

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.¹

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.

¹ 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.²

² 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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