IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5960

IN RE: PRUDENTIAL INSURANCE COMPANY OF AMERICA SALES PRACTICES LITIGATION AGENT ACTIONS

MICHAEL P. MALAKOFF, ESQUIRE AND MALAKOFF DOYLE AND FINBERG, P.C., APPELLANTS

Appeal from the United States District Court
for the District of New Jersey

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF APPELLANT

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INTEREST OF AMICUS

Amicus Public Citizen was founded in 1971 as a public advocacy, lobbying, and litigation organization. On behalf of its 150,000 members, Public Citizen works toward the enactment and effective enforcement of consumer protection laws. As part of this work, Public Citizen's attorneys regularly represent objectors to class action settlements. In the last eight years alone, Public Citizen has represented objectors in more than two dozen nationwide class action settlements in which the named representatives and their attorneys were inattentive to the needs and divergent interests of the absent class members whom they were supposed to represent. See, e.g., In re Diet Drugs Prods. Liab. Litig., 1999 U.S. Dist. Lexis 14881 (E.D. Pa. Sept. 27, 1999); Clement v. American Honda Finance Corp., 176 F.R.D. 15 (D. Conn. 1998); In re Ford Motor Bronco II Prods. Liab. Litig., 1995 U.S. Dist. Lexis 3507 (E.D. La. Mar. 20, 1995); see generally Henry J. Reske, "Two Wins for Class Action Objectors," 82 A.B.A. Journal 36, 37 (June 1996) (highlighting Public Citizen's work representing absent class members). Public Citizen's attorneys argued on behalf of lead objectors in two landmark cases from this Court involving nationwide class settlements that presented fundamental intra-class conflicts, see Georgine v. Amchem Prods., Inc., 83 F.3d 610 (3d Cir. 1996), aff'd Amchem Prods, Inc. v. Windsor, 521 U.S. 591 (1997); In re General Motors Corp. Pick-up Truck Fuel Tank Litig., 55 F.3d 768 (3d Cir.

1995), and were granted leave to file briefs and argue as amicus at the merits stage of the class action settlement underlying the present appeal. In re Prudential Ins. Co. America Sales Practice Litig., 148 F.3d 283 (3d Cir. 1998).

Public Citizen is filing this brief because if the sanctions imposed by the district court are allowed to stand, attorneys for objectors will have much greater difficulty representing class members who object to settlements that determine their rights. Public Citizen's longstanding institutional interest in preventing abuse of the class action and in representing class action objectors provides a perspective on this appeal different from that of the parties.

INTRODUCTION AND SUMMARY OF ARGUMENT

This amicus brief focuses on the vital role that objectors play in the class action settlement process. By the time the parties have reached an agreement, they no longer have an adversarial relationship, and the trial court, which is obligated to act as a fiduciary for the class, can look only to objectors to illuminate the other side of the case. Moreover, since objectors are "outsiders," they start at a considerable disadvantage in terms of knowledge of the case and access to crucial evidence. They are almost always placed under very tight time constraints by schedules typically set by the settling parties, whose goal is to allow as little time for objections as possible. Moreover, their audience — the court before whom the case is pending — has its own

incentives to approve the settlement if at all possible, especially where approval clears away a case that, like this one, is very complex. See 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). Objectors typically enter the process after the judge has granted preliminary approval to the settlement and notice, Manual for Complex Litigation Third § 30.41 (Federal Judicial Center 1995) (hereafter "Manual"), and the defendant has spent a considerable sum mailing the notice, Ahearn v. Fibreboard Corp., 1995 U.S. Dist. Lexis 11532, *291-*304 (E.D. Tex. July 27, 1995), so objectors face enormous pro-settlement momentum from the time they enter the process. See generally Susan P. Koniak & George M. Cohen, "Under Cloak of Settlement," 82 Va. L. Rev. 1051, 1122-30 (1996).

For these reasons, the structure of class action settlements makes meaningful and aggressive participation by objectors essential if the district court is to perform its approval function under Rule 23(e) in a careful and thoughtful way. At the same time, all of the pressures are on the existing parties and the trial court to expedite the approval process and downplay objections that would prolong the litigation. The issue here is not whether this Court should change these underlying dynamics, although Public Citizen supports certain reforms of the class action settlement process. See, e.g.,

