

MASS LAWSUITS AND THE AGGREGATE SETTLEMENT RULE

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"You'll all have to agree that you will act as one unit. There'll be no talk about this is for Toomey and not for Robbins or Zona, no talk about whose claim is more viable than someone else's claim."

Schlichtmann paused to gauge his clients' reaction. They looked expectantly at him. No one said anything.

"If the eight families can't do that," Schlichtmann said, "then we're in real trouble. If there's a problem between families, then I won't know who I'm representing. If there's a problem, it means that each family will have to get its own attorney."

Thirty seconds of silence ensued. Schlichtmann waited for a response. People looked cautiously at each other, wondering who would speak first.

Richard Toomey, whose dead son, Patrick, had the strongest of the remaining claims, sat directly across the table from where Schlichtmann stood. . . . He was the first to break the silence, in a voice clear and strong. "We're all in this together," he said. "That's how we started, and that's how we'll stay."

Anne Anderson smiled in sudden relief, and everyone began to say, as if in chorus, "We're unanimous, we're together."¹

Jonathan Harr, A Civil Action

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We are grateful to Frederick M. Baron for comments on a draft of this article and for giving us the benefit of his many years of experience handling mass actions. We also thank John F. Sutton, Jr., our colleague and the Reporter on the Model Code of Professional Responsibility, for extended conversations on the aggregate settlement rule. Sam Issacharoff, John Leubsdorf, Patrick Woolley, and Fred Zacharias also provided helpful comments on earlier drafts. Ron Alves and Keith Ann Stiverson provided valuable research assistance.

1. JONATHAN HARR, A CIVIL ACTION 442 (1995).

INTRODUCTION

Rule 1.8(g) of the Model Rules of Professional Conduct is known as the aggregate settlement rule. The portion of the rule relating to civil actions provides:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client consents after consultation, including disclosure of the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.²

On its face and as interpreted in the few pertinent decisions to date,³ the Rule imposes three requirements on lawyers seeking to settle lawsuits in which they represent multiple clients: (1) disclosure of all settlement terms to all clients, including disclosure to each of what other plaintiffs are to receive or other defendants are to pay; (2) unanimous consent by all clients to all settlement terms; and (3) a prohibition on agreements to waive requirements (1) or (2) even with the clients' unanimous consent.

These requirements have been on the books for years. Model Rule 1.8(g) carries forward Disciplinary Rule (DR) 5-106 of the Model Code of Professional Responsibility "almost verbatim."⁴ The *Restatement of the Law Governing Lawyers* appears to continue the chain unbroken by endorsing the aggregate settlement rule in its current formulation.⁵ The continuity across the three sets of rules suggests broad agreement that the rule works well. This is probably because the rule *does* work well in most multiple-client representations, where the number of jointly represented clients, although greater than one, is nonetheless small. When the case is one in which a couple of people injured in an automobile accident are represented by the same attorney, the benefits of the rule may well exceed its costs.

When the number of clients is large, however, the costs of the rule may be much greater. Today, one can easily find mass lawsuits, which are not class actions, in which hundreds, thousands,

2. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1995).

3. For a list of cases applying the Rule, see ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 134-135 (3d ed. 1996).

4. 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT § 1.8:801, at 277 (2d ed. Supp. 1997). The difference between DR 5-106 and Rule 1.8(g) is that only DR 5-106 requires a lawyer to disclose the total amount to be paid to all the plaintiffs in a settlement. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-106 (1981), with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g). We doubt that the difference matters much in practice, as the total size of the settlement is frequently disclosed.

5. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 209 cmt. (d)(i) (Proposed Final Draft 1996).

and even tens of thousands of clients sue as a group.⁶ Many mass lawsuits involve defective products,⁷ but large claimant groups also form in the aftermath of fires and explosions,⁸ airplane crashes,⁹ toxic releases,¹⁰ and other catastrophes that expose large numbers of persons to risks.¹¹ Injunctive cases involving exposure to common nuisances or patterns of discrimination can also involve numerous clients.¹² Even legal malpractice can generate a mass lawsuit.¹³ Whatever their sources, these massive proceedings may seek remedies involving millions or billions of dollars, often from numerous defendants who are sued on different theories and who, if found to have violated the law, would likely be required to contribute different amounts. Because the stakes are so large and the issues so complex, settlement is both more urgent and more difficult in mass lawsuits than in other litigation, and the aggregate settlement rule

6. See, e.g., *In re Bendectin Litig.*, 857 F.2d 290 (6th Cir. 1988) (involving consolidation of 1180 claims alleging birth defects caused by anti-nausea drug).

7. See, e.g., *In re Polybutylene Plumbing Litig.*, No. 92-02467674, 281st Judicial Dist., Harris County., Tex. (single law firm represented more than 67,000 signed clients who alleged property damage stemming from defective plumbing); Dean Starkman, *Should a Lawyer Get Over Half of a Settlement?*, WALL ST. J., Oct. 7, 1996, at B1 (discussing polybutylene plumbing case).

8. See, e.g., *Rando v. Luckenbach S.S. Co.*, 25 F.R.D. 483 (E.D.N.Y. 1960) (involving a consolidation of more than 300 actions brought by more than 500 plaintiffs in the wake of a fire and explosion at a pier).

9. See, e.g., *In re Air Crash Disaster at Fla. Everglades* on Dec. 29, 1972, 549 F.2d 1006, 1011 (5th Cir. 1977) (involving airplane crash consolidation in which four attorneys on the plaintiffs' steering committee collectively represented 60 clients).

10. See, e.g., *Scrivner v. Hobson*, 854 S.W.2d 148 (Tex. App. 1993) (involving an attorney who represented more than 100 families suing companies allegedly responsible for toxic waste site); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470 n.2 (5th Cir. 1986) (certifying class action containing thousands of asbestos claimants, about 80% of whom were already represented by proposed class counsel in their individual lawsuits).

11. See, e.g., *Arce v. Burrows*, No. 14-95-00360-CV, 1997 WL 528639 (Tex. App. Aug. 28, 1997) (discussing mass action arising out of explosions at chemical plant); H.R. REP. NO. 96-1016, pt. I, reprinted in 1980 U.S.C.C.A.N. 6119, 6123 (discussing the Love Canal hazardous waste disaster, which cost over \$27 million to clean up and generated over \$2 billion in personal injury and property damage suits).

12. See, e.g., *Knisley v. City of Jacksonville*, 497 N.E.2d 883 (Ill. App. Ct. 1986) (involving 61 plaintiffs seeking an injunction).

13. See *Arce*, No. 14-95-00360-CV, 1997 WL 528639 (Tex. App. Aug. 28, 1997) (involving a malpractice action brought by numerous explosion victims alleging breach of fiduciary duties); Brenda Sapino, *Blast Settlement Lost in Suits, Dozens of Grievances*, TEX. LAW., May 1995, at 132 (describing malpractice cases filed against lawyers who represented plaintiffs allegedly injured by pollution in Pampa, Texas); Daniel Fisher, *Legal Affairs: Plant Explosion Touches Off Malpractice Bomb*, BLOOMBERG FIN. NEWS, Mar. 29, 1995 (same); Brenda Sapino Jeffreys, *Former Clients Trade Suits with Counsel in Ten-Year Old Explosion Litigation Mess*, TEX. LAW., July 14, 1997 (same); see also Peter Passell, *Plaintiffs Win Right to Sue Lawyers in Malpractice Case*, N.Y. TIMES, Sept. 11, 1997, at A11.

is a complication that often gets in the way. One must therefore ask whether Rule 1.8(g) imposes costs that outweigh its benefits and, if so, how the rule should be changed to accommodate today's mass lawsuits.

To date, no one has asked these questions. Law professors have ignored the aggregate settlement rule and, more generally, the topic of mass settlements.¹⁴ Insofar as we can tell, no scholar has examined the rule in detail or given its role in mass lawsuits serious attention. At a time when law professors are prolifically writing about class actions and consolidations, the omission is lamentable. Mass actions—lawsuits in which lawyers consensually represent large numbers of signed clients—are natural models for class actions and consolidations. Mass actions are market-driven alternatives to these more coercive forms of group litigation. One should therefore expect to find in them institutional governance structures—meaning incentive systems and monitoring arrangements—that serve litigants well and that might usefully be mimicked in class actions and consolidations, where judges must impose these structures from above.

This article presents the first sustained scholarly analysis of the operation of Rule 1.8(g) in mass litigation. The thesis we will advance is that clients and their lawyers should be permitted to agree on alternatives to the disclosure and consent requirements set out in the Rule. We will not contend that particular alternatives are superior to the Rule's requirements across the range of mass actions or even in particular kinds of mass actions. Nor are we encouraging lawyers who handle multiple-client representations to change the way they practice law. Our point is the limited one that there are identifiable reasons for thinking that alternative disclosure and consent rules may work better for clients in some mass cases and that the option of using them should be available.

Whether we are right or wrong on this limited point, we think scholarly examination of the aggregate settlement rule and the practices to which it relates is long overdue. Hundreds or thousands of lawsuits involving large numbers of clients have settled.¹⁵ Settlement practices and structures have varied enormously from case to case and from lawyer to lawyer. Some plaintiffs' attorneys make lump-sum demands on behalf of groups of clients without

14. For example, Charles Wolfram's thousand-page treatise contains only two paragraphs of text devoted to Model Rule 1.8(g). CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 8.15, at 493-94 (1986).

15. See, e.g., Thomas E. Willging et al., *EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 60* (Federal Judicial Center ed., 1996) (reporting that "[i]n the four districts [studied], the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%," based on a sample of cases in which certification occurred apart from settlement rather than in conjunction with it).

telling defendants how the money will be distributed.¹⁶ Others present a series of individual demands showing what each client is to receive.¹⁷ Some plaintiffs' attorneys obtain settlement authority from all their clients before making demands. Others get authority only after defendants indicate their willingness to pay. Some defendants make settlement offers that all plaintiffs or a specified number of plaintiffs must accept before any plaintiff is paid.¹⁸ Others make offers that individual plaintiffs can accept or reject without limitation. Some plaintiffs' attorneys feel comfortable helping their clients divide a gross settlement recovery among themselves. Others feel awkward doing this and let the clients handle the task or bring in third parties to recommend allocations.¹⁹ Some lawyers feel comfortable with majority rule arrangements which allow groups of claimants to settle over the objection of minority plaintiffs. Others take a dim view of such arrangements, fearing that they give defendants strategic advantages and may deny the clients with the most at stake the power to control their fates.

