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Objector Blackmail Update: What Have the 2018 Amendments Done?

Brian T. Fitzpatrick

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INTRODUCTION

In 2012, I, along with Brian Wolfman and Alan Morrison, wrote a letter to the Federal Advisory Committee for the Rules of Appellate Procedure asking them to adopt a new rule to prohibit class members who file objections from dismissing their appeals in exchange for side settlements from class counsel.[1] Our letter was based on my 2009 article, *The End of Objector Blackmail?*,[2] where I argued that no good comes from these side settlements.[3] Either the objection has no merit and the side settlement therefore encourages more frivolous objections filed to hold up more settlements to extract more side settlements (i.e., "objector blackmail") or the objection has merit, but by resolving it on the side and not changing the class settlement, other class members were deprived of the benefit of the objection.[4] We argued that a flat prohibition on side settlements should reduce the number of appeals filed from class settlements and fee awards because the blackmail-minded objectors would stop bothering with objections if they knew they could not profit from them.[5]

Our letter was referred to the Federal Advisory Committee for the Rules of Civil Procedure, and it inspired the adoption of the new Federal Rule of Civil Procedure (FRCP) 23(e)(5)(B), which became effective in December 2018.[6] The new rule does not go as far as our letter recommended: it does not prohibit side payments but, instead, allows side payments if the district

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1. Letter from Brian T. Fitzpatrick, Brian Wolfman & Alan B. Morrison, to the Honorable Jeffery S. Sutton, Chair, Advisory Comm. on App. Rules (Aug. 22, 2012) [hereinafter Letter to Sutton], https://www.uscourts.gov/sites/default/files/fr_import/12-AP-F-suggestion.pdf [https://perma.cc/8BBX-C6D5].
2. Brian T. Fitzpatrick, *The End of Objector Blackmail?*, 62 VAND. L. REV. 1623 (2009).
3. *See* Letter to Sutton, *supra* note 1, at 2–3.
4. *Id.* at 4.
5. *Id.*
6. FED. R. CIV. P. 23(e)(5)(B).

court that approved the class settlement also approves the side payment.[7] I was skeptical when the new rule was adopted that it would mitigate objector blackmail. But now that we have had over one full year of experience with the new rule, we can take a look to see what the new rule has actually done. In this Essay, I attempt to do just that.

In Part I of this Essay, I describe the problem of objector blackmail, why prohibiting side payments to objectors would be the best way to screen blackmail-minded objections from other objections, and why I did not think the new FRCP 23(e)(5)(B) would do so as effectively. In Part II, I examine what district courts have done with their new side payment approval authority over the first sixteen months. I found six orders by district courts on whether to approve side payments: four approvals and two denials. Although this is not much data, qualitative review of the orders does not inspire confidence that district court judges will have the requisite backbone to reject blackmail-minded side payments. On the other hand, the approved side payments may be less lucrative under the new rule. In Part III, I try to assess how these two contrary forces might weigh against each other by studying empirically whether the new rule has discouraged class action objectors from taking appeals. Although my methods are crude, they suggest there has been no slowdown in these appeals in the first year of the new rule.

I. OBJECTOR BLACKMAIL: PROBLEMS AND PROPOSALS

Class members who object to class action settlements and fee awards can serve a vital role in class action litigation. Because both class counsel and the defendant, by definition, support class settlements, the only adversarial testing of settlements and fee petitions in either the district court or the court of appeals usually comes from objections litigated by absent class members. For this reason, it is important to ensure that class members who wish to improve settlements and trigger closer scrutiny of fee awards have the means and opportunity to do so through objections.[8]

But we have known for many years that some class members and their counsel file objections not because they want to improve settlements or reduce fee awards but, rather, because they want to delay settlements and extract private benefit for themselves.[9] This is what I call "objector blackmail."[10] Objectors can cause delay because they have the right to file appeals in the courts of appeals when district courts overrule their objections and approve class action settlements and fee awards.[11] These delays impose costs on class members, class counsel, and the defendant. Not only does it take time and money to file briefs but even frivolous appeals can significantly

7. *Id.*
8. Fitzpatrick, *supra* note 2, at 1630.
9. The first article on the subject was written by Edward Brunet. *See generally* Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403.
10. Fitzpatrick, *supra* note 2, at 1624.
11. *See* Devlin v. Scardelletti, 536 U.S. 1, 14 (2002).

postpone the distribution of settlements to class members, the distribution of fee awards to class counsel, and the finality for which the defendant has agreed to pay.[12] These costs and delays can become so significant that it becomes rational for class counsel (most commonly) or the defendant to pay the objectors to drop their appeals.[13] In essence, the law permits one class member to hold everything up for everyone else and, thereby, extract money from those affected by the delay.

