. *See id.* at 17 ("[T]here is no dispute that [a class member can] appeal the District Court's collateral order denying his motion to intervene . . . ."); Marino v. Ortiz, 484 U.S. 301, 304 (1988) ("[S]uch motions are, of course, appealable.").

a class.[131] Although this approach may have the virtue of accelerating the rejection of the most frivolous appeals, in light of the fact that class counsel have other reasons to buy off objector appeals besides delay avoidance, this rule may not completely solve the blackmail problem. Moreover, for the same reasons we might worry about the incentives of district courts asked to decide whether their rulings should be insulated from appeal, we might also worry about the incentives of appellate courts asked to decide whether to increase their workload by an additional appeal.[132]

C. The Optimal Solution to Objector Blackmail: Inalienability Rules

In light of the problems with undoing *Devlin* and the risks of ex post sanctions and large Rule 7 bonds, quick-pay provisions—despite their significant limitations—may very well be the best solution conceived thus far to objector blackmail. There is, however, another solution to objector blackmail that suffers from none of the limitations of quick-pay provisions and poses none of the risks of sanctions and bonds: an inalienability rule prohibiting objectors from settling their appeals.

For many years, scholars of property law have explored the possibility of using inalienability rules—rules that prohibit the sale of an entitlement—to mitigate the threats of holdouts and blackmail in voluntary market transactions.[133] This literature shows how inalienability rules can completely solve the holdout problem posed by class action objectors.

The efficient allocation of resources in a society is often best achieved with property rules: Give one party an entitlement that can be transferred to another only through a voluntary transaction with the other party. If the other party values the entitlement more than the initial party, the transaction takes place; if the other party does

131. *See* FED. R. CIV. P. 23(f) ("A court of appeals may permit an appeal from an order granting or denying class-action certification under this rule if a petition for permission to appeal is filed with the circuit clerk within 10 days after the order is entered. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.").

132. On this point, it may be worth noting that the only federal court with a docket that is almost entirely discretionary is the United States Supreme Court and its docket has significantly declined in size in recent decades.

133. The first treatment of inalienability rules was the famous article by Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972). Although Professor Calabresi and Mr. Melamed did not discuss inalienability rules in the contexts of holdouts and blackmail specifically, subsequent scholars have done so. *See, e.g.*, Ayres & Madison, *supra* note 12; Heller, *supra* note 12; Fennell, *supra* note 12.

not, the transaction does not take place.[134] This is the regime currently at work with class action objectors: objectors have a right to appeal settlements, and class counsel can take that right away only if both the objector and class counsel agree on a price.

In some circumstances, however, voluntary market transactions can be inefficient. One such example is when transactions must occur between specific parties—e.g., when one party has monopoly power or where one party can disrupt or delay a transaction by withholding his or her consent.[135] If the buyer places a particularly high value on the entitlement even though it is worthless to almost everyone else, then the seller might acquire the entitlement solely for the purpose of selling it to the buyer.[136] These sort of strategic acquisitions, which themselves do not create utility but only increase the cost of properly allocating resources, are the unfortunate side effects of allocating resources solely through property rules. And, of course, they are the unfortunate predicament in which class counsel find themselves vis-à-vis class action objectors: the right to take a frivolous appeal is worth nothing to anyone but class counsel, who is eager to avoid delay, risk, and litigation expenses.

One solution to the problem of thin markets is a liability rule: Permit the buyer to take the entitlement from the seller and have a court set the price at which the transaction takes place.[137] The problem with liability rules, however, is that courts are neither very good at setting prices nor very good at separating strategic sellers from those who sincerely place an unusually high value on an entitlement.[138]

As a result, scholars have advocated the use of inalienability rules—rules that prohibit sellers from transferring an entitlement altogether—to combat the inefficiencies of strategic acquisition of

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134. *See* Calabresi & Melamed, *supra* note 12, at 1092 (noting that property rules "let[] each of the parties say how much the entitlement is worth to him").

135. *See* Fennell, *supra* note 12, at 1423–27, 1438–39 (noting that a "paradigmatic source of inefficiency is the costly wrangling associated with bilateral monopoly," including "blackmail," and the related problem of "the possibility that a party whose entitlement is crucial to the necessary assembly will attempt to 'hold out' for a larger share of the assembly surplus").

136. *See id.* at 1423 (noting that the risk of "wasteful negotiation" is high when an entitlement "has an idiosyncratically high value for a single buyer while remaining worthless, or very nearly so, to everyone else").

137. *See* Calabresi & Melamed, *supra* note 12, at 1106–07 (noting that if society can accurately gauge the value of entitlements, then "the holdout problem is gone" and "an argument can readily be made for moving from a property rule to a liability rule"); Fennell, *supra* note 12, at 1439 (noting that the problem of holdouts is "usually approached . . . through liability rules").