The diversity of practices, which is far greater than a few examples can suggest, raises questions of professional responsibility that, surprisingly, have not been addressed by scholars, much less answered. What is an aggregate settlement? To what extent, if at all, can a lawyer suggest different settlement payments for different clients in a mass action without violating fiduciary duty law? Does it make a difference whether a plaintiffs' attorney knows how much a defendant is willing or able to pay? Does it matter that the settlement fund may be too small to compensate every plaintiff fully? Is it ever permissible to divide a settlement fund on a per capita basis rather than in proportion to the expected value of plaintiffs' claims at trial? Real lawyers face these questions every day, and the answers they give have the potential to affect greatly the lives of

16. See STEPHEN PATRICK DOYLE & ROGER SILVE HAYDOCK, *WITHOUT THE PUNCHES: RESOLVING DISPUTES WITHOUT LITIGATION* 117 (1991).

17. See *id.*

18. See, e.g., N.J. Supreme Court Advisory Comm. on Professional Ethics, Formal Op. 616 (1988) (discussing conflict of interest questions raised by settlement offers that condition enforceability on acceptance by all plaintiffs).

19. See, e.g., JAMES M. McCORMACK, *STATE BAR OF TEXAS, CONFLICTS OF INTERESTS IN COMPLEX LITIGATION: RECOGNIZING AND RESOLVING CONFLICTS OF INTEREST G-4* (1997) (observing "a [sic] interesting trend towards engaging outside ethics counsel to assist in formulating settlement criteria and demands in mass tort litigation, including aggregate and non-aggregate settlement cases"); Marc Z. Edell & Phillip J. Duffy, *Ethical Pitfalls Confronting the Mass Tort Lawyer*, N.J. LAW. 32, 34 (1995) (observing that "some attorneys have retained special masters to perform the distribution of the aggregate settlement figure"); Phil Watkins, P.C., *Settlement Authorization* (May 14, 1997) (unpublished form, on file with authors) (stating that the retained lawyers "inten[d] to have an independent third-party Arbitrator chosen by [the retained] lawyers or appointed by the Judge presiding over this litigation to allocate any settlement funds [the retained] attorneys are able to recover").

real clients. By launching a debate over the aggregate settlement rule, we hope to encourage law professors to think about these questions in a serious way.

We begin, in Part I, by describing the basic economic structure of group lawsuits and by discussing the incentives parties have to sue in groups. Our aim in this section is to familiarize the reader with the various forms of group litigation, including mass actions, and to lay a foundation for a discussion of the costs and benefits of the aggregate settlement rule. In Part II, we model the allocation conflict that arises whenever lawyers negotiate settlements on behalf of multiple clients, and consider how well the existing Rule constrains these allocation conflicts. Part III briefly describes four problems sometimes caused by the Rule: invasions of client privacy; inability of settling plaintiffs to offer defendants complete freedom from litigation; expense and delay in settlement negotiations; and strategic behavior by group members that frustrates global settlements. Part IV argues that the Rule should be amended to permit alternative private orderings when clients and their lawyers consider them appropriate.

Because this is our first examination of the aggregate settlement rule, we have reserved many interesting questions for another day. Chief among these are the many important questions of interpretation that arise from textual ambiguities in the rule. Although it is essential to clarify the meaning of the rule, we feel that it would be premature to embark on that project at this time. Similarly, we need not decide which possible readings of the Rule are best in order to make the case for waivability of its disclosure and unanimity requirements. We expect to return to the aggregate settlement rule in a sequel to this essay and hope to address these and other remaining issues there.

Another question we will not address, but whose importance we wish to stress, is how much information a lawyer should be required to give a group of clients before asking them to make a binding decision to subject themselves to a majoritarian voting rule at the time of settlement. Under any such rule, it is predictable that some clients will be outvoted. That may be because they favor a settlement others oppose or, more likely, because they oppose a settlement others want to accept. The reasonableness of ignoring a dissenter's wishes may, and likely does, turn on whether the dissenter entered into the agreement with his or her eyes open. What that means, however, is not self-evident. Like all decisions, the decision to opt for a less-than-unanimity rule must be made on the basis of incomplete information. But how much information can be missing? Does the answer depend on whether an agreement is entered into at the outset of a representation, in midstream, or immediately prior to settlement? These are interesting and important questions that must be reserved for another day.

I. THE ECONOMIC STRUCTURE OF MASS ACTIONS

A. *Mass Actions Distinguished from Class Actions and Consolidations*

There are several kinds of group lawsuits, each occupying a different spot on a continuum extending from involuntary to consensual in their formation. We will briefly describe the distinct types of group lawsuits in this section. We warn the reader in advance that our presentation will be somewhat artificial. Although we will treat mass actions, class actions, and consolidations as distinct kinds of group proceedings, in reality one often encounters hybrids of these ideal types. We do not think the hybrids pose any special difficulties for our discussion of the aggregate settlement rule, but they may. In any event, it is sensible to begin with the ideal types. Lessons learned by study of relatively simple problems often make complicated problems easier to solve.

Class actions are involuntary group lawsuits. They are permitted only when transaction costs prevent plaintiffs from forming groups on their own, even though they would be better off acting collectively.²⁰ Class action rules facilitate collective action by allowing some plaintiffs to draw others into groups without their consent, thereby eliminating any need to transact with other plaintiffs. A single named plaintiff can conscript any number of absent plaintiffs by filing a complaint alleging classwide harm and by having the class certified. The absent plaintiffs may never have heard of the named plaintiff, need not have filed lawsuits of their own, and may have no opportunity to exclude themselves from the class.

Because a named plaintiff creates a class action by a unilateral act, there is no contract between the named plaintiff or the attorney appointed to lead and represent the class and the absent plaintiffs. The right of the named plaintiff and class counsel to act on behalf of the absent plaintiffs is bestowed by class action law, which performs all the functions an engagement agreement ordinarily serves.²¹ Class action law creates the group, determines its members, appoints its leader-representatives, fixes the scope of the representation, regulates compensation, and establishes criteria to govern set-

20. See, e.g., FED. R. CIV. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable . . ."). This is the point of the numerosity requirement, which allows class actions to proceed only when voluntary or permissive joinder is impracticable.

21. See generally FED. R. CIV. P. 23 (governing rule in federal class actions); see also Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 637-38 (1997) (discussing procedural protections available in class actions).

tlement.²² Since there is no private ordering among the group members, institutional governance structures for class actions are necessarily imposed from above.

Consolidations are more consensual than class actions. Consolidations bring together plaintiffs with pending lawsuits, so one can at least be confident that each member of these groups wants to sue.²³ But consolidations are also involuntary because they bring together plaintiffs who originally chose to sue separately rather than as a group.²⁴ It therefore seems appropriate to presume that group litigation is likely to make consolidated plaintiffs worse off. If collective action improved their expected payoffs, judges probably would not have to order them to join forces. Of course, this is not a hard and fast rule. Plaintiffs sometimes initiate consolidation motions or join motions filed by others, thereby expressing support for group proceedings. Also, consolidation may facilitate the formation of some desirable groups whose creation is impeded by transaction costs or perverse incentives.²⁵ Still, when a court orders consolidation over plaintiffs' objections, the logical presumption is that group litigation is likely to make at least some plaintiffs worse off.

After consolidation is ordered, a governance structure must be created for the joint undertaking. Rules to govern the collective action are needed because concrete questions must be answered. Which lawyers will try the case, conduct discovery, and handle settlement negotiations? What fees will lawyers playing different roles receive? How will expenses be shared? Usually, the lawyers who represent the individual consolidated plaintiffs decide among themselves how power, responsibility, fees, and costs will be shared, building a governance structure which the court rubber stamps. The process is often acrimonious, with only the threat of a judicially imposed solution ensuring that an agreement is ultimately reached.

Because they eliminate the need to actually organize litigation groups, class actions and consolidations are powerful means of processing claims in volume. For the same reason, they are also dangerous and challenging. It has proven difficult to design appropriate governance structures for these group lawsuits, and there is wide agreement that defective incentive systems and monitoring ar-

22. See generally Wright et al., *Federal Practice and Procedure* §§ 1759-1803 (2d ed. 1987).

23. See FED. R. CIV. P. 42(a).

24. See, e.g., *In re Bendectin Litig.*, 857 F.2d 290, 294 (6th Cir. 1988) (involving a consolidation of defective product claims originally filed in diverse states and several foreign countries).

25. Often, the decision to sue individually rather than as a group says more about an attorney's desire to engage in forum shopping than about the desirability of group litigation. Plaintiffs' attorneys with multiple clients may file separate lawsuits, wait for judges to be assigned, and then consolidate their cases in the court with the most pro-plaintiff judge.

rangements create real risks of inadequate representation.²⁶ Much of the blame rests with judges who allow concerns about professionalism and public opinion to guide their treatment of economic issues. But the task is also inherently difficult. Although scholars have proposed ways of improving the operation of involuntary group lawsuits, there is no simple recipe which, when followed by a judge, always yields a well run class action or consolidation.

Mass lawsuits differ from class actions and consolidations by being fully consensual. They come to exist when numerous plaintiffs with legally or factually related claims against common defendants are jointly represented by the same attorneys. Sometimes lawyers assemble mass actions by soliciting or recruiting clients directly. This can occur via targeted mailings, other advertising campaigns, and lay referrals. Open air meetings can also be effective recruiting tools. At these gatherings, lawyers and civic leaders speak to large numbers of potential plaintiffs about matters affecting them generally, and clients are signed up after the speeches conclude. Unions, churches, homeowners and renters associations, and other voluntary membership groups are also potential sources of clients. Lawyers may approach leaders of these organizations to discuss the possibility of screening and representing their members.

Referral networks also help create client groups. Referrals move cases from generalist lawyers who are good at recruiting clients to lawyers who, because they specialize in particular kinds of lawsuits or possess other attributes, are better able to maximize the value of clients' claims.²⁷ Many lawyers who handle mass actions receive large numbers of cases by referral.²⁸ Texas asbestos lawyers are a good case in point. They have represented tens of thousands of nonresident plaintiffs who were enlisted by lawyers in other states.²⁹ Referrals also frequently play a role in other mass tort actions involving breast implants, toxic torts, defective pharmaceuticals, airplane crashes, and hotel fires, for example.³⁰

26. See generally Charles Silver, *Comparing Class Actions and Consolidations*, 10 REV. LITIG. 495 (1991) (discussing difficulty of creating appropriate incentives in consolidations and class actions).