The prospect of these side deals has encouraged class members to file objections and appeals to collect the blackmail payments. As a result, the Federal Judicial Center has long warned judges to "[w]atch out . . . for canned objections from professional objectors" and to "be wary of self-interested professional objectors who often present rote objections to class counsel's fee requests and add little or nothing to the fee proceedings."[14] Many courts have also commented on the blackmail problem.[15]

A number of solutions to this problem had been tried before the 2018 rule change, but all of them had failed.[16] As I explained in my 2009 article, the other potential solutions—sanctions for frivolous objections and appeals, requiring objectors to post appellate bonds, and provisions in settlement agreements that accelerate the payment of fees for class counsel (so-called "quick pay provisions")—are either incomplete solutions to the problem or create cures that are worse than the disease because they chill legitimate objectors as well as blackmail-minded ones (or, in some cases, *only* legitimate objectors and *not* blackmail-minded ones).[17]

What is needed is a way to clearly separate class members who file objections for the purpose of improving settlements from class members who file objections for the purpose of collecting side deals. The way to do this is through the proposal I made in my 2009 article and repeated in our 2012 letter: to prohibit objectors from dropping their appeals in exchange for something of value from class counsel or the defendant.[18] With such a rule,

12. Fitzpatrick, *supra* note 2, at 1634.

13. *Id.* at 1634–35.

14. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUD. CTR., MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES 15, 31 (2d ed. 2009), https://www.fjc.gov/sites/default/files/2012/ClassGd2.pdf [https://perma.cc/CYH3-3P7Q].

15. *See, e.g.*, Vaughn v. Am. Honda Motor Co., 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."); Vollmer v. Publishers Clearing House, 248 F.3d 698, 709 (7th Cir. 2001) (noting that class members sometimes appeal "solely to enable themselves to receive [a] fee"); Duhaime v. John Hancock Mut. Life Ins. Co., 183 F.3d 1, 6 (1st Cir. 1999) (noting that appeals from objections can become "extortive legal proceedings"); Barnes v. FleetBoston Fin. Corp., No. 01-10395, 2006 U.S. Dist. LEXIS 71072, at *3 (D. Mass. Aug. 22, 2006) (noting that blackmail-minded objectors "can levy what is effectively a tax on class action settlements"); Snell v. Allianz Life Ins. Co., No. 97-2784, 2000 WL 1336640, at *9 (D. Minn. Sept. 8, 2000) (noting objectors who "maraud proposed settlements—not to assess their merits on some principled basis—but in order to extort the parties"); Shaw v. Toshiba Am. Info. Sys., 91 F. Supp. 2d 942, 973 (E.D. Tex. 2000) (noting "objectors who seek out class actions to simply extract a fee by lodging generic, unhelpful protests").

16. Fitzpatrick, *supra* note 2, at 1651–57 (cataloguing these failed efforts).

17. *See id.*

18. *See* Letter to Sutton, *supra* note 1, at 4.

only objectors who actually care about the merits of their objections and appeals will file objections and appeals because their goal is to actually change the class settlement or fee award; objectors who are in it only for the side deals will no longer bother. In short, such a rule will effectively screen out blackmail-minded objectors but preserve access for objectors with legitimate bases for an appeal.[19]

