

## The Expert's Corner

### THE AMERICAN LAW INSTITUTE'S NEW APPROACH TO CLASS ACTION OBJECTORS' ATTORNEY FEES

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The American Law Institute ("ALI") is in the midst of a project considering aggregate litigation practices in the United States. The effort will not culminate with a "restate-ment," but rather aims to develop Principles of the Law of Aggregate Litigation. There are four reporters on the project, led by New York University law professor Sam Issacharoff, and a group of thirty-seven formal "Advisers" comprised of lawyers from both sides of the aisle, state and federal judges, and class action scholars and experts (I am one of these Advisers). The group's current draft – Discussion Draft No. 2 (April 6, 2007) – has been vetted at several recent sessions and will likely move to a final draft within the next year or so.<sup>1</sup>

Several aspects of the effort will interest class action fee observers. The draft itself is divided into three sections – the first provides a background to the *general principles* that underlie litigation aggregations; the second focuses on when *aggregate treatment of common issues* is called for; and the third and final section identifies principles applying to *aggregate settlements*. The aggregate settlement chapter contains two sections focusing on attorney's fees – one about class counsel's fee (§3.13), the other about objectors' fees (§3.08).

In last month's issue, I discussed the attorney's fees provisions; in this month's issue, I look at the objectors' fees provision.

<sup>1</sup> It remains, nonetheless, a draft that neither the ALI's governing Council nor the membership of the Institute has taken a position on, so its views do not yet represent those of the Institute.

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#### OBJECTORS' FEES

The ALI draft takes settlement seriously – a full third of it is devoted to the topic – and hence it offers a clearer view of objectors and objector fees than current case law does. The draft's discussion of objectors solely comes in the context of its consideration of objector fees. But within the commentary on fees, the draft identifies several key principles.

The first is that "[d]espite concerns about the motives underlying some objectors, the need for objectors is clear." §3.08, Comment B. Why? Because, as the draft makes clear, at the moment of settlement, the parties are united and – absent objection – the court is not presented with an adversarial account of the settlement. *Id.* Second, however, the draft notes that objectors' motivations are not always pure: objectors have the potential to hold up the settlement and, conventionally, might have done so to extract a fee in exchange for dropping the objection. *Id.* at Comment A. Rule 23(e)(4)(B) altered this dynamic in federal court by insisting that objections could only be withdrawn with court approval, meaning that such side deals would be disclosed to the court. Even absent the extortion power, however, objectors can still hold up a settlement and hope for a court-awarded fee based on the value of their objection. Moreover, the rule does not deter objectors who threaten to object, and then receive a payoff in return for not filing the objections.

Yet, third, the anomaly at the heart of objection practice is that an objector who improves a settlement may get a fee from the perfected settlement fund; but an objector who destroys a settlement leaves herself with no fund from which to extract a fee. An entrepreneurial objector therefore has an incentive to gravitate toward decent settlements, in the hopes of making them a little better, and away from indecent settlements which, if properly scuttled, will yield no fee.<sup>2</sup>

<sup>2</sup> I discuss these dynamics in greater depth in William B. Rubenstein, *The Fairness Hearing: Adversarial and Regulatory Approaches*, 53 U.C.L.A. L. REV. 1435, 1448-1450 (2006).

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The ALI draft attempts to balance the need for objectors, the possibility of abuse, and the perverse incentives currently in existence by proposing a three-fold approach:

- objector's counsel should be able to collect appropriate fees from a common fund if their efforts "materially improved" the settlement, with the fee "linked to the magnitude of the improvement to the class members' recovery;"
- if the objections cut so much to the heart of the settlement that they scuttled it – and hence no fund remained from which fees could be assessed – the draft suggests that the trial court have discretion to award fees from the defendant's purse or displaced class counsel's purse, as appropriate;
- conversely, if the objection is found to be "insubstantial and not reasonably advanced for the purpose of improving the settlement," the draft suggests that the trial judge be authorized to sanction the objector or objecting counsel.

