# Ethics Watch

## *Ethical Issues in Aggregate Settlements of Non-Class Action Cases, Part One*

*By Nathan M. Crystal*

In *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591 (1997), and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Supreme Court held that large product liability settlement classes could rarely if ever be certified under Rule 23 of the Federal Rules of Civil Procedure. These cases effectively eliminated class settlements as a device for resolving most mass torts. However, by restricting the use of class actions, these cases increased the need for non-class aggregate treatment of lawsuits involving large numbers of claimants.

This is the first of two columns addressing the ethical obligations of lawyers when participating in an aggregate settlement of claims that have not been certified for class treatment. Because the topic is complex, these columns are not intended to be comprehensive. Instead, I try to identify major issues and outline some possible solutions for significant problem areas. In this first column, I address the meaning of an aggregate settlement, ethical issues at the time of the engagement, and communication with clients prior to entering into aggregate settlement negotiations. In the second column I consider ethical issues in negotiation of an aggregate settlement agreement, the ethical requirements imposed on lawyers with regard to obtaining client approval of an aggregate settlement, and the propriety of settlement provisions that impose obligations on plaintiffs' counsel with regard to recommendation of settlements and with regard to withdrawal from representation of clients who reject an aggregate settlement.

### What is an "aggregate settlement"?

South Carolina Rule of Professional Conduct 1.8(g) (SCRPC) and comment 13 use the term "aggregate settlement," but they do not provide a definition. In Formal Opinion #06-438, the ABA Committee on Ethics and Professional Responsibility offered the following definition:

> An aggregate settlement or aggregated agreement occurs when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas.

The word "together" is ambiguous. Does the fact that a lawyer represents multiple clients in settlement negotiations arising out of a single matter or from a single product defect mean that the lawyer is engaged in aggregate representation? In 2009 the American Law Institute adopted Principles of the Law of Aggregate Litigation. Section 3.16(a) provides the following definition:

> A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is *interdependent* (emphasis added).

If a lawyer represents multiple clients in a matter—an automobile accident, for example—and separately negotiates a settlement for each of the clients based on the merits of their claims and the extent of their injuries, this is not an aggregate settlement because it does not involve interdependency between the claims.

Settlement of client claims can be interdependent and therefore subject to rules governing aggregate settlements in a variety of ways. Under the ALI analysis, claims are interdependent if the settlement involves either *collective conditionality* or *collective allocation*.

Collective conditionality means that the settlement is conditioned on a certain percentage of the claimants agreeing to the aggregate settlement. For example, the settlement against Merck in litigation arising from injuries caused by the use of the painkilling drug Vioxx required 85 percent of the eligible claimants in each of several categories to approve the settlement. See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 Cornell L. Rev. 265, 274-292 (2011) (discussing the terms and ethical issues involved in the Vioxx settlement). The settlement agreement in the Vioxx litigation is available online.

Collective allocation deals with the way in which the agreed-upon settlement is distributed among the claimants. Typically, claimants will have different injuries. In fact, the difference in injuries is one of the reasons that class action certification is unavailable. Settlements that involve collective allocation can take various forms. Here are some typical examples:

- Lump sum settlement with allocation among claimants proposed by their counsel;
- Evaluation of claims to determine average damages with total settlement amount equal to the multiple of the number of claims times the average damage amount;
- Development of a matrix in which the amount awarded to a claimant is based on a point system.

If a lawyer has multiple claimants in a matter but negotiates with the defendant a settlement for each claimant based on the damages of each person's claim with no caps or other limits on the overall settlement, then collective allocation does not exist. (The claim could still be part of an aggregate settlement,

however, if the agreement involved collective conditionality, as discussed above.) It is also possible for a lawyer to represent some clients in an aggregate settlement and other clients in the same matter in individual settlements or litigation. For example, subject to conflict of interest rules discussed below, a lawyer might represent a number of clients who agree to have their cases negotiated through aggregation, while the lawyer could represent individually some claimants who decide—either at the inception of representation or after analysis of a proposed aggregate agreement—to proceed individually. See ABA Formal Opinion #06-438, n.4.