It is true that a prohibition on side payments would prohibit even legitimate objectors with meritorious objections from dropping their appeals in exchange for something of value for themselves. Although at first blush it might seem strange to prevent someone who has brought a meritorious appeal from settling it, in the special context of class action objections, private settlements that are kept secret and not presented to judges for approval are never socially beneficial in my view. Any meritorious objection brought by a class member should, if vindicated, benefit not only the objector but other class members as well. If an objector is permitted to settle the objection in a side deal, however, only the objector benefits—none of the similarly situated class members do.[20] That is, the positive externalities to other class members that may have been derived from the objections and appeals are lost.[21] For example, if an objector objects to the manner in which a settlement is allocated among class members, all class members who are similarly situated to the objector stand to benefit from the objection. Or if an objector objects to the percentage of the settlement that will be paid in fees to class counsel, all class members stand to benefit from the lower fee percentage. But in both of these examples, only the objector will benefit if the appeal is dropped in a side deal because the merits of the objection are never addressed. For this reason, some commentators believe that private settlements with objectors are unethical as a general matter.[22] But even if we do not go that far, nothing is lost—and, indeed, much gained—when even class members with legitimate objections cannot drop their appeals in exchange for payments from class counsel or the defendant.

In 2003, in response to some of these concerns, FRCP 23(e)(5) was created to require district courts to approve the withdrawal of any objections to class action settlements.[23] When this amendment was under consideration, the Advisory Committee considered extending it to require district court

19. Fitzpatrick, *supra* note 2, at 1660–61.

20. *See, e.g.*, Holmes v. Cont'l Can Co., 706 F.2d 1144, 1148 (11th Cir. 1983) (indicating that similarly situated class members should be treated alike unless "rebutted by a factual showing that the higher allocations to certain parties are rationally based on legitimate considerations").

21. Fitzpatrick, *supra* note 2, at 1663.

22. *See* Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129, 132 (2001); *see also* Katherine Ikeda, Note, *Silencing the Objectors*, 15 GEO. J. LEGAL ETHICS 177, 203–04 (2001).

23. *See* FED. R. CIV. P. 23(e)(4)(B) advisory committee's note to 2003 amendment (revising and restyling the rule as 23(e)(5)).

approval even if an objection was dropped on appeal.[24] But the extension was dropped.[25] As a result, a loophole was created: objectors who wished to blackmail class counsel or the defendant simply waited for the appeal.

In our 2012 letter, we asked the Advisory Committee to do for objector appeals what the old FRCP 23(e)(5) had done for objections before the district court: require permission before a class member can withdraw.[26] But, in light of what we had learned about objector blackmail in the ensuing years, as well as what I noted above was the lack of benefit of any side settlement in the special context of class action objections, we further asked to forbid courts from granting that permission unless the objector and counsel for all the parties certified that they had neither given nor received anything of value in return.[27]

It should be noted that I do not believe that class members who file objections should *never* receive any compensation that other class members do not. Class members who file legitimate objections often must hire lawyers to do so, and, like any other counsel, these lawyers need some economic incentive to participate in the litigation. As such, I believe that class members with legitimate objections ought to be compensated for their efforts.[28] But when objectors are compensated, it should only be for successful objections that have created value for other class members, not objections that have failed or were never considered. Moreover, it should only come by way of district court approval, not by way of a secret side deal with class counsel or the defendant. Federal courts already widely recognize the authority of district courts under FRCP 23(h) to award objectors attorneys' fees when their objections create value for the class—for example, when an objection causes the district court to reduce class counsel's fee request or when an objection causes class counsel and the defendant to revise the terms of the settlement—by compensating them from the settlement proceeds or class counsel's fee award.[29] This is a manifestation of the same unjust enrichment doctrine that underlies class counsel's own attorneys' fees. Nothing I proposed would have changed this.

Nonetheless, the rulemakers were unwilling to go as far as we had recommended. Instead, they revised FRCP 23(e)(5) in two ways. First, they

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24. *See* Civ. Rules Advisory Comm., Minutes of the Meeting of October 16 and 17, 2000, at 9, https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-civil-procedure-october-2000 [https://perma.cc/Y5KM-CELH].

25. *See* DAVID F. LEVI, ADVISORY COMM. ON THE FED. RULES OF CIV. PROC., REPORT OF THE CIVIL RULES ADVISORY COMMITTEE 178–84, 277 (2002), https://www.uscourts.gov/rules-policies/archives/committee-reports/advisory-committee-rules-civil-procedure-may-2002 [https://perma.cc/KZT5-S5GJ].