§3.08(a)-(c).

Each of these principles is important and an improvement on current practice. That successful objectors ought to be able to receive a fee from a common fund is generally accepted, though not as completely as it should be. More importantly, the draft captures the award standard with greater precision than in most caselaw (1) by permitting fees for objections that have the effect of "materially improving the settlement;" (2) for the class "or any subclass;" and (3) by insisting that the magnitude of the fee be "linked to the magnitude of the improvement to the class members' recovery." §3.08(a).

In addition to delineating a clearer standard, the draft permits courts to fill the void left when a good objection undermines the settlement. At present, courts generally will not award a fee for such activity since the fund no longer exists; therefore, objectors have little incentive to mount such objections. The ALI's approach fixes this problem by, essentially, taxing a penalty or sanction on plaintiffs' counsel and the defendant that brought forward the now-defunct settlement. Were this approach effectuated, its aspiration would be to deter class counsel and defendants from forwarding questionable settlements since their own money would be on the line.

Finally, in a form of even-handedness, the draft takes a similar approach to objectors, suggesting that they can be sanctioned for trivial objections advanced for an improper

purpose. The draft might have employed a disjunctive "or" rather than a conjunctive "and" to signal that sanctions might be appropriate for "insubstantial objections" OR those "not reasonably advanced for the purpose of improving the settlement." But the conjunctive probably captures the proper spirit of the principle by not condoning too much sanctioning. In this spirit, the draft could have approved sanctions only against objecting counsel, instead of, as it does, permitting sanctions against objectors themselves; this could penalize un-represented parties for their ignorance of the legal system, though it is likely that judges will use their discretion accordingly.

Despite these quibbles, then, the draft generally gets each of its core principles right. Were this fee approach adopted, it would create stronger (financial) incentives for good objections, and hence could lead to the development of a portion of the class action bar whose function was to present good objections to class action settlements – a sort of roving band of class action overseers, subsisting by getting fees for good objections, but deterred by sanctions from filing frivolous ones. If such a practice were to emerge, it is likely those who engaged in it would develop expertise in oversight and objection. This would make the practice of objecting more professionalized and less random than it is at present.

That said, the draft still leaves several points unaddressed. First, the draft pre-supposes that objectors must be class members and hence that counsel that sees a poor settlement proposed must find a member of the class to represent before she can file an objection. If the goal is to encourage good objections where they exist and/or, more ambitiously, to produce a skilled group of objectors, the presence of a specific class member-client seems irrelevant. Perhaps the draft could recommend objectors fees even for amici (without clients) who help perfect a settlement. Second, the draft does not discuss whether objectors should be able to get discovery during the approval stage of the class action. Absent such discovery, mounting an objection can be difficult; but permitting wide-ranging discovery after preliminary approval of a settlement has the potential to disrupt the settlement process even when settlement is appropriate. Courts need guidance as to when discovery is appropriate, how much should be given, what limitations are worthy, etc. Third, despite the draft's penalization of frivolously filed objections, objectors still have incentives to suggest objections. True, if objections are filed,

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Rule 23(e) requires court approval for withdrawing them and the draft recommends monetary sanctions (fee shifting) in egregious circumstances. But if objections (and discovery) are simply threatened without being filed, objecting counsel may still extract a fee to go away. Under the draft's approach, settling counsel can call the objectors' bluff and force them to file the objection under threat of sanction if it is frivolous – but cautious counsel might prefer to just pay such potential objectors to go away.

#### CONCLUSION

In sum, the ALI's approach to objector fees is an important step forward for this field in three regards: (1) by clarifying that good objectors can get fees; (2) even when they completely undermine a proposed settlement; and (3) by clarifying that frivolous objectors might have to pay fees. Although other subjects might have been included – clients, discovery, threats – the ALI should nonetheless be applauded for this broad step forward on the subject of objector's fees.     Ω

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