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Lawyers should remember that in determining whether a settlement would be treated as an aggregate settlement, they must examine the ethics rules of the jurisdiction in which the case is pending. SCRPC 8.5(b)(1) provides that "for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, [apply] unless the rules of the tribunal provide otherwise." In federal court many cases arising from mass torts are consolidated for pretrial proceeding before a single federal court by the panel on multidistrict litigation (MDL). In that case the ethics rules of the MDL court where the case has been transferred would apply rather than the ethics rules of the state in which the case was filed or might have been filed.

## Ethical issues in non-class aggregate settlements in general

Aggregate settlements pose ethical concerns involving the following rules:

(a) Scope of representation under Rule 1.2;
(b) Communication with clients under Rule 1.4;
(c) Confidentiality of client information under Rule 1.6;
(d) Conflicts of interest under Rule 1.7;
(e) Approval of aggregate settlement agreements under Rule 1.8(g);
(f) Withdrawal under Rule 1.16;
(g) Interference with independent professional judgment under Rule 5.4;
(h) Restrictions on the right to practice under Rule 5.6.

Usually, obligations regarding aggregate settlements are considered from the perspective of plaintiffs' lawyers, but these issues also affect defendants' lawyers in two ways. Some rules apply to both defendants' as well as plaintiffs' lawyers. See Rule 1.8(g), which refers to "participation" in an aggregate settlement, and Rule 5.6, which prohibits "offering or making" certain agreements that restrict the right to practice law. In addition, defendants' lawyers must be aware of the ethical restrictions facing plaintiffs' lawyers when negotiating aggregate settlements.

I have organized these columns to discuss the ethical issues chronologically as they arise at various stages of the litigation because lawyers face problems sequentially rather than doctrinally. However, aggregate settlements to some extent pose a seamless web of ethical issues because when lawyers make decisions at one stage of the matter, for example when they present engagement agreements to their clients, they need to take into account decisions that come later, such as at the settlement stage.

## Ethical issues at the engagement

*Allocation of authority*. SCRPC 1.2(a) requires lawyers to abide by client decisions regarding the objectives of representation and consult with clients about the means to be used to obtain those objectives. Clients have the right to "make or accept an offer of settlement of a matter." It is not uncommon for lawyers to enter into settlement negotiations on behalf of their clients without explicit authority to do so either in the engagement agreement or otherwise. Because of the ethical sensitivity of aggregate settlements, it would be prudent for lawyers to include specific provisions in their engagement agreements authorizing them to enter into aggregate settlement negotiations. The provision should include sufficient information to meet the ethical requirement of communication under Rule 1.4. Rule 1.4(b) states: "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

*Conflicts of interest*. SCRPC 1.7 regulates concurrent conflicts of interest. Concurrent conflicts fall into two categories: direct adversity between current clients under Rule

1.7(a)(1) and material limitation conflicts under Rule 1.7(a)(2). When lawyers represent multiple clients, whether plaintiffs or defendants, representation of a client would be ethically improper when it would be directly adverse to another client in the same matter pending before a tribunal. Because of the systemic interest in adversarial presentations, this type of conflict is nonconsentable. See SCRPC 1.7(b)(3).