26. Letter to Sutton, *supra* note 1, at 5–6.

27. *Id.* at 6.

28. Fitzpatrick, *supra* note 2, at 1665; Letter to Sutton, *supra* note 1, at 6. It is an interesting question *how* judges should compensate successful objectors. Although I have not examined the question in detail, my intuition is that it should be done the same way we compensate class counsel: pay them a percentage of the benefits they create for the class. *See* BRIAN T. FITZPATRICK, THE CONSERVATIVE CASE FOR CLASS ACTIONS 90–95 (2019).

29. *See, e.g.*, Rodriguez v. Disner, 688 F.3d 645, 658–59 (9th Cir. 2012).

created FRCP 23(e)(5)(A) and took away some of the district court's authority over the withdrawal of objections still before the district court: whereas the old rule required the district court's permission to withdraw any objection, the new rule requires permission only if something of value is exchanged.[30] Second—and this was the response to our letter—they created FRCP 23(e)(5)(B) and gave the district court new authority over side payments once an appeal was filed: "Unless approved by the court after a hearing, no payment or other consideration may be provided in connection with . . . forgoing, dismissing, or abandoning an appeal . . . ."[31]

In my 2009 article, I considered a rule like FRCP 23(e)(5)(B),[32] but by the time of our 2012 letter, I had thought better of it for two reasons. First, as I noted above, if the objector has not changed the settlement or fee award for the rest of the class, then any legitimate concern with the settlement or fee award is lost by dropping the appeal.[33] Why would we want to lose these positive externalities for other class members? Second, I worried about the fortitude of our district court judges. There has been great concern for many years with their scrutiny of class action settlements because it usually takes place in the absence of adversarial presentations, and workload reduction pressure makes it easy to rubber-stamp uncontested motions.[34] Although the authority to approve side settlements granted by FRCP 23(e)(5)(B) does not implicate the latter concern—the workload implicated is that of the court of appeals rather than of the district court—the presentation of a side settlement to the district court will be uncontested. If district courts rubber-stamped side payments, then FRCP 23(e)(5)(B) would not screen blackmail-minded objectors from other objectors and the tide of objector blackmail would continue unabated.

At various junctures in the rulemaking process, I asked the rulemakers why they refused to go all the way and prohibit all side settlements. In particular, I asked for an example of when an objector should be paid despite not improving the settlement or fee award for the class. The only example I was offered was this one: suppose the district court believed the settlement was reasonable, but the objector raised a plausible concern that no one else raised; could not the district court approve a payment to the objector for improving the *process* of the consideration of the settlement and fees, even if the objector did not improve the *substance* of the settlement or fee award? Although there is some merit to this idea, it is so broadly applicable—it could apply to nearly any objection—that, in light of the rubber-stamping fear I

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

31. *Id.* r. 23(e)(5)(B). Because the objector will want to know whether the district court will approve the side payment before the appeal is dismissed, the district court will usually be asked only to make an "indicative ruling" of what it would do with the side payment. *See* BOLCH JUD. INST., GUIDELINES AND BEST PRACTICES: IMPLEMENTING 2018 AMENDMENTS TO RULE 23 CLASS ACTION SETTLEMENT PROVISIONS 28–30 (2018), https://judicialstudies.duke.edu/wp-content/uploads/2018/09/Class-Actions-Best-Practices-Final-Version.pdf [https://perma.cc/DHL3-L6EE].

32. Fitzpatrick, *supra* note 2, at 1664.

33. *See supra* notes 20–22 and accompanying text.

34. Fitzpatrick, *supra* note 2, at 1631 & nn.33–34.

described above, I worried that it had the potential to become an exception that would swallow the rule. In other words, this example confirmed my view that FRCP 23(e)(5)(B) would be a poor vehicle to separate blackmail-minded objectors from others.