138. *See* Calabresi & Melamed, *supra* note 12, at 1108 ("We cannot be at all sure that [the landowner] is lying or holding out when he says his land is worth $12,000 to him.")

entitlements.[139] The theory behind inalienability rules is that prohibiting the sale of an entitlement will change who chooses to acquire the entitlement ex ante.[140] This is the case because, as Professor Fennell has put it, if entitlements are inalienable, "[f]oreseeing the inability to sell, those motivated solely by resale opportunities would simply select out of the market."[141] The reason inalienability rules succeed where property and liability rules fail is essentially because inalienability rules do a better job than do courts at generating information about why someone would want to acquire an entitlement in the first place: inalienability rules separate those persons who wish to acquire an entitlement for strategic reasons from those sellers who genuinely value the entitlement.[142] Thus, one way to prevent parties from acquiring entitlements for the purposes of holding out and blackmailing another party is to prevent those parties from selling the entitlements they acquire.

Although the virtues of inalienability rules have been noted most frequently in the context of property transfers, the rules have also been employed in the literature on settlement of litigation. One such example can be found in the article by Randy Kozel and David Rosenberg calling for a prohibition on the ability to settle litigation before summary judgment.[143] The authors described their proposal as a solution to the problem of frivolous litigation: if plaintiffs know that defendants cannot settle suits prior to summary judgment to avoid litigation costs (and if they know their suits will be dismissed on summary judgment), then plaintiffs will not file frivolous suits in the first place.[144] Although the authors did not describe their proposal as such, it is an example of an inalienability rule.

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139. *See id.* at 1111 ("While at first glance efficiency objectives may seem undermined by limitations on the ability to engage in transactions, closer analysis suggests that there are instances, perhaps many, in which economic efficiency is more closely approximated by such limitations. This might occur when a transaction would create significant externalities . . . ."); Fennell, *supra* note 12, at 1440 ("Alienability restrictions more straightforwardly select against those whose primary value is in reselling.").

140. *See* Fennell, *supra* note 12, at 1412–13 (noting "inalienability's impact on ex ante incentives to acquire and use goods that are not deemed intrinsically unsuited for market transfer").

141. *Id.* at 1420.

142. *See id.* at 1424 (noting that an inalienability rule can be a "mechanism for filtering out . . . transactions [that are] worthless intermediations that introduce bargaining dilemmas without any countervailing social benefits").

143. *See* Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849 (2004).

144. *See id.* at 1860–64 (discussing authors' proposed model for deterring frivolous litigation or "nuisance-value strategies" in the class action context).

An inalienability rule would serve the same salubrious purposes in the context of class action objectors. If objectors were prohibited from selling their right to appeal to class counsel, then objectors who wished to appeal solely to extract rents from class counsel eager to avoid delay, risk, and litigation costs would not bother filing appeals at all. Indeed, even objectors who had legitimate appeals but who were happy to settle their appeals for a premium would be unable to collect those premiums. In short, inalienability rules completely eliminate any sort of holdout tax. In this respect, inalienability rules are superior to quick-pay provisions because, in light of the limitations of quick-pay provisions, objectors can still collect premiums from class counsel eager to avoid risk and litigation expenses.

At the same time, no legitimate objector would be discouraged from having their appeals heard in the face of an inalienability rule; the rule would not affect access to appellate review at all. That is, an inalienability rule can thwart blackmail-minded objectors at the same time it leaves access to appellate review open to sincere objectors. In this respect, inalienability rules are superior to the ex post sanctions and large appellate bonds advocated and adopted by courts and commentators; as I explained above, these devices will inevitably chill legitimate objector appeals.[145]

Inalienability rules typically come with one very big downside: unless they can somehow be restricted only to strategic acquirers, they will prohibit utility-enhancing transactions as well as utility-diminishing ones.[146] For example, in the context of property transfers, an inalienability rule that discourages strategic acquisition also prevents a sincere acquirer from finding a higher-value use for the same entitlement.[147] Indeed, this problem with inalienability rules is especially acute in the context of litigation settlements: it is thought that settlement at some price is almost always preferable to further litigation, no matter how meritorious the suit, because the parties can achieve results substantially similar to the expected outcome of adjudication without incurring litigation expenses.[148] Thus, a rule that

145. *See id.* at 1904–05 (explaining how sanctions for frivolous litigation are inferior to inalienability rules).

146. *See, e.g.*, Fennell, *supra* note 12, at 1420 ("Driving out transactions is usually a bad idea . . . .").