27. Stephen J. Spurr, *Referral Practices Among Lawyers: A Theoretical and Empirical Analysis*, 13 L. & SOC. INQUIRY 87, 108 (1988).

28. See Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 518 (1996).

29. See generally Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660-64 (1989) (discussing the history of asbestos litigation in East Texas); Dan McGraw, *Tipping the Scales of Justice: Texas Trial Lawyers Use the System to Extract Big Settlements*, U.S. NEWS & WORLD REP., Jan. 8, 1990 (explaining that 35,000 of the 40,000 asbestos claims in Texas were from out-of-state plaintiffs).

30. See, e.g., Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1025-26 (1993).

Mass actions are often styled as permissive joinder actions and differ from other such actions only by virtue of their size. Most permissive joinder actions are small. They typically involve a few passengers who were injured while riding in the same automobile or a victim of medical malpractice and a few family members who are suing for loss of consortium and support.

No legal limit restricts the number of plaintiffs with related claims who can sign onto the same complaint, however, and some joinder actions are large. For example, the Woburn, Massachusetts pollution case made famous in *A Civil Action* involved eight families totaling about thirty members.³¹ A toxic exposure case brought on behalf of residents of Pampa, Texas, involved more than 700 claimants.³² The East Austin Tank Farm case brought together over 200 homeowners who sued a half-dozen manufacturers for personal injuries and losses of property value allegedly attributable to petroleum spills.³³ More than 900 plaintiffs jointly sued the owners and operators of a natural gas storage facility outside Brenham, Texas, after a gas cloud exploded.³⁴ But mass actions can also take other procedural forms. One asbestos settlement covered claims filed in three separate joinder actions which together contained about 1700 families.³⁵ A settlement of claims pending against the manufacturer of polybutylene plumbing aggregated more than 60,000 plaintiffs whose complaints had been filed in many different courts.³⁶

For our purposes, the defining characteristic of a mass action is that, with the clients' understanding and without the aid of judicial orders, lawyers decide to group related claims against common defendants and move the cases toward trial or settlement as a block. As legal barriers to solicitation and case referrals have softened, as advertising has become less expensive, as ad hoc associations among plaintiffs' law firms have become more widespread and accepted, and as risky activities affecting large populations have become more frequent, the kind of litigation activity we envision has

31. HARR, *supra* note 1.

32. See Brenda Sapino Jeffreys, *Former Clients Trade Suits with Counsel in 10-Year-Old Explosion Litigation Mess*, TEX. LAW., July 14, 1997, at 4; Gary Taylor, *Texas "Tort Reform": Sue the Litigators*, 17 NAT'L L.J. 27, Mar. 6, 1995, at A5.

33. See generally Robert D. Bullard, *Solid Waste Site and the Houston Black Community*, 53 SOC. INQUIRY 275 (1991).

34. For further discussion of the events at Brenham, Texas, see *infra* notes 69-73, 82-85 and accompanying text.

35. Order Regarding Proposed Partial Settlement with Premises Defendants and Disclosure of Settlement Terms, entered in *Allen v. American Petrofina, Inc.*, *Alston v. American Petrofina, Inc.*, and *Hicks v. Bethlehem Steel Corp.*, Feb. 24, 1994 ("These three actions involve asbestos disease claims of some 1665 families.") (on file with authors).

36. See *In re Polybutylene Plumbing Litig.*, No. 92-02467674 (281st Judicial Dist., Harris County, Tex. 1992) (unpublished case, on file with authors).

become more common. Concomitantly, costs attributable to the aggregate settlement rule have become more important.

B. The Basic Structure of Mass Actions

Whether created by direct solicitation, referrals, or a combination of the two, all mass lawsuits involve a nexus of contracts that connect each plaintiff to the lawyers for the group. The connection is obvious when clients are solicited directly, since each signs a retainer agreement with the attorney. The connection is more attenuated, but equally real, when clients are referred. The referring lawyer, who was engaged directly, acts as the client's agent for the selection of counsel and creates a legal relationship between the receiving lawyer and the client when the receiving lawyer is retained. The receiving lawyer can therefore be considered a co-agent who, like any agent, is contractually bound to the principal.³⁷

Mass actions are natural products of market forces that encourage claimant groups to form. They are spontaneous collective actions organized by lawyer-entrepreneurs who use retainer contracts to establish governance structures. In these respects, mass actions resemble corporations, partnerships, and voluntary membership organizations, whose shareholders, partners, and members decide whether to participate and on what terms. Plaintiffs contribute assets—their claims—to the joint undertaking. In a few of the cases, they also contribute money or time. They engage lawyer-managers to run the enterprise and give these individuals incentives to maximize their gains. The primary forms of lawyer-manager compensation are stock in the enterprise (the right to a contingent percentage of the recovery) plus a priority claim to repayment of monies advanced on behalf of the enterprise.

The lawyer-manager's job is to sell the assets of the enterprise to the defendant at the highest possible price. One way to effect the transaction is by trying the group lawsuit. A trial forces the defendant to pay, and the plaintiffs to accept, a price set by a jury or a judge. Plaintiffs' attorneys can also sell claims by negotiating consensual transactions called settlements. Because settlements occur in all but a tiny fraction of disputes, trial preparation is largely an effort in salesmanship and is often seen by the participants as such. Its purpose, from the plaintiffs' perspective, is to persuade a reluctant defendant-purchaser that a trial would yield a high forced-sale price so that settlement at a still high, but slightly lower, price would be a good deal.

Absent an indication that claimants are systematically likely to act irrationally or that markets consistently fail for other reasons, it is reasonable to presume that mass actions form because they are advantageous for their members. When a pattern of consensual

37. RESTATEMENT (SECOND) OF AGENCY § 1 cmt. c (1958).

group litigation emerges, as has occurred in the asbestos context,³⁸ the inference that claimants are better off in groups than they would be suing alone seems especially strong. This is true for plaintiffs and defendants alike. Thus, parties considering joint representation or a coordinated defense will compare these cooperative options with the possibility of flying solo. They will ask themselves how well they can expect to do individually, and if the option of joining with others has a higher expected payoff, they will proceed as a group. When making this decision, plaintiffs and defendants usually rely heavily on lawyers for advice.

Plaintiffs can gain several important advantages by suing collectively. These include (1) economies of scale in litigation costs, (2) increased leverage in settlement negotiations, (3) equalization of plaintiffs' and defendants' risks, and (4) conservation of defendants' assets.

1. *Economies of scale*

Group lawsuits can enable plaintiffs to reduce per capita litigation costs by taking advantage of a property many litigation resources possess: jointness of supply. A good or service is joint (or nonrival) if an additional person can use it without diminishing its availability to others.³⁹ Radio waves are joint because new listeners can tune them in without restricting the access of existing listeners. Information and ideas are joint because innumerable people can use them simultaneously. By contrast, treadmills and pizzas are rival. Only one person can use a treadmill at a time, and each slice of pizza one person eats leaves that much less pizza for another.

Many litigation resources display the property of jointness across a broad range of consumption. These include: information produced by investigations of common legal and factual questions, such as whether asbestos causes certain diseases, whether a defendant knew asbestos dust to be hazardous, what law governs plaintiffs' claims, and what the standard of care is under the applicable state law; representation at trial, especially when so-called "bellwether" trials⁴⁰ are employed; representation in settlement negotiations; document preparation, such as drafting a complaint or a response to a motion; expert witness testimony on common issues; and computer simulations. By sharing these goods and services after paying for them once, plaintiffs can substantially reduce their per capita litigation costs.

Plaintiffs who sue in groups also save time because only the designated leaders of the group usually participate in depositions,

38. See *infra* notes 74-75, 79-81 and accompanying text.

39. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 46 (1988).

40. *MANUAL FOR COMPLEX LITIGATION* § 33.28 (3d ed. 1995). For an interesting discussion of how bellwether cases should be selected, see *In re Chevron U.S.A. Inc.*, 109 F.3d 1016 (5th Cir. 1997).

attend hearings and trials, monitor counsel, or bear other time-related costs of litigation. These savings too can be divided among plaintiffs, making all of them better off than they would be if they sued alone.

2. *Increased leverage in settlement negotiations*

Most group lawsuits settle.⁴¹ Settlement dynamics and bargaining power are therefore no less important in group lawsuits than in single-plaintiff lawsuits, which also typically settle. In theory, plaintiffs can often gain leverage in settlement negotiations with a common defendant by joining forces.⁴² This happens in large part because plaintiff groups often find it rational to litigate more intensively than plaintiffs who sue individually.

The impact of economies of scale on bargaining power is clearest when individual claims are too small to justify the expense of litigation. In this situation, claims pressed by individual plaintiffs have little settlement value because plaintiffs cannot make credible threats to take their cases to trial.⁴³ By comparison, the threat value, and therefore the settlement value, of groups of small claims may be relatively great, due to the feasibility of trying small claims en masse.

Reduced litigation costs per capita are predicted to increase the settlement value of large claims as well. On the standard economic model of the decision to settle or sue, a plaintiff's minimum settlement demand falls as litigation costs rise.⁴⁴ Because aggregation

41. See *supra* note 15.

42. "Plaintiffs' attorneys like having multiple cases against a single defendant because a group gives more leverage against that defendant." FREDRICK M. BARON, STATE BAR OF TEXAS, MASS TORT LITIGATION: ETHICAL ISSUES, MULTIPLE CLIENT REPRESENTATION A-1 (1995). Baron is one of the country's leading asbestos lawyers.

43. For a nontechnical introduction to the extensive literature on the economics of settlement and the threat potential of negative expected value lawsuits, see COOTER & ULEN, *supra* note 39, at 481-92.

44. For a presentation and critical discussion of the standard model, see Samuel Issacharoff et al., *Bargaining Impediments and Settlement Behavior*, in DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP (D. Anderson ed., 1996). To appreciate the point made in the text, consider a simple example: Suppose a plaintiff predicts that he or she is 75% likely to win ($P_p = .75$) a judgment (J_p) in the amount of \$100,000 after incurring trial-related expenses (C_p) of \$30,000. The plaintiff's expected net recovery at trial is therefore

$$P_p(J_p) - C_p = .75(\$100,000) - \$30,000 = \$45,000.$$

If the plaintiff is economically rational, he or she will accept any amount greater than \$45,000 in settlement.