II. QUALITATIVE ANALYSIS OF FRCP 23(E)(5)(B) IN PRACTICE

Now that we have lived with the new rule for over one year, we can assess whether my skepticism was mistaken. In order to do so, I looked for every time a district court has been asked to approve a side settlement under FRCP 23(e)(5)(B). As of April 2020, I found six such occasions.[35] They are summarized in Table 1 below, where I list in chronological order the name of the case, how much the court awarded class counsel in fees, how much class counsel or the defendant wanted to pay the objector to drop the appeal, and whether the court approved the side payment. The amount of the side payment includes all payments, whether styled as a fee to the objector's attorney, an incentive payment to the objector, or, in one case, a donation to charity. I include class counsel's fee award in the table because class counsel usually pays side payments, and the amount that objectors can extract is, in theory, correlated with how much class counsel stands to gain by getting rid of the objector.[36]

35. *See infra* notes 37–42.
36. *See* Fitzpatrick, *supra* note 2, at 1634–35.

Table 1: FRCP 23(e)(5)(B) Side Settlements Requests Through April 2020

Case	Class Counsel's Fees	Proposed Side Payment	Side Payment Approved?
***In re Volkswagen Timing Chain Products Liability Litigation* (D.N.J.)**[37]	$8,500,000	Undisclosed	Yes
***In re Experian Data Breach Litigation* (C.D. Cal.)**[38]	$10,500,000	$10,000	Yes
***Douglas v. Western Union Co.* (N.D. Ill.)**[39]	$425,000	$79,740	No
***In re Foreign Exchange Benchmark Rates Antitrust Litigation* (S.D.N.Y.)**[40]	$300,335,750	$300,000	No
***In re Dental Supplies Antitrust Litigation* (E.D.N.Y.)**[41]	$26,666,667	$150,000	Yes
***In re Takata Airbag Products Liability Litigation* (S.D. Fla.)**[42]	$74,775,000	$1,906,000 (to twelve objectors)	Yes

37. Order at 3, *In re* Volkswagen Timing Chain Prod. Liab. Litig., No. 16-cv-02765 (D.N.J. Feb. 19, 2019), ECF No. 250 (stating that the court will grant approval of the settlements with the objectors upon remand of the Third Circuit but withholding the amount of the settlement).

38. Order Approving Payment to Objector Pursuant to FRCP Rule 23(e)(5)(B) at 2, *In re* Experian Data Breach Litig., No. 15-cv-01592 (C.D. Cal. July 3, 2019), ECF No. 335; Stipulation Requesting Approval of Payment to Objector Pursuant to FRCP Rule 23(e)(5)(B), *In re Experian*, No. 15-cv-01592 (C.D. Cal. July 2, 2019), ECF No. 334) (approving the $10,000 payment to the objector and his counsel pursuant to an agreement that the objection would be withdrawn and the original terms of the settlement shall remain in place for the remainder of the class).

39. Notification of Docket Entry at 1, Douglas v. W. Union Co., No. 14-cv-01741 (N.D. Ill. Oct. 2, 2019), ECF No. 187 (denying in part the motion for an indicative ruling approving the objector's settlement under FRCP 23(e)(5)(B) after a hearing on the issue).

40. Opinion & Order at 1, *In re* Foreign Exch. Benchmark Rates Antitrust Litig., No. 13-cv-07789 (S.D.N.Y. Oct. 11, 2019), ECF No. 1358 (denying the motion for an indicative ruling of approval for a $300,000 side payment to come from class counsel's fees to avoid encouraging frivolous objections).

41. *See* Joint Motion by Plaintiffs & Objector for Indicative Ruling to Effectuate Terms of Settlement with Objector & Objector's Counsel at 2–4, *In re* Dental Supplies Antitrust Litig., No. 16-cv-00696 (E.D.N.Y. Oct. 8, 2019), ECF No. 344 [hereinafter Joint Motion] (asking the court to approve a settlement, which was granted without written opinion on October 17, 2019, where $100,000 of class counsel fees would be donated to the American Dental Association, $5000 would reimburse the objector for his participation, and $45,000 would go to the objector's counsel for attorney fees); *see also* Objector's Unopposed Motion for Attorney Fees at 2–4, *In re Dental Supplies*, No. 16-cv-00696 (E.D.N.Y. Oct. 8, 2019), ECF No. 345 (same).