Brian Wolfman & Alan B. Morrison, "Representing the Unrepresented in Class Actions Seeking Monetary Relief," 71 N.Y.U. L. Rev. 439, 477-507 (1995); William W. Schwarzer, "Settlement of Mass Tort Class Actions: Order Out of Chaos," 80 Cornell L. Rev. 837 (1995); Deborah R. Hensler et al., Class Action Dilemmas: Public Goals for Private Gain — Executive Summary 25-37 (Rand Inst. for Civil Justice 1999) (available on Westlaw, RAND-ICJ database, doc. MR-969/1-ICJ) (hereafter "Rand Class Action Study"). Rather, the issue here is the need for control over district judges who disagree with the tactics of objectors' counsel or who believe that counsel was overzealous in protecting the rights of clients who were made involunarily plaintiffs in class action settlements. If the decision below is upheld, the critical role of objectors will be made even more problematic since objectors henceforth will fear not only failing to persuade the court of the merits of their positions, but also monetary sanctions and the wearing of a judicial scarlet letter. If such a chill does result, the real losers will not be objectors' counsel — they will find other more lucrative, less hazardous ways to make a living — but the courts, which will be deprived of an adversarial presentation and, most importantly, the absentee class, whose interests will be less ably protected.

ARGUMENT

As noted above, this case is important because of the unfortunate precedent that

would be set unless the district court's sanctions are reversed and class action objectors' lawyers can represent their clients zealously without fear of crippling monetary and other penalties. Thus, Part A below discusses why class action settlements raise concerns of collusion at the expense of absent class members and why, because of the non-adversarial nature of those settlements, the trial court is often deprived of information that might cast doubt on the settlement's legality. Then, Part B explains that objectors are critical players in the class settlement process because they inject the missing element of adversariness and thus are able to shed light on a settlement's inadequacies, as demonstrated by this Court's landmark decisions in Georgine, 83 F.3d 610, and General Motors, 55 F.3d 768, and, indeed, by this Court's searching review of the merits of the settlement in this very case. See generally Prudential, 148 F.3d 283. Finally, using several examples from this case, Part C shows that sanctioning objectors' counsel poses a profound risk of chilling legitimate and important advocacy and thus increases the likelihood that unfair and illegal class settlements will be approved without the "undiluted, even heightened" scrutiny that Rule 23 demands. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 620 (1997). This discussion also illustrates why the particular sanctions imposed on Malakoff cannot stand.

A. CLASS ACTION SETTLEMENTS LACK THE ADVERSARIAL QUALITY OF TRADITIONAL LITIGATION THAT WOULD OTHERWISE PROTECT CLASS MEMBERS' INTERESTS.

The basis of the legal system as a justice-promoting, truth-finding process is the adversarial relationship between plaintiff and defendant. In ordinary litigation, courts usually rely on this competition to bring forward the truth and the judge acts mainly as a referee. See Marvin E. Frankel, "The Search for Truth: An Umpireal View," 123 U. Pa. L. Rev. 1031, 1033-34 (1975). By contrast, class action settlements create incentives for defendants and plaintiffs' counsel to collude in reaching a settlement agreement. And, even where there is no explicit collusion, the lead parties are nevertheless in a non-adversarial relationship in presenting a settlement for court approval. Because of these altered conditions, the court has a heightened role in protecting the interests of class members, a role it must perform without the benefit of the adversarial relationship on which courts traditionally rely to protect the parties' interests. Amchem, 521 U.S. at 621.

Class action settlements create incentives for plaintiffs' counsel and defendants to collude because plaintiffs' counsel has interests in common with defendants and opposed to her class member-clients. See General Motors, 55 F.3d at 801-02; Mars Steel Corp. v. Continental Illinois Nat'l Bank and Trust Co., 834 F.2d 677 (7th Cir.

1987). Put differently, a settlement class may become merely "a vehicle for collusive settlements that primarily serve the interests of defendants — by granting expansive protection from law suits — and of plaintiffs' counsel — by generating large fees gladly paid by defendants as a quid pro quo for finally disposing of many troublesome claims." General Motors, 55 F.3d at 778.

In addition, in contrast to ordinary litigation, the absentee clients cannot control the conduct of their lawyers because they have little knowledge of their activities and typically have insufficient individual stakes in the outcome to motivate them to monitor their attorneys' behavior. As Judge Posner has observed:

> The problem in the class-action setting, and the reason that judicial approval of the settlement of such an action is required [citation omitted], is that the negotiator on the plaintiffs' side, that is, the lawyer for the class, is potentially an unreliable agent of his principals. . . [O]rdinarily the unnamed class members have individually too little at stake to spend time monitoring the lawyer — and their only coordination is through him. . .The danger of collusive settlements . . . [is] rendered much greater than in the ordinary litigation by the tenuousness of th[is] control . . .

Mars Steel, 834 F.2d at 681-82; see also General Motors, 768 F.3d at 789; Crawford v. Equifax Payment Servs., 201 F.3d 877, 880 (7th Cir. 2000); In re American Reserve Corp., 840 F.2d 487, 490 (7th Cir. 1987).