147. *See id.* at 1454–55 ("Alienability restrictions could screen out those building [spite fences] for strategic reasons . . . [but] by blocking potential bargains, such rules risk leaving in place inefficiently ugly but earnestly constructed fences.").

148. *See* SHAVELL, *supra* note 2, at 403, 406 (discussing extent to which, in the litigation context, parties are likely to prefer settlement rather than prolonged litigation).

prohibits the settlement of litigation (including settlement merely before summary judgment, as Kozel and Rosenberg advocated[149]) will prevent some nonfrivolous litigation from settling (or at least prevent it from settling as quickly as it might have, in the case of Kozel and Rosenberg's proposal) even though settlement would have been preferable.

Fortunately, this downside to inalienability rules may not have much, if any, application in the context of class action objections. This is because the only objector appeals for which it is socially desirable to settle rather than litigate are the ones that an inalienability rule would discourage from being filed in the first place: those that serve no purpose but to delay the finality of the settlement. By contrast, unlike ordinary litigation, it is generally *not* utility-enhancing to settle nonfrivolous objector appeals. This is the case because settlement of objector appeals is rife with agency problems and foregone positive externalities: virtually any nonfrivolous appeal brought by an objector, if vindicated, will benefit not only the objector who brought the appeal but other class members as well. For example, if an objector appeals the size of the fee award class counsel received, a lower award will often benefit every other class member pro rata.[150] Similarly, if an objector appeals the manner in which the settlement was to be allocated among class members, all class members who are similarly situated to the objector (i.e., those who bought shares in a company before a certain date, those who suffered certain physical injuries, etc.) stand to benefit from the appeal as well. Indeed, it is difficult to conceive of *any* objector appeal—save the frivolous ones that do nothing but delay the finality of the settlement—that would not deprive other class members of its potential benefits when it is settled by class counsel.[151] It is for this reason that some commentators have

149. *See* Kozel & Rosenberg, *supra* note 143, at 1876 ("[A]pplication of [mandatory summary judgment] to the separate action process has the potential to add expense to the settlement of non-nuisance-value cases.").

150. This is the case when fee awards come from the corpus of the settlement rather than from the defendant pursuant to a fee-shifting statute. In the case of fee-shifting statutes, neither the objector nor any other class member stands to gain personally from a lower fee award; nonetheless, class members may enjoy the right to appeal those awards. *See, e.g.*, *In re* Cendant Corp. PRIDES Litig., 243 F.3d 722, 727–32 (3d Cir. 2001) (holding that class members had standing to appeal fee award even though any reduction in the award would go to the defendant rather than class members).

151. Sometimes class members raise objections to settlements that go to the propriety of certifying the class in the first place as opposed to merely reallocating the settlement proceeds away from class counsel or other class members. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (vindicating objector appeals complaining that the class was certified in violation of the Rule 23 requirement that the lead plaintiff and class counsel adequately represent absent class members). One might argue that other class members benefit from settling such appeals

advocated forbidding class counsel from settling with objectors at any point in the settlement process.[152]

Indeed, this general disfavor toward side settlements with individual class members is also the reason the Federal Rules of Civil Procedure were amended in 2003 to prevent class members from withdrawing their objections in the district court before the court rules on approval of the settlement.[153] Rule 23 now requires the district court's approval for any such withdrawal.[154] In my view, there is little reason not to promulgate a similar rule for appeals taken by objectors. Such a rule would not only prevent class counsel from settling appeals that could redound to the benefit of class members other than the objector—the traditional concern among commentators advocating such an approach—but it could also serve the equally salubrious end of solving the problem of objector blackmail. In short, an inalienability rule would prevent holdouts from extracting any tax from class counsel, and it would do so while preserving the opportunity for other class members to have their appeals heard. As such, an inalienability rule may be the optimal solution to the problem of objector blackmail.[155]

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because permitting them to go forward might scuttle the settlement altogether, thereby leaving the other class members with nothing at all. But, if Rule 23 would not permit a piece of litigation to proceed as a class action, then it probably *should not* proceed as a class action; if the Rule is preventing socially useful class actions from going forward, then it strikes me that the better course is to rework the Rule rather to permit class action lawyers who think they know better to circumvent it. In addition, I am skeptical that very many of these objectors seek to scuttle settlements altogether. For example, in the *Amchem* litigation, although the objectors complained that the prerequisites to certification had not been satisfied, the gravamen of their complaint was that some class members (those with present injuries) were getting more than others (those with future injuries). *See id.* Many such complaints can be fixed by revising the settlement or at least renegotiating it under a different structure of class representation; to the extent that such problems cannot be solved in light of Rule 23, then, again, it would seem that the proper course would be to rework Rule 23 rather than allow class counsel to circumvent it.