Now suppose trial-related expenses fall to \$15,000 as a result of aggregation. The plaintiff's expected net recovery at trial then rises to

$$.75(\$100,000) - \$15,000 = \$60,000.$$

The plaintiff will therefore reject settlement offers in the \$45,000-\$60,000 range that previously would have been accepted.

reduces plaintiffs' per capita litigation costs, it should increase their minimum settlement demands and, therefore, the settlement value of their claims.⁴⁵

Aggregation can also increase plaintiffs' demands by increasing the expected value of their claims at trial. A claim's expected value is partly a function of the probability that a plaintiff will prevail in a trial against a defendant.⁴⁶ In turn, the probability of winning is itself a function of the level and quality of litigation support services obtained. If members of plaintiff groups save money by sharing the cost of nonrival litigation services, they can afford to purchase more services or services of better quality than plaintiffs who sue by themselves. One should therefore expect plaintiff groups to be better represented than individual plaintiffs, and better representation can be predicted to yield higher settlement demands and more favorable settlements.⁴⁷

Cooperation among plaintiffs also helps equalize the stakes between plaintiffs and defendants, resulting in more nearly balanced litigation investments and more equal bargaining power. When plaintiffs with related claims sue separately, a defendant typically enjoys a bargaining advantage because the defendant, as a repeat player confronting a one-time player, can credibly threaten to outspend any individual plaintiff's attorney.⁴⁸ Threat potential derives from the fact that even when plaintiffs sue separately, their fortunes intertwine. Judgments and settlements in cases resolved today influence estimates of the value of cases to be resolved tomorrow because information about cases is widely published and freely shared. A defendant facing a series of related cases therefore has a significant incentive to obtain favorable precedents in the first cases to come along, and to establish a reputation for aggressiveness, as cigarette manufacturers have done.⁴⁹ This incentive can easily lead a defendant to spend far more defending an individual case than the claim involved in the lawsuits, standing alone, would warrant.

45. For an explanation of how aggregation can reduce a plaintiffs' per capita litigation costs, see *supra* Part I.B.1. See also 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, 685 (1986) ("[T]he class action device lowers plaintiffs' litigation costs below the level that would be incurred by bringing individual suits . . ."). For an example of why a plaintiff's minimum settlement demand and a settlement value should increase as a result of reduced per capita litigation costs, see *supra* note 44 and accompanying text.

46. For a discussion and illustration of how to determine a party's expected value of going to trial, see COOTER & ULEN, *supra* note 39, at 484-87.

47. Hensler & Peterson, *supra* note 30, at 1042-44.

48. Coffee, *supra* note 45, at 690.

49. Paul Jaskunas, *Right Time, Right Place, Right Lawyer*, AM. LAW., Mar. 1997, at 98 ("As of last March, the tobacco industry had yet to settle a case or lose a dime in a smoking-related product liability suit, despite a barrage of litigation that the industry had been fending off since the late 1970s.").

If the defendant's threat to spend more than the expected value of a plaintiff's claim at trial is credible, the next question is whether a plaintiff's attorney can equalize the terms of bargaining by making an equally credible and sizable threat in return. Generally speaking, the answer is no.⁵⁰ An attorney who represents a single client cannot credibly threaten to spend more than the expected value of the client's claim because the attorney's return is limited by the fee interest the attorney holds. That interest is usually a contingent fraction of the expected value of the claim at trial.⁵¹ The possibility that a better result in the instant case would enrich other plaintiffs by enabling them to recover more would not induce a contingent-fee attorney representing only one client to invest more because the attorney has no financial stake in the other cases.

Aggregation brings the plaintiffs' and defendants' incentives to invest in litigation more nearly into balance, although defendants are still likely to enjoy an edge. When all plaintiffs join in a single lawsuit, the defendant's liability exposure is the sum of the expected values of the plaintiffs' claims at trial (or the defendant's total assets, whichever is less).⁵² As a group, the plaintiffs' expected gain is the same amount. The investment incentives are still unequal, however, because it is the attorneys representing the plaintiffs, rather than the plaintiffs themselves, who decide how much to invest. And the plaintiffs' attorneys stand to earn only a fraction of the amount their clients recover.⁵³ Nonetheless, the plaintiffs' attorney(s) can credibly threaten to invest significant resources even when they are not willing to match the defendant dollar-for-dollar, and they can certainly commit to spending far greater resources than any individual plaintiff's claim would warrant. If litigation investments have declining marginal value, this credible threat to in-

50. A plaintiff's attorney can often gain some leverage by threatening a defendant with discovery costs that exceed the expected value of a claim at trial. See COOTER & ULEN, *supra* note 39, at 486 (discussing the threat value of nuisance suits). Still, there is no obvious connection between the size of a defendant's exposure to discovery costs and the aggregate expected value of the related claims a defendant faces. In our experience, the latter usually greatly exceeds the former.

51. Plaintiffs' attorneys usually charge contingent percentage fees in the range of 30-50 percent, depending upon the stage at which litigation concludes. See, e.g., Fred Misko, Jr. & Frank E. Goodrich, *Managing Complex Litigation: Class Actions and Mass Torts*, 48 BAYLOR L. REV. 1001, 1057-59 (1996). Defendants usually pay their lawyers by the hour and thus can easily spend beyond the amounts they stand to lose in litigation.

52. See John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 635 (1986/1987) (discussing what defendants have at stake in litigation).

53. See *id.* at 635-36 (discussing how plaintiffs' attorneys contingency fees directly result in lower investment incentives for plaintiffs' attorneys as compared to defendants). See generally Hensler & Peterson, *supra* note 30, at 1042 (discussing how plaintiffs' attorneys through their law firms determine which cases to invest in and how much to invest).

vest heavily should often be enough to bring the plaintiffs' bargaining power more closely in line with that of the defendants.⁵⁴

3. *Equalizing plaintiffs' and defendants' risks*

A defendant facing a group lawsuit is often concerned about the prospect of facing a single trial in which its entire liability will be adjudged. In this respect, a defendant opposing a plaintiff group differs from a defendant who is opposing the same number of plaintiffs one by one. A defendant who litigates against a number of plaintiffs serially often enjoys a considerable risk advantage relative to each plaintiff.⁵⁵ Each plaintiff will have a large claim that may even be his or her single largest asset, and the risk associated with litigating the claim is likely to be one the plaintiff can neither easily bear nor readily diversify. The defendant, by contrast, will face tens, hundreds, or thousands of claims, some of which will succeed, some of which will fail, and none of which taken individually will likely pose a serious threat to solvency. Because the defendant can more easily bear the risk of trying cases than can solitary plaintiffs, economic theory predicts that the plaintiffs will fare worse in settlement negotiations than if both sides were equally fearful of trial.⁵⁶ The stronger a person's desire for a deal, the lower the price a person can be forced to accept.

Aggregation puts plaintiffs and defendants on more nearly equal footings. It exposes defendants to the possibility of taking a large financial hit and perhaps even being rendered insolvent by a single trial, a high variance event. In other words, aggregation saddles a defendant with a large, undiversifiable risk.⁵⁷ It also forces a

54. See Coffee, *supra* note 52, at 636 (stating that in class actions for very high damages, the defendants lose their advantage and the investment incentives for each side become more nearly equal).

55. See e.g., Note, *Class Certification in Mass Accident Cases Under Rule 23(B)(1)*, 96 HARV. L. REV. 1143, 1145 (1983) (stating that when many individual actions are pursued, the "defendant may be able to impose considerable financial pressure on each plaintiff," whereas joint litigation equalizes the bargaining power between the plaintiffs and the defendant).

56. See generally DONALD G. GIFFORD, *LEGAL NEGOTIATION: THEORY AND APPLICATIONS* 36 (1989) (discussing relative bargaining power).

57. Former Professor, now Judge Richard A. Posner makes this point in *In the Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (stating that a class action which exposed the defendants to a potential \$25 billion liability in a single jury trial, gave the plaintiffs, hemophiliacs who had contracted the AIDS virus from tainted blood products, tremendous settlement leverage). Although Posner, following Judge Henry Friendly, characterized this leverage as legalized blackmail, his analysis is not persuasive. He ignores the fact that the class action saddled the plaintiffs with an equally large risk, namely, the risk that a single jury would extinguish a group of claims potentially worth as much as \$25 billion. Nor did Posner offer a normative defense of the distribution of risk or the settlement leverage that exists when a single HIV-positive plaintiff confronts a manufacturer whose financial interest greatly exceeds the plaintiffs.

defendant to go to trial knowing that the attorneys representing a plaintiff group have strong incentives to invest in the litigation. Many defendants are willing to pay large sums to avoid the prospect of a long and expensive trial followed by liquidation.

4. *Conservation of defendants' assets*

When a defendant's assets (including insurance) are insufficient to cover all plaintiffs' claims, a group lawsuit can benefit plaintiffs by conserving the defendant's resources and preserving the going concern value of the defendant's operations. When claims are litigated in separate forums, defendants must retain local counsel in each venue, pay experts to testify concerning the same scientific issues at each trial, suffer the expense of repetitive depositions of managerial personnel, and bear other duplicative costs. These expenditures, which can be avoided when plaintiffs sue in a single proceeding, diminish the pool of resources ultimately available to satisfy the plaintiffs' claims.

The value of a defendant's assets can also be diminished when they are liquidated piecemeal rather than as a unit, so that the value of the defendant's operation as a going concern is lost.⁵⁸ Competing plaintiffs participate in an *n*-person Prisoner's Dilemma.⁵⁹ If each strives independently for a share of the defendant's resources, the defendant's operations will be liquidated piecemeal, its going-concern value will be lost, and the plaintiffs as a group will net a smaller recovery than they would have if they had cooperated in keeping the defendant's operations intact. The possibility of avoiding piecemeal liquidation might similarly be thought to weigh in favor of group lawsuits.

II. SETTLEMENT ALLOCATION AND MONITORING PROBLEMS IN GROUP LAWSUITS

Group litigation is not for every client. The preceding section discussed advantages that *may* flow from group lawsuits, not that always or necessarily do. It is also important to recognize the existence of half-way houses on the road to full-fledged group litigation. Some plaintiffs may gain by joining forces for pretrial purposes, but not for trial or settlement. Others may present a united front for settlement purposes, but go their own ways otherwise. Only *settlements* involving multiple clients implicate the aggregate settlement rule. This section presents an analytical description of the problems associated with such settlements that Rule 1.8(g) aims to address.

58. See Daniel J. Tyukody, Jr., *Good Faith Inquiries Under the Bankruptcy Code: Treating the Symptom, Not the Cause*, 52 U. CHI. L. REV. 795, 800 (1985) ("A [business] is often worth more as a going concern than it would be if it were liquidated on a piecemeal basis.")