42. Order of Indicative Ruling Under Federal Rule of Civil Procedure 62.1, at 2–3, *In re* Takata Airbag Prods. Liab. Litig., No. 15-cv-02599-MD (S.D. Fla. Jan. 27, 2020), ECF No.

As the table shows, objectors are batting 0.666, very good by baseball standards and not bad by objector standards: they have had a much better than even chance at getting paid for making unsuccessful objections thus far under the new rule. But whether this track record might discourage blackmail-minded objectors depends on why courts are approving and rejecting the payments. What did the judges say?

Three reasons have thus far emerged for approving the side payments. First, two courts noted that doing so avoided further delay in getting compensation to the class.[43] Second, two courts noted that the objections helped to frame the issues for the reviewing courts.[44] Third, one court noted that the objection had improved the settlement administration process—in that case, the objectors had recommended using a lottery to improve the percentage of class members taking advantage of the settlement, and the recommendation was adopted by class counsel.[45]

What about the courts that rejected the side payments? One, Judge Gary Feinerman, did not give any written reasons, and a transcript of the hearing is unavailable.[46] The other, Judge Lorna G. Schofield, wrote a four-page opinion that said she refused to pay an objector to "avoid further delay . . . that the Objector . . . caused by filing the appeal" or to reward the objector when the court's decision to reduce class counsel's fee had "nothing to do with the Objector's objection," even though "the Court's fee award minimally correlates with the premise of the objection" (i.e., that the requested fee was too high).[47] In short, "[a]pproving agreements in these circumstances would serve only to encourage objectors or their attorneys to extract this type of payment, and 'make a living [as serial objectors] simply by filing frivolous appeals and thereby slowing down the execution of settlements.'"[48]

What can we make of these decisions? To begin with, it is clear to me that the courts that approved side settlements because they avoided delay in

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3632 (awarding the settlement fee of $1,906,000 to the twelve objectors based on their agreement with class counsel to use $5 million of the settlement for a sweepstakes program, beneficial to the entire class).

43. Order, *supra* note 37, at 2–3 (noting that the court would grant approval because "14,635 claims have been filed by Class Members but distribution of approved settlement funds is delayed until the Objectors/Appellants' appeals are resolved"); Joint Motion, *supra* note 41, at 4 ("[A]pproving these payments will allow the settlement funds to be distributed without further delays arising from adjudicating the Objector's appeal.").

44. Joint Motion, *supra* note 41, at 3 ("Class Counsel agree that the objection assisted in framing the issues for consideration by the Court in connection with its approval of the Class Settlement under Fed. R. Civ. P. 23(e)."); Order Approving Payment to Objector Pursuant to FRCP Rule 23(e)(5)(B), *supra* note 38, at 2 (accepting the reasoning in the stipulation, which stated, "the Parties agree that the Objection assisted in framing the issues for consideration by the Court in connection with settlement approval under Fed. Rule Civ. Pro. 23(e)").

45. Order of Indicative Ruling Under Federal Rule of Civil Procedure 62.1, *supra* note 42, at 2–3.

46. *See generally* Notification of Docket Entry, *supra* note 39.

47. Opinion & Order, *supra* note 40, at 2–3.

48. *Id.* at 3 (second alteration in original) (quoting *In re* Polyurethane Foam Antitrust Litig., 178 F. Supp. 3d 635, 639 (N.D. Ohio 2016)).

getting money to the class made a mistake. As Judge Schofield noted, the only reason there is a delay is because the objector filed the appeal! Paying the objector to avoid delay created by the objector is akin to paying a bank robber to give money it robbed back to the bank. That is a recipe for more robberies, not fewer. This is why the "best practices" promulgated by the Bolch Judicial Institute at Duke Law School in the wake of the rule say that "a court may not consider as a benefit to the class members the time that would otherwise be spent addressing the withdrawn objection or appeal . . . . Otherwise, every improper objection would be subject to compensation on these grounds."[49]