Once the lead parties have reached a preliminary settlement agreement, the goal of both parties is to persuade the court to accept the agreement. Thus, the court loses

the benefit of the bi-lateral competition and "adversarial investigation" that drives traditional litigation. Amchem, 521 U.S. at 621. And because, in the settlement class context, certification is not actively contested, courts lose the benefits of the adversarial process necessary to unearth information bearing on whether the class is sufficiently cohesive to properly bind the absentee plaintiffs. General Motors, 55 F.3d at 789. In sum, the lead parties "can be expected to spotlight the [settlement] proposal's strengths and slight [or even hide] its defects." Bell Atl. Corp. v. Bolger, 2 F.3d 1304, 1310 (3d Cir. 1993).

Given these dynamics, judges overseeing class settlement proceedings have a heightened responsibility regarding class members that is akin to that of a fiduciary. Amchem, 521 U.S. at 620 (rules designed to protect absent class members "demand undiluted, even heightened, attention in the settlement context"); see also General Motors, 55 F.3d at 784-85 (court must independently analyze class certification and fairness because it is "protector of absentees' interests, in a sort of fiduciary capacity"). Despite their increased responsibility, courts themselves face considerable pressures to go along with, rather than question, settlement proposals. Id. at 790. As one commentator has put it:

> Judge Henry Friendly observed that "[a]ll the dynamics conduce to judicial approval of [the] settlement[]" once the adversaries have agreed. [citation omitted]. 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." In re Warner Communications Sec. Litig., 618 F. Supp. 735, 740 (S.D.N.Y. 1985).

Coffee, supra, 86 Colum. L. Rev. at 714 n.121.

The institutional pressures courts face include crowded dockets, the scarcity of judicial resources, and a general preference for settlements. Rand Class Action Study 10; see also Koniak & Cohen, supra, 82 Va. L. Rev. at 1122-30. This "momentum" in favor of settlement, Mars Steel, 834 F.2d at 680, results in part from the nature of the approval process: Once class counsel and the defendant have reached an agreement, the judge tentatively approves the settlement and the form of notice (which includes the schedule for objections and the fairness hearing) and orders the defendant to disseminate notice to the class members. See Manual, § 30.41. Although this approval is in theory preliminary, id., the parties and the judge are thereafter personally invested in the settlement. The problem may be particularly acute for the judge, see Mars Steel, 834 F.2d at 680; Koniak & Cohen, supra, 82 Va. L. Rev. at 1122-28, who has indicated that the settlement is within the range of reasonableness, see Manual, § 30.41, at 237, and has ordered the defendant to spend what is often a large amount to mail and publish the notice. See, e.g., In re Prudential Ins. Co. America Sales Practice Litig., 962 F. Supp. 450, 495-96 (D.N.J. 1997); Ahearn, 1995 U.S. Dist. Lexis 11532,

*291-*304. Moreover, it is only after preliminary approval that objectors typically first receive notice and then have the opportunity to raise objections, Manual, § 30.41, at 237-38, at which point objectors usually confront considerable momentum in favor of settling. See Mars Steel, 834 F.2d at 680-81 (notice simultaneously presenting existence of class action and settlement may seem to class members a "fait accompli"). This may explain why 90% of settlements are approved without any substantive changes. Thomas E. Willging et al., "An Empirical Analysis of Rule 23 to Address Rulemaking Challenges," 71 N.Y.U. L. Rev. 74, 141 (1996) (study of class actions in four federal districts).

B. OBJECTORS PLAY A VITAL, BUT ALREADY DIFFICULT, ADVERSARIAL ROLE IN CLASS ACTION SETTLEMENTS THAT COURTS SHOULD NOT CHILL.

1. Objectors Should Be Encouraged Because of Their Vital Adversarial Contribution to Class Action Settlements.

Objectors have unique interests in class action settlements that distinguish them from other participants and that benefit the judicial system. Sanctioning objectors such as Malakoff for zealous representation would chill objectors' participation and thus deprive these inherently problematic proceedings of important benefits.

Objectors and their counsel pursue legitimate and important goals by seeking to block or significantly improve class settlements. Objecting is often the only way to protect some class members' interests, even if class members have the opportunity to

opt out of the class. For claimants whose damages are relatively small, it is not feasible to opt out and litigate individually even if they believe that their recovery under a proposed settlement or inclusion in the class is unfair. Moreover, class members are precluded from pursuing a class claim if they opt out; generally, they may opt out only on an individual basis. Where opting out is not feasible, objecting is the only way for class members to assert their perceived interests. See Crawford, 201 F.3d at 880-81; Ace Heating & Plumbing Co. v. Am. Radiator & Standard Sanitary Corp., 453 F.2d 30, 33 (3d. Cir. 1971). In addition, a settlement may be generous to some or most of a class but nevertheless unfair to a certain group, see General Motors, 55 F.3d at 797 (lack of collusion does not necessarily mean entire class is adequately represented); In re General Motors Corp. Engine Interchange Litig., 594 F.2d 1106, 1133-37 (7th Cir. 1979) (each sub-group of class, however small, entitled to fair settlement), particularly because both plaintiffs' counsel and defendants have incentives to make the class as broad as possible and thus release the class' claims against the defendant. General Motors, 55 F.3d at 797.[1]