59. For an extended scholarly discussion of the Prisoner's Dilemma and its application to group behavior, see RUSSELL HARDIN, *COLLECTIVE ACTION* (1982).

A. *The Problems Conceptualized*

FIGURE 1: THE BASIC ECONOMIC STRUCTURE OF GROUP LAWSUITS

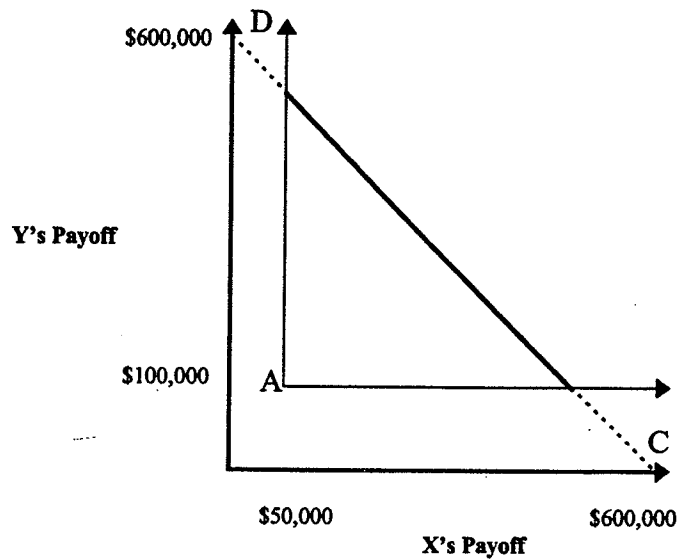


Figure 1 displays the basic economic structure of group litigation. Where X and Y are plaintiffs with related claims, point A represents the expected payoff to each if each brings a separate lawsuit against the common defendant. It is assumed that X and Y expect to recover \$50,000 and \$100,000, respectively, for a total of \$150,000. This point, represented by A in figure 1, will be referred to as each client's *security level*, because it is the amount each client can guarantee himself or herself without cooperating with the other.

By joining forces, X and Y can recover more than A. They can move to a point on CD, the line representing all possible allocations between X and Y of the expected aggregate recovery, assumed to be \$600,000. Therein lies the promise of group litigation. By cooperating, X and Y can make themselves *jointly* better off, here by an expected \$450,000. They can also make themselves *individually* better off by dividing the cooperative surplus in a manner that gives each some amount more than his or her security level.⁶⁰

Group litigation is also dangerous, however, for two reasons. First, it can make X or Y *individually* worse off because by suing together X and Y put their security level payoffs at risk. The expected aggregate return from joint litigation can be divided between X and Y in amounts ranging from (\$600,000, \$0) to (\$0, \$600,000). Some

60. A move from A to any point on the darkened segment of CD to the northeast of A would be a Pareto improvement from the perspective of X and Y. Such a move would harm neither X nor Y and would make at least one of them better off.

of these allocations, represented by the dotted segments of CD in Figure 1, give X or Y less than his or her security level. Any of these extreme allocations would make X or Y worse off than he or she would have been suing alone.

Even if extreme allocations are ruled out, it is important to see that X and Y also have divergent preferences over points on the darkened segment of CD. X prefers points closer to C while Y prefers points closer to D. Group lawsuits are mixed-motive games in which plaintiffs' interests align and conflict. Plaintiffs share an interest in maximizing their aggregate recovery, but can be expected to have different preferences with respect to the settlement fund's allocation.

Second, group litigation can make X and Y *jointly* worse off. The expected outcome from group litigation, the line connecting C and D in Figure 1, is the payoff predicted to be realized if the group lawsuit is conducted in a collectively rational manner, i.e., a manner that maximizes the expected joint return. There is no guarantee that it will be conducted this way, however. It may not be, for example, if the plaintiffs' attorney operates under defective incentives or is inadequately monitored against shirking or other opportunistic behavior.

In both single-client and multiple-client representations, plaintiffs' attorneys are customarily compensated by means of contingent percentage fees that encourage them to maximize their clients' recoveries.⁶¹ Taken alone, however, this fee arrangement does not prevent plaintiffs' attorneys from engaging in opportunistic behavior. For example, early in the litigation process, before much time has been invested in a case, a defendant may effectively "bribe" a plaintiffs' attorney by offering a relatively cheap settlement that would nonetheless pay the attorney a handsome premium on his or her hourly rate. An attorney may accept the offer, even though it fails to maximize the client's recovery, because the marginally greater fee to be earned if the offer is declined is too small to induce the attorney to incur added risk of continued litigation. An offer of this sort is especially likely to succeed when a defendant makes a credible threat to litigate aggressively if the offer is declined.

The danger of attorney opportunism is predictably greater in mass actions than in conventional lawsuits. The incentive to act opportunistically is a function of the amount to be gained by doing so, and in mass actions there is usually far more at stake than in a conventional lawsuit. Aggregation enables a defendant to offer a plaintiffs' attorney a huge premium for settling early and cheaply. Effective hourly rates in the hundreds of thousands of dollars are possible, making such offers especially difficult to resist. Aggrega-

61. See Kevin M. Clermont & John D. Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978) (discussing incentives created by various contingent fee arrangements).

tion may also make a defendant's threat to litigate aggressively even more credible than it ordinarily is.⁶²

Although individual group members can discourage opportunism by closely monitoring their lawyers, no individual plaintiff is likely to do so at a level that is efficient for the group as a whole. From a group's perspective, monitoring is a public good.⁶³ A public good is one that must be made available to all members of a group if it is to be available to any member individually. Monitoring is a public good in a group lawsuit because all members benefit when any one member attempts to keep the group's attorney honest and on track. Because no member can internalize the entire benefit of monitoring, no member is likely to have an incentive to monitor at a level that is optimal for the group. To the contrary, individual group members, each hoping to enjoy the benefits of another's labor without bearing any portion of the cost, will rationally decline to perform monitoring activities that are cost-justified from the perspective of the group. Free-riding of this sort is especially likely to be a problem in large groups that bring together plaintiffs who do not otherwise know or interact with one another.

Inaction due to free-riding and defective incentives creates a serious risk that unchecked attorney opportunism will leave group members worse off than they could be and perhaps worse off than they would have been suing alone. For example, in Figure 1, any outcome short of CD is inferior in the sense that it is worse than the result a collectively rational litigation effort would be expected to produce. But only outcomes to the southwest of A make X and Y jointly worse off. There is a range of inferior outcomes that, although collectively poorer than CD, are jointly better than A. Group lawsuits can work less than ideally yet still be better for plaintiffs than individual suits.

62. This assertion is consistent with the contention, made in Parts I.B.2. and I.B.3. above, that defendants facing multiple plaintiffs in separate lawsuits have incentives to outspend individual plaintiffs because of the possible collateral effects of litigation. Both statements can be true. Aggregation can bolster a defendant's already strong incentives to invest in litigation by making the applicability of an adverse judgment to all plaintiffs clearer than it is when only the law of offensive collateral estoppel applies.

63. WILLIAM J. BAUMOL & ALAN S. BLINDER, *ECONOMICS: PRINCIPLES AND POLICY* 639-40 (4th ed. 1988). A "public good" is to be distinguished from a "private good" in that

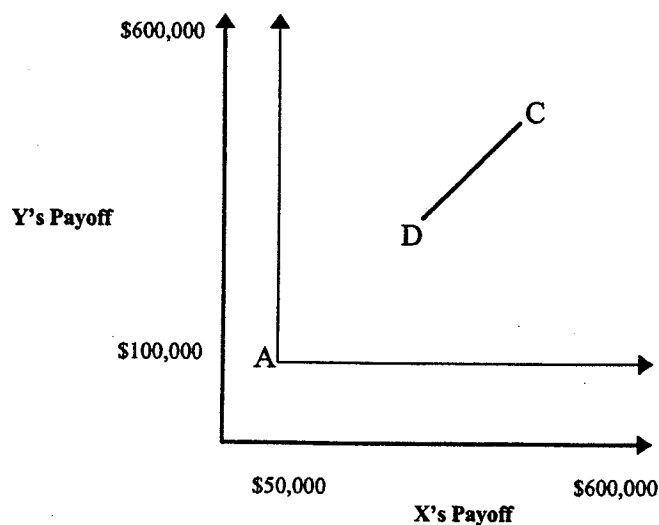
[a] public good is a commodity or service whose benefits are not depleted by an additional user and for which it is generally difficult or impossible to exclude people from its benefits, even if they are unwilling to pay for them. In contrast, a private good is characterized by both excludability and depletability.

Id. See also COOTER & ULEN, *supra* note 39, at 46-48.

B. The Aggregate Settlement Rule as a Means of Handling Allocation Conflicts and Monitoring Failures

Attorney opportunism and allocation conflicts among the plaintiffs create a need for governance structures that will encourage the plaintiffs' agents to act appropriately. The aggregate settlement rule is one such structure. Judging from the little that has been written about it, the purpose of Rule 1.8(g) is to enable each plaintiff to police allocation conflicts by vetoing a proposed settlement.⁶⁴ A veto is most likely to be exercised whenever a plaintiff considers his or her share of a settlement to be too small, either in absolute terms or in relation to the payments other plaintiffs are to receive.

FIGURE 2: A FULLY COOPERATIVE GROUP LAWSUIT



This allocation-based defense of the Rule captures one important problem that group members confront, but misses another. In a game free of conflict, there would be no allocation problem to worry about. For example, Figure 2 depicts a game of pure coordination. If by joining forces X and Y could move from A to any point on CD, self-interest would incline both toward C because at C each would be individually best off.⁶⁵ Because of their agreement on the

64. Robert P. Schuwerk & John F. Sutton, Jr., *A Guide to the Texas Disciplinary Rules of Professional Conduct*, 27A HOUS. L. REV. 126, 138-39 (1990) (stating that the aggregate settlement rule "seeks to protect the interests of each client when a lawyer makes a settlement of claims of two or more clients whose interests in the proceeds necessarily conflict").