Second, I remain skeptical of the courts that approved side settlements because the objectors helped frame the issues—the reason cited to me by the rulemakers when I challenged the new rule while it was still a proposal. I have examined the objections in both of these cases, and they are no different from nearly every other objection I have seen filed in class action cases. As I feared, I believe this justification for side payments has the potential to become an exception that swallows the rule in the hands of judges who can be too prone to rubber-stamp uncontested motions. In my opinion, Judges Feinerman and Schofield deserve kudos for resisting the temptation to go along with such entreaties.[50]

The only justification for approving a side settlement that has any resonance with me is Judge Federico A. Moreno's order in *In re Takata*: improving the settlement administration process.[51] When I proposed my rule uniformly prohibiting side payments, I had not anticipated that an objector might create value for the class without changing the settlement agreement itself. But it is true that improving the distribution process is one way that can occur. Thus, of the four approved side payments, this one may be the only one where I agree the objector might have deserved to be paid. But it is important to note that nothing prevents an objector that improves settlement administration from seeking an unjust enrichment fee award in the normal course under FRCP 23(h) in the same way an objector could for improving the settlement itself. That is, there is no need to hold up the settlements and fees by taking appeals in order to improve the settlement administration process and get paid for it. In my view, judges should channel such objectors to the normal process of FRCP 23(h), instead of encouraging them to create undue leverage over class counsel by holding things up on appeal and then seeking payment under FRCP 23(e)(5)(B).

In sum, based on the first year of experience under FRCP 23(e)(5)(B), I am still skeptical that the rule will have much effect on objector blackmail. I suspect blackmail-minded objectors will continue freely filing their objections and appeals until they run into judges like Judges Feinerman and Schofield, and then they will stop filing their objections in those courts and

49. BOLCH JUD. INST., *supra* note 31, at 25.

50. *See* Notification of Docket Entry, *supra* note 39; Opinion & Order, *supra* note 40.

51. *See* Order of Indicative Ruling Under Federal Rule of Civil Procedure 62.1, *supra* note 42, at 2–3.

those courts only; they will continue freely filing in the courts that approve side payments or have yet to confront one.

Nonetheless, there may be one way in which the new rule has mitigated the threat of objector blackmail. In the three cases where side payments were approved and the amounts of the side payments were disclosed, we can see that the payments were closely tied to the objector's counsel's lodestar (in addition to reimbursement of travel expenses and small incentive payments to the objectors themselves).[52] In other words, the side payments do not appear to be a function of class counsel's fee award. This should make objector blackmail much less lucrative. If so, the new rule could discourage blackmail-minded objections by making them less profitable even if not less successful.

III. DOES FRCP 23(E)(5)(B) DISCOURAGE BLACKMAIL-MINDED OBJECTIONS?

As I noted in Part II, there are reasons to be both skeptical and hopeful that FRCP 23(e)(5)(B) may discourage blackmail-minded objections. On the skeptical side, most judges have been lax in approving side payments. On the hopeful side, the amount of the side payments may have been reduced to nothing more than reimbursement of time and expenses—not a very good investment for objectors when any approval of the side payment is uncertain. In this part, I ask whether we can test these competing hypotheses empirically by examining how many objectors filed appeals from class action settlements in the year before the new rule took effect (2018) compared to how many objectors did so in the year after the new rule took effect (2019).[53]

As I learned from my past studies of class action settlements, it is difficult to conduct empirical studies in this area because there is no readily available list of class action settlements outside of the securities fraud area, and even when the settlements can be identified, the only way to learn information about the settlements—including whether an objector filed an appeal—is to examine the court dockets by hand.[54] That sort of investigation here would have taken many months and is beyond the scope of this Essay.

Instead, I decided to try a shortcut. There is a commercially available product called Lex Machina that uses machine learning to read the docket sheets in the federal courts' Public Access to Court Electronic Records (PACER) system. I asked the team at Lex Machina if we could query the system to calculate how many objectors filed appeals from class action settlements in 2018 compared to 2019. Although that precise query was not

52. *Id.* at 3; Objector's Unopposed Motion for Attorney Fees, *supra* note 41, at 3–4; Stipulation Requesting Approval of Payment to Objector Pursuant to FRCP Rule 23(e)(5)(B) at 3, *In re* Experian Data Breach Litig., No. 15-cv-01592 (C.D. Cal. July 2, 2019), ECF No. 334.