Malakoff's role here illustrates these points. Malakoff had a duty to his clients

[1] The recognition that interests among class members may diverge is the rationale for requiring that proposed class settlements meet not only the fairness requirements of Rule 23(e) but also the class certification requirements of Rules 23(a) and (b). See Amchem, 521 U.S. at 619-22; General Motors, 55 F.3d at 796.

to stay in the class and object. If the federal settlement were approved, the state class action brought by Malakoff's clients would effectively be over, as his clients would be bound by the federal settlement and their claims dismissed. Since opting out the named representatives in the state-court litigation would have precluded Malakoff's clients' ability to litigate as a class, the only way for Malakoff to protect the rights of his absentee clients in the state class action was to stay in the national class and object to class certification and/or the fairness of the settlement, the course that Malakoff in fact pursued.

In contrast to plaintiffs' counsel in a class action settlement, objectors' counsel's interests are better aligned with those of their clients because they lack the incentives regarding fees that might conflict with their clients' interests. Objectors' attorneys who are successful — in limiting a settlement to exclude their clients, or avoiding settlement altogether — gain, or retain, only the opportunity to continue litigating on behalf of their clients. To be sure, some objectors' attorneys selfishly agree to let their clients' claims be included in a settlement, obtaining only superficial changes to the settlement, or none at all, in exchange for a portion of class counsel's fees. See Rand Class Action Study 10, 34. However, here the objections Malakoff raised were substantive, see infra note 2, and notably Malakoff did not extort fees for himself at the expense of his clients. Objectors may also be awarded fees if the judge finds that they

have improved the settlement, but that is rare. See Koniak & Cohen, supra, 82 Va. L. Rev. at 1107 n.184. Here, Malakoff's primary goal was to get out of the national class suit so that his clients could litigate a state-court class action. Like other legitimate objectors, if Malakoff had been successful in achieving this goal, he would have succeeded only in extricating his clients from the national suit, leaving them with the opportunity to pursue their own class litigation. As with other objectors, Malakoff's purpose — and incentive — was not to garner an illegitimate fee, but to act in his clients' best interests by objecting.

In light of these interests, the participation of objectors benefits the settlement process because objectors re-introduce adversariness into class settlements where it is otherwise lacking. See Girsh v. Jepson, 521 F.2d 153, 157 (3d Cir. 1975) (because objector is in adversarial relationship with plaintiff and defendant, objector is entitled to reasonable discovery with respect to both). This dynamic is important to the trial court, which must ensure that class certification and the settlement meet legal standards, a determination which is difficult to make in the absence of the adversarial context on which courts traditionally rely. See General Motors, 55 F.3d at 803 ("where there is an absence of objectors, courts lack the independently-derived information about the merits to oppose proposed settlements") (emphasis added). A major study by the Rand Institute for Civil Justice concerning problems with class

settlements argues that judges should increase their regulation of these proceedings, proposing that judges seek more assistance from objectors by giving them sufficient time and information to participate effectively. Rand Class Action Study 34.

The value of class action objectors is not merely hypothetical. Some of the most important recent cases regarding class action settlements — which illustrated the potential for abandonment of absentees by their court-approved counsel — were brought before this Court because objectors appealed district courts' certification and fairness decisions. Georgine, 83 F.3d 610; General Motors, 55 F.3d 768. This Court has implicitly recognized the importance of objectors, not only by fully considering and acting on the legal issues they raised, id., but also by safeguarding their substantive participation at the trial level. Girsh, 521 F.2d 153; Greenfield v. Villager Industries, 483 F.2d 824 (3d Cir. 1973). Notably, the objectors in Georgine greatly increased the length, complexity, and contentiousness of the district court and appellate proceedings, taking large numbers of depositions, filing numerous motions, and raising a wide range of legal issues in multiple proceedings. See, e.g., Georgine, 83 F.3d 610 (vindicating objectors' challenge to settlement); Carlough v. Amchem Prods., Inc., 10 F.3d 189 (3d Cir. 1993) (rejecting objectors' preemptive collateral attack); Carlough v. Amchem Prods., Inc., 5 F.3d 707 (3d Cir. 1993) (objectors' appeal regarding intervention); Georgine v. Amchem Prods., Inc., 878 F. Supp. 716 (E.D. Pa. 1994) (objectors' attack

on anti-suit injunction); Carlough v. Amchem Prods, Inc., 158 F.R.D. 314, 320 (E.D. Pa. 1994) (discussing multiple hearings and objectors' assault on notice); Carlough v. Amchem Prods, Inc., 157 F.R.D. 246, 257-67 (E.D. Pa. 1994) (illustrating extensive role of objectors). Yet without objectors' participation, the Georgine settlement almost surely would have been approved and the class members' interests severely compromised.

