

LITIGATION

Aggregate Settlements and Ethical Considerations in Mass Tort Claims

BY MARINA CORODEMUS
AND RENEE HENDERSON

Special to the Legal

The past few years have witnessed a sharp increase in the use of the aggregate settlement as the go-to device for globally resolving mass tort claims. However, as with most new devices, the excitement over the novelty can sometimes outpace ethical considerations. En route to an aggregate settlement, plaintiffs and defendants are free to negotiate a resolution without judicial supervision. Attorneys beware; this route may lead to catastrophe for those not apprised of the ethical implications that arise during all phases of settling in the aggregate.

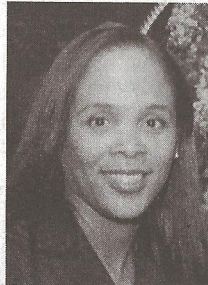
ETHICS DURING NEGOTIATION

The primary goal of a corporate defendant faced with a multitude of claims against them is global resolution. One method defendants use to pave the way toward this goal during negotiations is to require that plaintiffs counsel agree to forgo further litigation against the corporation. Forbearance is secured through the use of an engagement agreement, which makes the corporation the plaintiffs attorney's new "client." Rule 1.7 of the Model Rules of Professional Conduct (MRPC) then prohibits representation due to the concurrent conflict of interest.



CORODEMUS

MARINA CORODEMUS brings more than 10 years of experience on the bench as New Jersey's sole mass tort judge. She is the director of ADR practice in her firm, Corodemus & Corodemus. She can be contacted at 732-603-0005 or mc@ccesqs.com.



HENDERSON

RENEE HENDERSON is of counsel with Corodemus & Corodemus. An attorney with more than 10 years of experience, Henderson has served as both plaintiffs and defense counsel in complex civil litigation matters for single-plaintiffs, class actions and coordinated cases for pharmaceutical and medical device manufacturers, manufacturers of industrial products, insurance companies and financial institutions. She can be contacted at 732-603-0005 or rh@ccesqs.com.

While a clever approach toward the goal of global resolution, such an agreement may violate MRPC Rule 5.6(b), which prohibits an attorney from "participat[ing] in offering

or making ... an agreement in which a restriction on the lawyers' right to practice is part of the settlement of a client controversy." Moreover, Rule 1.9(a) prohibits a lawyer "who has formerly represented a client in a matter" from representing "another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing."

Recently, a New York law firm represented 587 people who had discrimination claims, against the same corporate defendant. The law firm entered into an agreement with the corporation, which provided, among other things, that after settlement, the corporation would retain the law firm for two years at \$1 million per year. It also contained provisions preventing the law firm from taking on new claimants against the corporation. The appellate court found that the arrangement between the law firm and corporation was an object, unwaivable, conflict of interest.

INFORMED CONSENT

In aggregate settlements, where two or more clients are represented by the same counsel together to resolve their claims, a settlement offer triggers Rule 1.8(g) of the American Bar Association Model Rules of Professional Conduct. Termed the "aggregate settlement rule," it applies in all jurisdictions of the United States either by state adoption

of the Model Rules or through a state ethical rule. Under Rule 1.8(g) there are five key areas of responsibility for the lawyer:

- The lawyer must advise each client of the total amount or result of the settlement agreement.

- The lawyer must advise each client of the amount and nature of every client's partici-

pation in the settlement agreement.

- The lawyer must advise each client of the fees and costs to be paid the lawyer from the proceeds by an opposing party or parties.

- The lawyer must advise each client of the total amount of attorney fees and costs regardless of whether the fees and/or costs

Inherent in any aggregate settlement of claims is the concern that the individual plaintiff's claim will not receive a fair allocation.

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will be paid, in whole or in part, from the proceeds of the settlement or by an opposing party or parties.

- The lawyer must advise each client of the method by which the costs are to be apportioned to each client.

All jurisdictions require compliance with the aggregate settlement rule. However, in order to abide by the rule, the attorney must first comply with MRPC 1.6(a), which governs disclosing information relating to the representation clients. Including a statement

in a retainer agreement that disclosure of confidential information may be necessary to reach an aggregate settlement may keep in compliance with Rule 1.6(a).

AFTER A SETTLEMENT IS REACHED

Once an aggregate settlement agreement is reached, both defense and plaintiffs counsel should reconsider any intention they may have of conducting their own allocations. For the defendant involved in mass litigation, being pinned to an individual settlement may cause future claimants to treat the settlement amount as a floor in subsequent negotiations. For the plaintiffs lawyer, the job of allocating settlement funds is more

problematic. Inherent in any aggregate settlement of claims is the concern that the individual plaintiff's claim will not receive a fair allocation.

Because there is but one pot of funds, a lawyer allocating a larger amount to one client over another has a conflict of interest problem. How do you advocate vigorously for all of your clients and at the same time decide that one client deserves less? In this situation, a third-party neutral or special master can substitute for the judge's gavel and allay fears of or temptation for unethical behavior. •