However, most conflicts arising from multiple representation involve the risk of a material limitation under Rule 1.7(a)(2) rather than direct adversity. In connection with aggregate settlements, two types of material limitation conflicts occur frequently. One risk is that the lawyer may favor the interests of one group of clients over another group. For example, in order to obtain a settlement a lawyer might be inclined to agree to terms that would be beneficial to a large majority of clients, for example those with minor injuries, even though it disfavors a minority, such as those with significant damages. A second risk involves the negotiation of legal fees. To the extent that the defendant will pay the legal fees of the plaintiffs, whether by statute or agreement, lawyers have a personal financial interest that poses a risk of limitation of their representation of the plaintiffs. Neither of these conflicts prohibits lawyers from engaging in multiple representation, but they do require the lawyer to obtain the informed consent of the affected clients confirmed in writing. SCRPC 1.7(b)(4). Informed consent requires more than a "waiver" of conflicts. The lawyer must explain the advantages, disadvantages, implications, and alternatives of the multiple representation in light of the possible conflicts and the fact of aggregate representation. Indeed, comment 13 to Rule 1.8(g) states that the difference in the willingness of multiple clients to accept an aggregate settlement is "one of the risks that should be discussed before undertaking the representation, as part of the process of obtaining the clients' informed consent." On informed consent, see SCRPC 1.0(g) and comments 6-7.

Lawyers engaged in multiple representation that involves the possibility of either individual or aggregate settlements should carefully evaluate their engagement agreements in light of the requirement of informed consent. I want to emphasize one aspect of the representation that should be discussed fully in the engagement agreement—the principle of equal treatment of similarly situated clients, discussed in more detail in Part Two.

*Confidentiality*. As discussed in Part Two, one of the major issues in non-class aggregate settlements relates to Rule 1.8(g), which provides that a lawyer shall not participate in making an aggregate settlement unless the clients consent to the settlement in a signed writing after they receive disclosure of material aspects of the settlement. In order to make the full disclosure required by the rule, lawyers will typically need to give information about every client's case and injuries to other clients. Such disclosure is not proper under Rule 1.6 without the informed consent of the clients. The lawyer's engagement agreement should seek informed consent to reveal such information in connection with the clients' consideration of a proposed aggregate settlement. ABA Formal Opinion #06-438 states: "The best practice would be to obtain this consent at the outset of representation if possible, or at least to alert the clients that disclosure of confidential information might be necessary in order to effectuate an aggregate settlement or aggregated agreement."

*Additional provisions*. Rule 1.8(g) makes it difficult for lawyers to negotiate non-class aggregate settlements because it prevents lawyers from having an advance agreement by clients, whether in the engagement agreement or otherwise, to bind themselves to a settlement that has been approved by an agreed-upon majority. There are some provisions that lawyers may consider including in their engagement agreements to increase the incentives for clients to agree to an aggregate settlement. These provisions are discussed in Part Two in connection with Rule 1.8(g).

### Communication prior to commencement of aggregate settlement negotiations

Lawyers have a duty to communicate reasonably with their clients. See SCRPC 1.4 and, in particular, 1.4(b) quoted above. Under this rule lawyers have an obligation to keep their clients informed about the status of their cases; this obligation applies to all cases, regardless of whether they involve aggregate settlement negotiations. As suggested above, in their engagement agreements, lawyers should obtain informed client consent to enter into aggregate settlement negotiations. However, clients will have given this consent at the inception of the representation when discovery had not been done. In addition, circumstances affecting the client, the defendant, or the status of the law may have changed since the client executed the engagement agreement. Before commencing aggregate settlement negotiations, it would be prudent for lawyers to communicate with their clients their intent to proceed with aggregate negotiations. Communication to the client of this intent should include other relevant information, such as: (1) the procedural status of the case, (2) the status of any settlement discussions that have already taken place, (3) the ethical rules governing aggregate settlement, including the client's right to accept or reject a settlement after receiving complete information about the settlement, (4) the lawyer's obligation in negotiation to treat all similarly situated clients equally, (5) possible structures for a settlement agreement, such as appointment of a claims administrator, judicial appointment of a special master, or use of a grid system, (6) the client's right to proceed individually rather than as part of an aggregate settlement, (7) the client's right to seek independent advice as to whether an aggregate settlement would be in the client's interest, (8) the availability of the lawyer to answer any questions that the client might have and to give advice as to whether it is in the client's interest to continue as part of an aggregate settlement. ■