65. Of course, X (or Y) would be best off if he could get *all* of the money. The way the game is structured, however, C represents the most money that either X or Y could receive. Thus, there is no way for X (or Y) to get all the money. It is useful to think of the payoff as a public good, with X and Y both preferring provision to nonprovision and higher levels of provision to lower levels.

optimal outcome, there is no conflict between X and Y and no reason to fear that one might be made better off at the other's expense.⁶⁶ Even under this scenario, however, there might still be a need for the aggregate settlement rule. By empowering group members to reject settlements they dislike, the Rule enables them to discourage their lawyers from acting opportunistically. This function should not be forgotten. An attorney can act improperly by putting one client's interests ahead of another's *and* by giving his or her own interests improper weight. By rejecting a settlement offer, a group member signals that he or she has been offered too little. The cause may be the allocation formula, the total size of the settlement, or both.

Consider an example. Suppose X and Y have settlement thresholds of \$200,000 and \$150,000, respectively, which are assumed to reflect the expected value of their claims at trial. Each will accept any offer promising at least the threshold amount. Now suppose a lump-sum offer to settle both claims is received. If the offer is for \$400,000, one and possibly both clients would accept it. Both would likely support a (\$225,000, \$175,000) split, but only Y would be expected to vote for a (\$175,000, \$225,000) deal. In this hypothetical, the fund is large enough to provide both clients more than their threshold amounts, and the right to reject the offer ensures that both plaintiffs will play the important role of policing the allocation conflict.

Now suppose the settlement offer is for \$300,000. This time, one and possibly both clients would vote to reject the settlement offer. Both clients would likely reject a (\$175,000, \$125,000) split, but X might well support a (\$200,000, \$100,000) division and Y would likely favor a (\$100,000, \$200,000) division. In this hypothetical, the right to reject the offer enables each client to police both the allocation conflict and the inadequate size of the proposed settlement fund which, as a practical matter, may appear to the dissatisfied client as the same issue.

The effectiveness of each client's right to reject an offer in performing these functions depends partly on the voting rule that gov-

66. Figure 2 suggests why no analogue to the aggregate settlement rule applies to joint trials. When a mass lawsuit is tried, a court enters judgment for each plaintiff individually. See FED. R. CIV. P. 58 (stating that judgment is entered for each party to a lawsuit). There is no value allocation problem to solve because the court decides how much each plaintiff is to receive. There could be a resource allocation problem if a lawyer were to develop some clients' claims more fully than others. In most cases, however, a plaintiffs' attorney does best for himself or herself by seeking the largest possible recovery for each plaintiff. Unless a defendant is insolvent, plaintiffs' interests generally align at trial, each benefiting from a successful presentation on liability and from argument for the most generous damage model that might be employed. Since mass trials are more harmonious than mass settlements, there is no trial analogue to the aggregate settlement rule.

erns a litigation group. Any of three rules could govern the group containing X and Y. First, affirmative votes by both clients could be required as a condition of settlement by either client. Under this decision rule, assuming X and Y have settlement thresholds of \$200,000 and \$150,000, respectively, the \$300,000 offer would always fail, and the \$400,000 offer would succeed only if it were allocated somewhere in the range from (\$200,000, \$200,000) to (\$250,000, \$150,000). Second, the rule could allow either client to settle individually even if the other client votes against the offer. Under this rule, at least one client and possibly both would accept the \$400,000 offer, depending on the allocation. At most one client would favor the \$300,000 offer, which can be divided in a manner that gives X or Y (but not both) more than his or her settlement threshold. But, of course, both clients could also vote against it. Third, the rule could allow the affirmative vote of a single client to bind the group. The \$400,000 offer would always be approved under this rule, regardless of its allocation, because at least one of the two clients must receive more than his or her settlement threshold. The \$300,000 offer might also be accepted since, for example, X would vote in favor of a (\$225,000, \$75,000) split and X's affirmative ballot would bind Y under this voting regime.

Clearly, different voting regimes can have different practical effects. Under the third regime, a dissenter has little power to challenge misallocations and attorney opportunism because a single supporting vote can seal the fate of the entire plaintiff group. Under the first regime, a dissenter has great power because a single negative vote can prevent everyone from settling. The second regime seems to give a dissenter a middling degree of power, enough to protect himself or herself from an inadequate settlement, but too little to prevent others from taking advantage of offers they want to accept. Although the proper interpretation of the aggregate settlement rule can be debated, it is the second regime that appears to be codified in the Rule.⁶⁷ That is, the Rule appears to allow any client to settle his or her own claim while authorizing no client to determine whether another's claim will be settled or not. The policy question is whether this particular voting arrangement should be insisted upon or made a waivable default.

III. PROBLEMS CAUSED BY THE AGGREGATE SETTLEMENT RULE

Anyone who has participated in mass litigation would likely agree that it is miraculous that attorneys settle these lawsuits as often and as quickly as they do. The nonwaivable consent and disclosure requirements of Rule 1.8(g) make the task even more difficult than it would otherwise be. In this Part we discuss four major

67. See, e.g., *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892 (10th Cir. 1975); *Knisley v. City of Jacksonville*, 497 N.E.2d 883 (Ill. App. Ct. 1986).

respects in which we believe the Rule complicates the settlement process: by invading plaintiffs' privacy; by preventing plaintiffs from offering defendants finality; by generating expense and delay; and by encouraging strategic behavior within plaintiff groups that frustrates global settlements.

A. *Privacy Concerns*

The aggregate settlement rule requires attorneys engaged in multiple-client representations to disclose to each client "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement" in the course of obtaining each client's consent to a settlement.⁶⁸ These required disclosures may be more helpful than troubling when the number of clients is small. In mass actions, however, the emotional and other costs to the plaintiffs of these invasions of privacy may well exceed any benefits of having information about other group members' claims and anticipated settlement payments. Consider two recent Texas cases in which the plaintiffs' privacy interests were protected only because their attorneys found ways to circumvent the Rule's disclosure requirements.

In 1992, a large volume of natural gas escaped from an underground storage facility near Brenham, Texas.⁶⁹ When a truck ignited the gas cloud, the resulting explosion caused several deaths and numerous personal injuries, and damaged scores of buildings.⁷⁰ Through referrals and solicitations, a single law firm came to represent more than 900 people whose homes or businesses were affected by the explosion.⁷¹ When the defendants showed an interest in settling all pending claims for an amount in excess of \$40 million, the plaintiffs' attorneys became concerned about Texas Rule 1.08(f), the Texas equivalent of Model Rule 1.8(g).⁷² The lawyers knew they could not comply with the Rule because many of their clients refused to allow them to tell other clients how much they would receive under the proposed settlement.⁷³ To settle the lawsuit en masse, the lawyers had to find a way around Texas Rule 1.08(f) by devising a means of settling 900-plus claims that was not an "aggregate settlement."

A similar problem arose in a mass asbestos action handled by lawyers in Beaumont, Texas. The defendants, all companies that

68. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1995).

69. *The Big Numbers of 1996 Verdicts: A Special Supplement*, 19 NAT'L L.J. 24, Feb. 10, 1997, at C5.

70. *Id.*

71. Conversations with John R. Alworth, Esq., Counsel for Plaintiffs (various dates 1996).

72. *Compare* TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.08(f) (1996), with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1995).

73. Conversations with John R. Alworth, Esq., Counsel for Plaintiffs (various dates 1996).

operated plants where workers were exposed to asbestos, wanted to settle three separate lawsuits brought by injured employees.⁷⁴ The settlement was to exceed \$140 million and would resolve the claims of approximately 1700 families, all of whom were named parties on at least one of the petitions.⁷⁵ Again, the plaintiffs' lawyers were worried about Texas Rule 1.08(f). They feared that their clients would be hounded by reporters, stock brokers, con men, and long-lost family members if information about their recoveries became public, so they looked for a way to settle the case without distributing (even to other plaintiffs) a list of the amount each plaintiff was to be paid.

Brenham, Texas, the site of the natural gas explosion, is a small town where everyone knows everyone else.⁷⁶ Telling all 900-plus plaintiffs what every plaintiff was to receive would have been the equivalent of publishing the information in the local newspaper. Plaintiffs who wished to keep the size of their recoveries secret from the larger public could have had no hope of doing so. Some of the Beaumont asbestos clients had even more important worries. A number of them suffered from mesothelioma, an invariably fatal disease.⁷⁷ To comply with Texas Rule 1.08(f), these individuals would have had to tell more than 1700 other plaintiffs that they would shortly die. It is easy to sympathize with victims who wished to keep their tragic conditions to themselves in order to spend their final months in dignity and quiet peace with their loved ones.

The lawyers who represented the plaintiffs in the Brenham and Beaumont cases found ways to preserve their clients' privacy while still settling the cases. In view of their success, one may reasonably wonder whether the Rule's nonwaivable disclosure requirement poses any genuine privacy concerns. If these lawyers found ways around the Rule, why can't other lawyers? The answer is simple: Other lawyers may be, and often are, unwilling to assume the risks that the Brenham and Beaumont lawyers chose to bear. The lawyers who handled these two Texas cases adopted readings of the aggregate settlement rule which more risk-averse lawyers would not have embraced. The readings were available because the Rule contains some important ambiguities. As the case law develops, such ambiguities are likely to disappear. Depending on their resolution,

74. *Allen v. American Petrofina, Inc.*, No. B-126,986 (60th Judicial Dist., Jefferson County, Tex. 1994); *Alston v. American Petrofina, Inc.*, No. A-135,236 (58th Judicial Dist., Jefferson County, Tex. 1994); *Hicks v. Bethlehem Steel Corp.*, No. A-134,614 (58th Judicial Dist., Jefferson County, Tex. 1994).

75. Order Regarding Proposed Partial Settlement, *supra* note 35.

76. See *Award in Big Gas Explosion May Be Cut Substantially*, NAT'L L.J., Mar. 4, 1996, at A13.

77. Order Regarding Proposed Partial Settlement, *supra* note 35.

even the Brenham and Beaumont lawyers may have to reveal their clients' secrets in future cases, as other lawyers already do.⁷⁸

Consider the ambiguity in the disclosure requirement that the Beaumont lawyers exploited. By its terms, Texas Rule 1.08(f) mandates "disclosure . . . of the participation of each person in the settlement."⁷⁹ Notice that the Rule does not expressly state that each person must be identified by name. The omission allowed the Beaumont lawyers to reveal only proposed payments by disease categories and the number of persons with each disease.⁸⁰ They did not have to indicate by name which plaintiffs suffered which diseases. To protect themselves from the charge of having violated the Rule, the lawyers also told their clients that a list containing complete information for each plaintiff was available for inspection in their offices.⁸¹ They hoped and expected that few plaintiffs would consult it.