Malakoff's actions in this case are comparable to the zealousness exhibited by the Georgine objectors. Malakoff's objections raised substantial legal issues producing a 121-page district court opinion, Prudential, 962 F. Supp. at 450-571, that became the basis for this Court's 63-page ruling. Prudential, 148 F.3d at 283-346. This Court's decision resulted in a partial reversal on attorney's fees, id. at 346, and an opinion which treated seriously most or all of the objections Malakoff raised.[2] See id.

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[2] Malakoff raised three of the central questions regarding the settlement addressed on appeal: 1) whether replacement claims should be a subgroup of the class, Prudential, 148 F.3d at 316; 2) whether the class impermissibly included "futures" claims, id. at 325; and 3) whether the federal securities claims of a few class representatives gave the federal court supplemental jurisdiction over the state law claims of other class members. Id. at 299-300. Although this Court ultimately approved the settlement, it fully addressed these objections. See id. It stated moreover that it did not agree with the settling parties that the replacement claims issue could be "dismissed so easily." Id. at 317 n.60. The jurisdiction issue was the subject of a concurrence by Judge Roth, who agreed in part with Malakoff's contentions. Id. at 346. The futures claim question was important because both this Court and the Supreme Court suggested concern with including such claims in

(continued...)

Malakoff was thus sanctioned for objections that produced the only serious consideration of the merits of the class settlement here. This case illustrates as clearly as Georgine that such activities should be encouraged — rather than discouraged by the threat of sanctions — because the adversarial participation of objectors brings benefits to class action settlements that they otherwise lack.

2. Courts Should Be Extremely Cautious in Imposing Sanctions on Objectors' Counsel Because of the Intrinsic Difficulties Objectors Face.

Objectors are intrinsically unwelcome and at a disadvantage in class action settlements. They are unwelcome in class action settlements because they are dissenters seeking to introduce an adversarial element into a context otherwise focused on agreement. Thus, in forcing the parties and the court to consider the possible shortcomings of the settlement, objectors by definition obstruct and delay reaching settlement. If the court is singularly focused on settlement, objectors may be particularly susceptible to unwarranted sanctions.

Objectors also face unique obstacles to participating in class action settlements. They are outsiders, both because of their adversarial position relative to the lead parties

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(...continued)
settlement classes, expressly leaving the question open. Amchem, 521 U.S. at 628; Georgine, 83 F.3d at 634 (expressing doubt whether binding futures plaintiffs to a Rule 23(b)(3) opt-out class could meet requirements of Rule 23 and Constitution). These points are in addition to the meritorious objections Malakoff raised regarding attorney's fees.

and the difficulties that they face in participating effectively. They often have limited access to discovery, and they face time constraints that the class counsel and defendant do not because they enter the process or are allowed access to certain parts of the process (such as discovery) long after a preliminary agreement has been reached. See Koniak & Cohen, supra, 82 Va. L. Rev. at 1106-10.

In addition, the fact that objectors' rights regarding settlement proceedings are a matter of judicial discretion weighs against imposing sanctions for attempting to assert — and in the process determine — those rights. Objectors have a due process right to participate in class action settlement proceedings because they will be bound to the results of the settlement by the res judicata effect of the court's dismissal of their claims. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 810-13 (1985). Although we believe, and this Court has held, that due process grants objectors particular rights to assert objections to class action settlements, Greenfield, 483 F.2d at 833 ("it is elemental that an objector at such a hearing is entitled to an opportunity to develop a record in support of his contentions"); Girsh, 521 F.2d at 160 (same), courts often determine the participation allowed objectors merely by analyzing the settlement's fairness, id. at 157, which in turn is reviewable only for abuse of discretion. Id. at 156-57. Although case law is developing in this area, see, e.g., Amchem, 521 U.S. 591, some courts and commentators have noted that codified settlement rules lack specific

limitations on this discretion. General Motors, 55 F.3d at 802 (noting lack of procedural safeguards in settlements as one reason collusion exists); id. at 788 (approval of settlement classes is ad hoc adjudication lacking regulatory mechanisms of other proceedings); Schwarzer, supra, 80 Cornell L. Rev. at 841 (criticizing standardless "fairness" Rule 23(e) determination under current law).