152. *See, e.g.*, Koniak & Cohen, *supra* note 67, 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, 203–04 (2001) (discussing problems with judicially endorsed practice of side settlements between class counsel and class objectors and arguing that courts should require class counsel to disclose side settlements for review).

153. *See* FED. R. CIV. P. 23(e)(4)(B) 2003 advisory committee's note (revised and renumbered as 23(e)(5)).

154. *See* FED. R. CIV. P. 23(e)(5).

155. It is important to note that an inalienability rule should not simply push back the period in which side settlements are negotiated to the thirty days during which an objector must file a notice of appeal. As Kozel and Rosenberg explain in the context of their mandatory-summary-judgment inalienability rule, because blackmail-minded, nuisance litigants lose all of their leverage once they file their suits (in this case, their appeals), their negotiating opponents can "costlessly and credibly" reject any pre-filing settlement demand "with a dismissive, 'See you in court.' " Kozel & Rosenberg, *supra* note 143, at 1863–64. On the other hand, because legitimate

Although an effective inalienability rule could take many forms, perhaps the most effective rule would prevent all settlement of objector appeals that did not involve a modification of the underlying class action agreement for the benefit of rest of the class. This rule would go beyond Rule 23 insofar as it would not permit the settlement of an appeal solely for money, even if a court were willing to approve it; in light of the dangers of trying to separate blackmail-minded objectors from legitimate ones, as well as the danger of foregoing positive externalities to other class members, there is little reason to allow settlements that do not involve a modification to the underlying class action agreement. On the other hand, objectors should be permitted to settle their appeals if the settlements involve a modification to the underlying class action agreement. Such modifications make it at least facially plausible that other class members are also benefited from the concerns raised by the settling objectors. Moreover, modifications would need to return to the district court for approval; district courts could filter merely cosmetic modifications from those in which other class members shared equally in the benefits sought by the settling objector. Of course, if an objector wished to drop her appeal and receive nothing at all in return (e.g., because she no longer wished to pursue the matter given its expense, chances of success, etc.), the objector should be allowed to do so, so long as some mechanism exists to verify that the objector has, in fact, received nothing in return (e.g., a certification under oath to that effect).[156]

It is true that an inalienability rule of this sort might create more work for courts of appeals insofar as class members unable to settle will end up litigating a greater number of appeals to fruition. Nonetheless, the amount of extra work is likely to be relatively trivial. As showed in Table 1, only twenty-seven class action settlements in all of 2006 were appealed by class members. It would not overtax the appellate courts, which decide thousands of appeals every year, to decide a few dozen more. For all these reasons, an inalienability rule—

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objectors can credibly threaten to file an appeal and see it through to fruition, it may be possible for legitimate objectors to collect a premium over the expected value of their appeals in exchange for refraining from filing their appeals during the thirty-day period. To this extent, even an inalienability rule cannot completely eliminate class counsel's incentives to pay premiums to avoid appeals.

156. Kozel and Rosenberg's analysis shows that any ability an objector might have to "throw" an appeal in exchange for later collecting a settlement from class counsel would be thwarted by the unenforceability of any such agreement: once the objector lost his or her appeal, class counsel would have no incentive to pay the agreed sum because the agreement could not be enforced by the objector. *See* Kozel & Rosenberg, *supra* note 143, at 1864–66 (making a similar argument for why plaintiffs will not "throw" summary judgment motions).

not quick-pay provisions, ex post sanctions, or large appellate bonds—may very well be the most effective solution to objector blackmail.

VI. CONCLUSION

For many years, courts and commentators have been concerned with the ability of class action objectors to blackmail class counsel by filing meritless appeals that could delay the final resolution of settlements for months or years. In response, courts and commentators have proposed, and in some cases adopted, somewhat draconian countermeasures that are likely to discourage both blackmail-minded and legitimate objectors from participating in class action litigation. In doing so, courts and commentators have been unaware that class counsel had already developed a more effective and better-tailored solution to the blackmail problem: the quick-pay provision. These provisions permit class counsel to receive their fee awards before appeals from the settlement are resolved. In 2006, already one-third of all class action settlements, and nearly 80 percent of securities settlements, included these provisions.

Although quick-pay provisions are a clever response to the blackmail problem, they come with several limitations. These limitations render them a suboptimal solution to objector blackmail. Drawing on property law scholarship, I have shown that an inalienability rule—a rule that would prohibit objectors from settling their appeals—is preferable. Such a rule would completely eliminate the ability of objectors to collect premiums from class counsel unrelated to the merits of their appeals, and at the same time it would keep access to appellate review fully open for those class members with genuine complaints about a class action settlement. An inalienability rule is therefore the optimal solution to the blackmail threat.