The Brenham lawyers exploited a different ambiguity in the Rule—the meaning of the phrase "aggregate settlement."⁸² The Texas Rule, like the Model Rule, states that "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients"⁸³ It does not say that a lawyer must refrain from making a nonaggregate settlement of multiple clients' claims. Several cases take the position that a series of individual settlement demands for jointly represented clients does not constitute an aggregate settlement.⁸⁴ The

78. Some lawyers obtain authority to make required disclosures in their engagement agreements. *See, e.g.*, Contingency Fee Agreement and Disclosure, Group Litigation Authorization and Disclosures (unpublished form, on file with authors). Other lawyers obtain authority separately. *See, e.g.*, Settlement Authority (unpublished form, on file with authors). Letters sent to plaintiffs in the Austin Tank Farm Case show that required disclosures are in fact made. The letter informed the plaintiffs that

each property damage Plaintiff and Plaintiffs' Intervenor will receive Six Hundred and 00/100 dollars (\$600.00), as settlement for his or her property damage claims against [the settling defendant] and that each personal injury damage Plaintiff and Plaintiffs' Intervenor will receive Six Hundred and 00/100 Dollars (\$600.00), as settlement for his or her personal injury damage claims.

Id.

79. TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.08(f).

80. Order Regarding Proposed Partial Settlement, *supra* note 35.

81. Court Approved Disclosure Regarding Settlement Offers from Premises Defendants, *Allen v. American Petrofina, Inc.*, at 14 (on file with authors).

82. *See, e.g.*, MCCORMACK, *supra* note 19, at G-3 ("Texas law [does not] define 'aggregate settlement' and the Texas Supreme Court's Professional Ethics Committee has issued no opinions defining the term or construing Rule 1.08(f). Other jurisdictions have dealt with aggregate settlements in both ethics opinions and court opinions, but with little or no effort to define the term.").

83. TEX. DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Rule 1.08(f); MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1995).

84. *Attorney Grievance Comm'n v. Engerman*, 424 A.2d 362, 368 (Md. 1981); *Arce v. Burrows*, 1997 WL 528639, at *2 (Tex. App. 1997) ("An aggregate

Brenham lawyers therefore structured their settlement as 900-plus independent demands, each of which had prior authorization from the client on whose behalf it was made and each of which could be accepted or rejected by the defendants without limitation.⁸⁵

To take such positions, the Brenham and Beaumont plaintiffs' lawyers had to tolerate risks.⁸⁶ If their conduct had been questioned in the wake of the settlements, it was far from certain that courts would have accepted their readings of the Rule. Few cases have construed the aggregate settlement rule, and some decisions contain language that cuts against the positions just described.⁸⁷ Although the conduct of these Texas attorneys seems perfectly reasonable to us, there is little question that the risk-averse course would have been to disclose the details of each plaintiff's claim and settlement payment to all other plaintiffs.

The magnitude of the risk a lawyer incurs by experimenting with the rule was recently made clear. In *Arce v. Burrows*, plaintiffs sued their former attorneys alleging a violation of the aggregate settlement rule.⁸⁸ The court of appeals held that in the event of a violation, plaintiffs can recover the entire attorney's fee without a showing of harm.⁸⁹ We predict that few lawyers will risk their entire fee for the sake of preserving their clients' privacy.

One might think that any wrongful infringement of clients' privacy could be avoided by telling clients at the time the attorney is engaged that their names and settlement payments will have to be disclosed to other members of the plaintiff group. After all, if consent to disclosure is obtained in advance, no client can have a valid

settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client."); *Scrivner v. Hobson*, 854 S.W.2d 148, 152 (Tex. App. 1993) (discussing aggregate settlement in which "no individual negotiations on behalf of any one client were undertaken"). The same result is suggested by comments to the effect that aggregate settlements are lump-sum settlements. See *Schurwerk & Sutton, supra* note 64, at 138 n.46 (using the terms "lump sum" and "aggregate settlement" interchangeably); *Edell & Duffy, supra* note 19, at 34 (same). In conversation, John F. Sutton, Jr., the Reporter for the Model Code of Professional Responsibility, offered his understanding that the Rule does not apply to settlement in which a separate demand is made for each client. Interview with John F. Sutton, Jr., Reporter for the Model Rules of Professional Conduct, in Austin, Texas (July 1997).

85. Conversations with John R. Alworth, Esq., Counsel for Plaintiffs (various dates 1996).

86. The defendants in these cases and their lawyers also assumed a risk that the settlements would not be sustained. Presumably, they understood the risk, but preferred it to the option of forcing the plaintiffs attorneys to make the disclosures required by the Rule.

87. See, e.g., *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229 (Tex. App. 1985) (pointing out that the plaintiffs' attorney failed to give the plaintiffs "a list showing the names and amounts to be received by the other settling plaintiffs").

88. 1997 WL 528639 (Tex. App. 1997).

89. *Id.* at *9.

complaint when the relevant information is subsequently disclosed. The difficulty with this position is that it puts clients with legitimate privacy interests in a bind. They may either join with other plaintiffs and compromise their privacy or sue alone and lose the advantages of litigating as part of a group. The third option, allowing participation in a group lawsuit while preserving privacy, is currently unavailable because the Rule's disclosure requirement cannot be waived.⁹⁰ We question whether there is sufficient reason to foreclose this third option.

B. Finality

It is easy to see why plaintiffs who perceive an advantage in settling as a group might opt for some less-than-unanimity rule, such as majority rule. Majority rule is more conducive to affirmative decisions on group-wide settlement offers than a unanimity rule, which enables a single dissenter to block a group deal. But are group-wide settlements particularly advantageous? Why might it be better to settle all claims at once than to settle piecemeal? In this section and the next, we explore the reasons.

A potential advantage of group-wide settlements stems from the fact that defendants who settle these lawsuits want finality and are willing to pay for it. The desire for finality accounts for a variety of common settlement features, including mandatory classes from which plaintiffs cannot opt-out and ceilings on the number of plaintiffs who can reject an offer in a mass action without causing a settlement to explode.

Why do defendants value finality? There are several reasons. First, defendants may face a risk of adverse selection. When plaintiffs can opt-out of settlements, there is a danger that those with the strongest claims will do so, leaving a defendant with a settlement dominated by weak claims.⁹¹ The danger is clearest when a defendant offers to make level payments for entire claim categories. For example, the schedule shown below was used in a lawsuit involving 153 asbestos plaintiffs.⁹²

90. See *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d 892 (10th Cir. 1975).

91. A second danger of adverse selection also stems from the use of level payments. Under this scenario, plaintiffs will attempt to get themselves into higher-paying categories than their injuries warrant. Defendants can deal with this danger by capping the total amount to be paid to a group of claimants, by capping the number of claimants per disease category, and by providing for arbitration of disagreements over individual plaintiffs' status.

92. Anonymized Table provided by Reaud, Morgan & Quinn Law Firm (on file with authors).

<i>DISEASE</i>	<i>PAYMENT</i>
Mesothelioma	\$25,000
Lung Cancer	\$13,000
Other Cancers	\$9,600
Pulmonary Asbestosis	\$8,000
Pleural Disease	\$4,800

In each disease category, this arrangement likely overcompensated plaintiffs with weak claims and undercompensated plaintiffs with strong claims. Consider lung cancer victims, each of whom received \$13,000. If this figure reflected the value of the average lung cancer claim, then victims with relatively weak claims (smokers) did marginally better than they should have, and victims with relatively strong claims (nonsmokers) fared marginally worse. Victims with strong claims therefore had the greatest incentive to opt-out. To avoid paying top dollar for a settlement containing a disproportionate number of weak claims and then facing the strong claims in a later lawsuit, a defendant's settlement offer may reasonably be conditioned on its acceptance by a high percentage of the plaintiff group.⁹³

Defendants also prefer broader settlements to narrower ones because broad settlements give them better returns on their sunk transaction costs, the money they spend negotiating deals. At the margin, the cost of including additional plaintiffs in a proposed mass settlement is just the added amount the plaintiffs will receive. For example, including an extra lung cancer victim in the settlement described above would have cost the defendant an additional \$13,000. There would have been negligible bargaining costs to bear since the deal was already in place. It would cost more to settle with the same lung cancer plaintiff via separate negotiations, even if the payment again turned out to be \$13,000, because one would have to include the cost of hammering out an additional agreement. To minimize future transaction costs, defendants try to include as many plaintiffs as possible in group deals.

A third reason for wanting finality has to do with the financial exposure defendants face from continued litigation by nonsettling plaintiffs. This exposure may not be a linear function of the number of nonsettling plaintiffs. In other words, a defendant who faces 100 opt-outs may not bear an exposure 100 times as great as that borne by a defendant who faces a single opt-out plaintiff in subsequent litigation. If, as we suggested above in Part I.B.4, a defendant's exposure per plaintiff falls as the number of plaintiffs rises, the former

93. High participation requirements may encourage plaintiffs' attorneys to pressure plaintiffs with strong claims to accept marginally low settlement offers.

defendant may bear a risk only fifty times as large as that borne by the latter. In this situation, the value of bringing the last few plaintiffs into a group settlement is disproportionately large.

Knisley v. City of Jacksonville,⁹⁴ one of two leading cases on the aggregate settlement rule,⁹⁵ makes this point nicely. In *Knisley*, sixty-one plaintiffs sought an injunction preventing the construction of certain buildings.⁹⁶ Believing that all the plaintiffs had agreed to be bound by majority rule, the attorney representing them settled with certain defendants after learning that most of the plaintiffs supported a proposed deal.⁹⁷ Thereafter, a few plaintiffs complained and the attorney convened a meeting of the clients.⁹⁸ When the meeting became discordant, the attorney repudiated the settlement and withdrew from the case.⁹⁹ The defendants then moved to enforce the settlement, forcing the court to decide whether all plaintiffs were bound.¹⁰⁰

It is easy to see why majority rule may have been desirable in *Knisley* from both the plaintiffs' and the defendants' perspectives. The remedy sought was an injunction that would have prohibited the defendants from going forward with a construction project.¹⁰¹ Any plaintiff suing alone could have obtained this remedy and brought the project to a halt. Freedom from the threat of an injunction was therefore a lumpy or step good that only the entire plaintiff group could deliver.