53. The rule took effect on December 1, 2018. *See* H. COMM. ON THE JUDICIARY, 115TH CONG., FEDERAL RULES OF CIVIL PROCEDURE XIII (Comm. Print 2018).

54. Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 816–17 (2010).

possible, a similar one was possible. Lex Machina could ask how many "class action" cases resolved by "likely settlement: stipulated dismissal" with termination dates in 2018 or 2019 were also "appealed to circuit court." This query is not precisely what we want to study here—e.g., it includes appeals from anyone, not only objectors, and it includes cases settled before class certification—but it is overinclusive in the same ways for both years. As such, there is no reason to believe the lack of precision will bias the comparative results in one direction or another. On the other hand, it is still possible that the noise caused by the irrelevant cases will obscure any effect on the relevant cases; after all, the number of cases that objectors appeal appears to be low: in prior empirical work, I found only twenty-seven objector appeals from federal class action settlements or fees in a given year.[55] Even with all those caveats, the results from Lex Machina are not encouraging: the program found slightly *more* class action cases appealed (120) in 2019 than in 2018 (107), despite the fact that the total number of class action cases with settlements went *down* in 2019 (2691) from 2018 (2809).

CONCLUSION

I have long advocated changing the federal rules to discourage class action objectors from using the appellate process to extract side payments from class counsel and defendants. Although the rulemakers amended FRCP 23 in 2018 in an attempt to do this, I have been skeptical that the new rule is strong enough to get the job done. In order to assess how the new rule is faring, I examined every district court order considering whether to approve a side payment since the new rule became effective, through April 2020.[56] Although this is not much data, qualitative analysis of the data does not inspire confidence that district court judges will have the requisite backbone to reject blackmail-minded side payments. On the other hand, the side payments approved may have become less lucrative under the new rule. Still, crude attempts to determine whether the overall effect of the new rule has discouraged blackmail-minded objections are not encouraging.

What more can be done absent a stronger rule from the rules committee? In a remarkable decision, the Seventh Circuit recently forced objectors to disgorge their side payments on the grounds that the payments constituted unjust enrichment.[57] I am not sure if this decision is right on the law, but if it were to become the law of the land, it would do through the common law what I had asked the rulemakers to do legislatively in 2012. Although the decision dealt with side payments that were made before the 2018 amendments to FRCP 23 and it might be hard to use it against side payments

55. Fitzpatrick, *supra* note 2, at 1640.

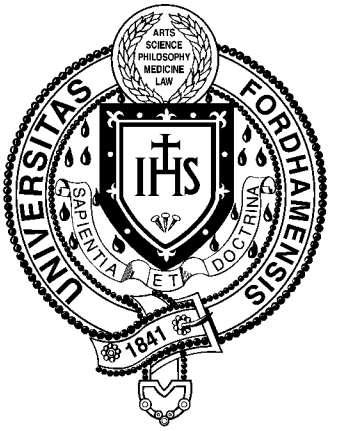
56. *See supra* Part II.

57. *See* Pearson v. Target Corp., No. 19-3095, 2020 WL 4519053, at *1 (7th Cir. Aug. 6, 2020).

that are blessed by a federal judge under the new rule, the decision might discourage objectors from seeking such side payments to begin with.[58]

But we may not need judges or rules committees to stamp out objector blackmail; it may be something that parties to class actions can do on their own. How? By credibly precommitting to refuse to make side payments. For example, if class action settlements contained a "poison pill" that said the agreement would become void if class counsel or the defendant made a side payment to an objector, then objectors would know they would be unable to extract one of these payments in that case. Only objectors interested in changing the agreement would then file objections. I have never seen parties try this strategy, but it may be the best hope to eliminate this unsavory corner of class action practice.

58. *See* Holly Barker, *Objector Seeking $400,000 Abandons Wells Fargo Settlement Appeal*, BLOOMBERG L. CLASS ACTION NEWS (Aug. 27, 2020), https://news.bloomberglaw.com/class-action/objector-seeking-400-000-abandons-wells-fargo-settlement-appeal [https://perma.cc/Q9WV-TEU3].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