That the precise contours of objectors' rights are uncertain suggests that objectors' counsel should have more, not less, leeway, than counsel for ordinary litigants in pressing to participate in settlement proceedings. And objectors' counsel is in a difficult position indeed if the judge whom she must try to persuade to give her a significant role may also sanction her if she presses too hard. Under Rule 11, courts may not sanction lawyers for advancing novel but meritless legal arguments because sanctions would chill legitimate advocacy and be unfair to the attorney. See Fed. R. Civ. P. 11(b)(2) & 1993 Adv. Comm. Notes thereto. The inapplicability to attorneys asserting novel legal arguments of sanctions under section 1927 and the court's inherent powers is also well-settled. In re Orthopedic Bone Screw Prods. Liab. Litig., 193 F.3d 781, 796 (3d Cir. 1999); Barney v. Holzer Clinic, 110 F.3d 1207, 1212-13 (6th Cir. 1997). Litigating to expand or determine the bounds of judicial discretion in a particular case is analogous to asserting novel legal arguments, and, for similar reasons, should not be sanctioned: It would both chill legitimate advocacy and be

inherently unfair to sanction an objector for trying to advance her role by appealing to the sole authority with discretion to determine that role.

Because of these inherent difficulties for objectors, the cautions that guide courts in imposing sanctions are highly relevant here. See Chambers v. NASCO, 501 U.S. 32, 44 (1991) ("because of their potency, the court's inherent powers must be exercised with restraint and discretion"). This Court has stated that judges should exercise restraint in imposing sanctions in cases that are factually and legally complex, Orthopedic Bone Screw, 193 F.3d at 796 (citations omitted), and they should be "wary of chilling legitimate advocacy" by resisting the "'understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims . . .'" Id. at 795-96 (quoting Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-22 (1978)); see also Baker Industries v. Cerberus Ltd., 764 F.2d 204, 208 (3d Cir. 1985) (finding of bad faith is required to "avoid chilling an attorney's legitimate ethical obligation to represent his client zealously"); cf. 1983 Adv. Comm. Note to Rule 11 (courts must "avoid using the wisdom of hindsight" in assessing counsel's creative factual and legal theories). The inherent position of objectors such as Malakoff, the complexity of this case, and Malakoff's duty to raise objections to the settlement similarly make sanctions here

inappropriate.

C. APPELLANT WAS A TYPICAL OBJECTOR ACTING IN GOOD FAITH.

1. Sanctions Require a Level of Abuse Not Present in this Case.

Objectors are unwelcome outsiders in class action settlements, but the purpose underlying their actions — asserting or attempting to assert objections in class action settlement proceedings — is entirely proper and thus cannot be sanctioned as bad faith conduct.

Sanctions under either section 1927 or the court's inherent power require a litigant's or attorney's "willful bad faith." Orthopedic Bone Screw, 193 F.3d at 795; Baker Industries, 764 F.2d at 209. "Bad faith," in turn, is the "intentional advancement of baseless contentions made for an ulterior purpose." Ford v. Temple Hospital, 790 F.2d 342, 347 (3d Cir. 1986). As the examples in the next section illustrate, Malakoff's actions were not sanctionable because they were neither baseless nor undertaken with any motive other than to assert his clients' objections.

This Court's precedents also suggest that bad faith necessarily involves interference with or abuse of the court itself. See id. For example, this Court upheld sanctions under the court's inherent powers against an attorney who intentionally favored one creditor's interests at the expense of others' and misrepresented the client's position to the court, Fellheimer, Eichen & Braverman v. Charter Techs., 57 F.3d 1215

(3rd Cir. 1995); agreed that an attorney who destroyed evidence should be sanctioned, Schmid v. Milwaukee Elec. Tool Corp., 13 F.3d 76 (3d Cir. 1994); and affirmed sanctions against an attorney who filed objections to a referee's report after signing a stipulation agreeing that the report would not be reviewable. Baker Industries, 764 F.2d 204. The Supreme Court upheld sanctions under the court's inherent powers against an attorney who tried to fraudulently deprive the court of jurisdiction over disputed property. Chambers, 501 U.S. 32; see also Ford, 790 F.2d at 347 (sanctions require that judge find "serious and studied disregard for the orderly process of justice") (citation omitted). The sanctioned party in each of these cases either directly disobeyed or attempted to deceive the court. Malakoff's conduct lacks such disregard for the judicial system and thus should not be sanctioned.

2. Malakoff Objected in Good Faith.

Malakoff acted as a vigorous objector in the context of a complex class action settlement. The district court's finding that Malakoff acted in bad faith and thus warranted sanctions was clearly erroneous because the court disregarded the potentially collusive nature of class action settlements and the position of objectors in such proceedings. In that context, Malakoff's conduct was reasonable and undertaken with a proper purpose. Thus, the district court's sanctions are reversible as an abuse of discretion. Orthopedic Bone Screw, 193 F.3d at 795.

The district court cites the recusal motion filed by Malakoff as one basis for sanctions, In re Prudential Ins. Co. America Sales Practice Litig., 63 F. Supp.2d 516, 520-21 (D.N.J. 1999), but the recusal motion was not baseless. At the beginning of the case, Judge Wolin issued an order stating that the court had the right to "speak ex parte to any attorney in this case without permission from, but on notice to, the adversary attorneys," and that the parties present at the conference at which the matter was discussed (including Malakoff), see Jt. Appx. 111, 124, "specifically consented to this provision." Pretrial Order No. 2, Jt. Appx. 216, 218. The judge also stated on the record that such communications would concern "mostly administrative matters." Jt. Appx. 124. One of the primary complaints Malakoff made in his motion to recuse was that the judge participated in an ex parte meeting on October 16, 1996, of which Malakoff was not informed and which concerned the possibility of merging the states' attorneys general Task Force Settlement and the pending national class action. Prudential, 148 F.3d at 343. Since this meeting deviated from the type of ex parte communication to which the judge requested Malakoff consent, it was not "intentionally . . . unreasonable" for Malakoff to conclude he had been treated unfairly by the court. Prudential, 63 F. Supp. 2d at 520.

The district court also concluded that, because Malakoff had expressed a desire to be excluded from the class action settlement, it was unreasonable for Malakoff to

believe he would be informed of ex parte communications. Id. at 520-21. This erroneously suggests it is inconsistent to stay in a class — foregoing the chance to opt out — and also object to being included in that class. To the contrary, because approval of the nationwide federal settlement would subordinate his clients' claims to that settlement, the only way for Malakoff to represent his clients' interests was to participate as an objector. Suggesting that Malakoff acted unreasonably because he objected to his clients' inclusion in the class, but nevertheless stayed in the class to assert objections, not only disregards the legitimate duty of objector's counsel, it is tantamount to a rejection of the participation of objectors altogether.

Concluding that Malakoff was unreasonable in expecting to be treated as a party also demonstrates the fundamental confusion that existed regarding Malakoff's status — and objectors in general — in the class action suit, confusion for which Malakoff should not be punished. The judge's first pre-trial order lists Malakoff's client as a party to the class action. Jt. Appx. 94, 109 (Oct. 24, 1995). In addition, before the parties reached a preliminary agreement, the judge denied class counsel's motion, Jt. Appx. 380(1) (Dec. 29, 1995), to prevent Malakoff from participating as an objector to the class action, Jt. Appx. 385(1) (Mar. 14, 1996), and issued an order stating that Malakoff could file a complaint separately from class counsel, Jt. Appx. 91 (Oct. 24, 1995), among other actions providing Malakoff with broad opportunities to participate.

It was only after the national settlement was reached that the judge seems to have changed his mind and sought to sharply curtail Malakoff's participation, for example by barring his access to discovery. Jt. Appx. 553(a), 553(a)-58 (Sept. 10, 1996) (listing all plaintiffs' firms except Malakoff's as eligible to view discovery); Jt. Appx. 655(1) (Oct. 28, 1996) (continuing order excluding Malakoff from discovery).

This judicial about-face also illustrates the paradoxical nature of the trial court's discretion regarding the role of objectors: At the same time that Malakoff's role was perceived as a matter of judicial discretion, Malakoff was also subject to sanctions for questioning or litigating the use of that discretion. Far from supporting sanctions, this scenario demonstrates the uncertain and unwelcome position in which objectors may find themselves once lead parties reach a preliminary settlement agreement of which the judge approves. Sanctions here would be terribly unfair and, more importantly, would signal to future objectors that they should not attempt to object in the first place.

Malakoff's objections to the fee examiner and his report were also not baseless or asserted in bad faith. The district court's Judge Walls found that Malakoff's assertions had no basis and were "hyper-technical," Prudential, 63 F. Supp. 2d at 521, referring to Judge Wolin's findings on the issue. Jt. Appx. 2501 (Feb. 11, 1997). Judge Wolin characterized Malakoff's objection that the fee examiner had not met with the parties within the 20 days required by Rule 53 as "hyper-technical" because the fee

examiner had met with lead counsel five days before and 27 days after his appointment on November 6, 1996. Jt. Appx. 2501(10). However, Malakoff was unaware of these meetings before he filed his motion because they were conducted off the record. Moreover, before he filed his motion, Malakoff brought to the court's attention what he believed to be the fee examiner's failure to hold a meeting, and the court simply replied, "It's not a perfect world, is it Mr. Malakoff?," 12/30/96 Tr. at 85, thus implying that the fee examiner had not yet held a meeting. It was therefore reasonable for Malakoff to conclude that the fee examiner had not complied with Rule 53, and to sanction Malakoff for being unaware of the meetings the fee examiner had held is inappropriate and merely reinforces Malakoff's disadvantageous position as an outsider. It was also reasonable and not "hyper-technical" for Malakoff to object to a failure to hold meetings. To conclude otherwise ignores Malakoff's legitimate concern with being excluded from settlement proceedings — he had already been denied access to pre-existing discovery by the parties and the court and been shut out of meetings between other parties and the judge — and the intrinsic need for objectors to have access to settlement proceedings and information to assert their objections. This sanction also trapped Malakoff in the paradox of judicial discretion: He had a duty to his clients to seek to participate — here, seeking a meeting with the fee examiner — but was sanctioned for doing so.

The district court also sanctioned Malakoff for attorney's fees objections on which he did not prevail, while ignoring his meritorious objections. Malakoff raised multiple objections to fees, including on appeal. Prudential, 148 F.3d at 336-42. Although his objections to the fee examiner were rejected by this Court, several other objections were the basis of this Court's remand. Id. This fact illustrates not only that Malakoff's objections ultimately contributed substantively to the case, but also that the district court may have simply engaged in an ad hoc, retrospective evaluation of the merits of those objections rather than asking whether they were made in subjective bad faith.

Malakoff was also sanctioned for making two discovery requests. First, he requested that plaintiffs' counsel conduct a keyword search of discovery documents. The second request was for Prudential to fax Malakoff letter-sized charts summarizing certain discovery material in lieu of Malakoff traveling from Pittsburgh to New York to obtain the information. The district court held that these were unreasonable requests that delayed the case. Prudential, 63 F. Supp. 2d at 522. It is hard to see how these requests delayed litigation since the information was available at the time it was requested. Jt. Appx. 2304(1) (allowing lead counsel to present demonstrative evidence).

More surprisingly, the court faulted Malakoff for failing to follow the discovery

process. Discovery had resulted in Prudential's production of more than one million documents along with additional information. Prudential, 148 F.3d at 319 n. 64. The court denied Malakoff permission to view discovery from two months after discovery began until December 30, 1996, several days after the deadline for filing objections to the settlement, December 19, 1996. Jt. Appx. 553a, 557-558a (September 10, 1996) (listing all plaintiffs' firms except Malakoff's as eligible to view discovery); Jt. Appx. 655(1)-(2) (Oct. 28, 1996) (continuing order excluding Malakoff from discovery). Malakoff requested and was granted an extension of only two days after being granted access to discovery to file additional objections, Jt. Appx. 1575, 16375-1647a, and it was to make the most of this two-day period that Malakoff requested the keyword search.

It is ironic that the district court faults Malakoff for not following a process in which he was barred from participating until after the deadline for filing objections and during all but the last several weeks before the fairness hearing. More important, sanctioning Malakoff for making two special discovery requests fails to account for the "outsider" position of objectors, especially those who, like Malakoff, were put in that position by the court itself. By disabling Malakoff, and then sanctioning him for merely making a request that might, if granted, help him compensate for his disadvantage, the court seriously abused its discretion.

* * *

Malakoff's position in this litigation reflects the features of class settlements that make sanctions particularly likely to chill legitimate and reasonable advocacy. The suit was complex even for a class action. It dealt with novel legal arguments in an area of law that continues to undergo significant changes and which are central to objectors' concerns about class certification and fairness. Moreover, Malakoff's role was not only unclear, but also changed during the course of the suit, leaving fundamental uncertainty about how Malakoff should protect his clients' interests. Thus, there is no basis to conclude that he acted in bad faith, particularly when his conduct is viewed in the context of the unwelcome objector seeking to shed light on an otherwise non-adversarial process.

The purpose of class action litigation is not convenience or efficiency for its own sake, but rather facilitating the vindication of rights by small stakeholders. Class settlements, too, when properly monitored and substantively fair, can be powerful tools for justice. But because of the inherent conflicts in class settlements between the class attorney and her absent clients, and the non-adversarial nature of the process, those settlements carry with them a considerable potential for abuse. The momentum and perceived benefits of settlements should not be permitted to overshadow the important interests objectors bring to the legal system that help preserve its underlying goals.

The district court's decision, by sanctioning an objectors' attorney for aggressive, zealous representation will, if allowed to stand, chill future challenges to unwise or unlawful settlements.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,*

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* Marka Peterson, a 3rd year student at New York University School of Law working under the supervision of counsel for amicus, made a major contribution to this brief. Had she been admitted to practice, she would have been listed as the first counsel for amicus.

CERTIFICATE OF COUNSEL

I, Brian Wolfman, counsel of record in this appeal, am a member of the bar of this Court.

_____
Brian Wolfman

July 5, 2000

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)(7)

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I state that this brief complies with the type-volume limitations of Rule 32(a)(7)(B), and contains 6,869 words according to WordPerfect 7, the word-processing program system used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that, on July 5, 2000, I caused to be served by first class mail two copies of the foregoing brief on each of the following counsel who have entered an appearance in this appeal:

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