When continued litigation by a nonsettling plaintiff exposes a defendant to disproportionately great risks or costs, a defendant will predictably pay considerably less per plaintiff—perhaps nothing at all—to settle with some plaintiffs than to settle with all of them. Therein lies the advantage of being able to offer the defendant a package deal. A mechanism that facilitates collective action by a claimant group enables all plaintiffs to share the premium for settling the last claim, and avoids a situation in which each plaintiff has an incentive to jockey for the position of being the last holdout to settle. Majority rule would have helped the *Knisley* plaintiffs arrange a group-wide settlement if the Illinois court of appeals had decided that the dissenters were bound. The court, however, insisted on unanimity.¹⁰²

94. 497 N.E.2d 883 (Ill. App. Ct. 1986).

95. The other leading case is *Hayes v. Eagle-Picher Industries, Inc.*, 513 S.W.2d 892 (10th Cir. 1975).

96. *Id.* at 884.

97. *Id.* at 885.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 884.

102. *Id.* at 887. In reaching this result, the *Knisley* court explicitly followed *Hayes v. Eagle-Picher Industries, Inc.*, 513 F.2d at 894-95 (10th Cir. 1975) (holding that an agreement allowing the majority to govern the rights of the

It is easier for plaintiffs to act collectively under majority rule than under a unanimity requirement. Plaintiffs may therefore opt for majority rule when their desire to act collectively exceeds their fear of winding up in the minority. It is beyond dispute that some plaintiffs would opt for majority rule if permitted.

C. *Expense and Delay*

The aggregate settlement rule requires a lawyer to provide certain information to each client before obtaining each client's consent. Ordinarily, the information required to be communicated cannot be known until negotiations occur. The Rule clearly contemplates that a lawyer will confer with his or her clients before closing a deal whose details have already been hammered out.

When a lawyer represents only a few clients in the same matter, the need to confer with them after negotiating with the defendants and their counsel is easily met because the lawyer can usually contact the clients quickly and at little expense. With a few telephone calls and hastily-arranged office visits, a settlement can be put to bed. Nor is the communication requirement likely to cause a defendant to fear that it is wasting its breath by negotiating a settlement. In small-number representations, it is fairly cheap to bargain, and a plaintiffs' attorney can be expected to predict accurately the likelihood that his or her clients will accept a deal.

Expense and delay can be real concerns when clients number in the hundreds or thousands, however. A lawsuit involving approximately 25,000 farm workers is an extreme example, but a good one.¹⁰³ The plaintiffs, who resided in twelve foreign countries,¹⁰⁴ alleged that exposure to a pesticide reduced their fertility and prevented them from having children.¹⁰⁵ They sought compensation from the manufacturer of the pesticide and from growers who used it on their crops.¹⁰⁶ After their claims were dismissed on forum non conveniens grounds,¹⁰⁷ the plaintiffs appealed to the Fifth Circuit. While the appeal was pending, the manufacturer offered to settle all 25,000 claims. The plaintiffs' attorneys regarded the offer as a great opportunity. They wanted to settle immediately, but the aggregate settlement rule prevented them from doing so. They had to confer with and poll their clients before agreeing to the deal.

minority violates the basic tenets of the attorney-client relationship), a case we discuss in substantial detail in Part IV.A.1. below. See *Knisley*, 497 N.E.2d at 887 (same).

103. See *Dow Offers 22 Million to Banana Workers*, AGENCE-FRANCE-PRESS, June 18, 1997, available in 1997 WL 2136074.

104. See *Product and Environmental Claims from Latin America Against Multinational Corporations on the Rise*, LATIN AM. L. & BUS. REP., July 31, 1996.

105. See *Dow Offers 22 Million to Banana Workers*, *supra* note 103.

106. See *Delgado v. Shell Oil Co.*, 890 F. Supp. 1324 (S.D. Tex. 1995).

107. See *id.* at 1373.

The difficulty of contacting 25,000 agricultural workers in twelve foreign countries is hard to exaggerate.¹⁰⁸ Few claimants had telephones or permanent addresses, and most workers therefore had to be contacted in person to be reached at all. It was nearly inconceivable that the lawyers should attempt to reach each plaintiff twice: once before a settlement was closed and a second time to hand out checks. The plaintiffs' attorneys therefore wanted to make only one contact, at which the settlement would be described and checks would be distributed to those plaintiffs who accepted the manufacturer's offer.

The defendant manufacturer had grave concerns about this procedure. There was no assurance in advance as to the number of plaintiffs who would approve the settlement or the composition of the block of settled claims. If a large number of claimants rejected the offer or if mainly plaintiffs, with weak claims accepted it, the settlement would turn out to be an expensive proposition that would do the manufacturer little good. The manufacturer was also concerned that after it committed to the settlement the Fifth Circuit would decide the pending appeal while the plaintiffs' attorneys were still seeking their clients' consent. If the Fifth Circuit affirmed the *forum non conveniens* dismissal, the vast majority of the farm workers would accept the proposed settlement and the manufacturer would lose its money. But, if the Fifth Circuit reversed, the plaintiffs would have live claims and their lawyers might encourage many of them to reject the deal. The manufacturer could then find itself back in court against the plaintiffs with the strongest and most substantial claims, having paid the weakest claimants a good deal of money.

These problems could have been solved if the plaintiffs' attorneys had been able to bind the farm workers without polling them. Such settlement authority might have been conferred in several ways. At the extreme, the clients could have authorized the lawyers in advance to accept any deal within the reasonable exercise of their discretion. Short of this, the farm workers could have agreed to be bound by the decision of a plaintiffs' steering committee containing a small number of members who could be consulted easily. A third alternative would have been to authorize a lawyer in each country to settle on behalf of all workers living there. Any of these arrangements would have facilitated collective action.

The farm workers litigation is unusual in having tens of thousands of plaintiffs scattered across the globe, but it is typical with respect to the parties' need and desire to consummate quickly a set-

108. Michael J. Maloney & Allison Taylor Blizzard, *Ethical Issues in the Context of International Litigation: "Where Angels Fear to Tread"*, 36 S. TEX. L. REV. 933, 963 (1995) (observing that the consent required by the aggregate settlement rule "may be more difficult to obtain from foreign plaintiffs than from domestic plaintiffs" and setting out numerous reasons).

tlement binding on everyone. Many settlements are driven by uncertainty about the future and by a concomitant need to conclude matters before events unfold. The Brenham explosion case settled when it did because the defendants had been tagged with a multi-million dollar verdict in a related lawsuit brought by a different group of plaintiffs.¹⁰⁹ The \$40 million settlement was negotiated, however, that verdict was on appeal, and made sense only because no one knew what the outcome of the appeal would be. The need to consult with the clients caused negotiations to drag on for months, however, creating an ever-present risk that events in the other lawsuit would tear the settlement apart.

If fewer than all plaintiffs are to participate in a settlement, a defendant will want to limit the size and composition of the opt-out group for reasons already explained. If the group is too large or contains too many strong claims, a defendant may prefer not to participate in a partial deal. This is why mass settlements usually contain walk-away provisions. For example, in one asbestos settlement, the defendants reserved the right to kill the deal unless one-hundred percent of the mesothelioma victims and claimants representing eighty-five percent of the total settlement fund accepted the deal.¹¹⁰

Walk-away provisions are sources of transaction costs. To set the thresholds in the asbestos settlement, the lawyers had to bargain in the face of uncertainty about the number of plaintiffs who would approve the deal.¹¹¹ They walked a fine line, protecting the settling defendants from future litigation to the greatest possible extent without imposing participation requirements so high that a few disgruntled or strategic plaintiffs could scotch a nearly global deal.¹¹² The defendants also had to take care to give the plaintiffs' attorneys an incentive to maximize the number of plaintiffs who would accept the deal. Although only claimants representing eighty-five percent of the settlement fund were required to join in, the defendants wanted one hundred percent to accept.¹¹³ Because only the plaintiffs' attorneys could convince their clients to participate, the defendants required assurances that they would use their best efforts to minimize the plaintiffs' opt-out rate.¹¹⁴

109. See *Award in Big Gas Explosion*, *supra* note 76.

110. Confidential Client Letter (Feb. 24, 1994) (unpublished letter, on file with authors).

111. *Id.*

112. See *id.*

113. See *id.*

114. The same problem is dealt with in the same way in class actions. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1465 n.144 (1995) ("[D]efendants can (and do) protect themselves against this danger by including a provision in the settlement agreement entitling them to back out if a specific percentage or number of class members chooses to opt out.").

Another matter of great concern to defendants is who will represent nonsettling claimants in future litigation. Many defendants refuse to proceed with partial settlements unless the attorneys representing the original group agree not to represent nonsettling claimants in the future. This desire is understandable. Throughout the settlement process, defendants unavoidably give plaintiffs' attorneys valuable information that can be used against them in future litigation. To protect themselves, defendants must either settle all claims, thereby avoiding future litigation, or must preclude the plaintiffs' attorneys from representing opt-out claimants. Because the unanimity requirement all but eliminates the first option, it forces defendants to bargain for the second. Negotiating withdrawal is problematic, however, even when the plaintiffs' attorneys want to go along. It flies in the face of existing professional responsibility law, which prohibits a lawyer from agreeing to restrict his or her right to practice law in connection with the settlement of civil litigation.¹¹⁵

Scholars have criticized the prohibition on negotiated withdrawals, and in practice the rule frequently is ignored.¹¹⁶ For our purposes, however, the desirability of the prohibition is a side issue. The main point is that the unanimity requirement creates a problem—continued representation of opt-out claimants by current counsel—that either would not arise or would arise less often if plaintiffs could commit in advance to group-wide deals.

Clearly, the aggregate settlement rule can be a source of expense and delay in the settlement process. The magnitude of the costs is an empirical question, but we have reason to fear that in some cases the costs are quite large. Whether benefits flowing from the Rule exceed these costs is also an empirical question, though one that turns on the value plaintiffs attach to the benefits they receive. By saying this and arguing for waivability of the disclosure requirement, we do not mean to discourage lawyers from conferring with clients or to trivialize their duty to obtain informed client consent to settle. To the contrary, we are persuaded that lawyers who undertake to represent large numbers of clients should ordinarily

115. See ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT Rule 5.6(b) (3d ed. 1996) (collecting cases on Model Rule 5.6(b), which prohibits a lawyer from agreeing to "restrict a lawyer's right to represent certain clients or to sue specified parties as part of the settlement of a controversy between private parties").

116. See, e.g., ABA/BNA, *Lawyer's Manual on Professional Conduct* § 51:1211 (Supp. 1996) ("It is pretty much taken for granted that some lawyers use restrictive covenants in settlement agreements despite the ethics' rules prohibition."); Stephen Gillers, *A Rule Without a Reason*, A.B.A. J., Oct. 1993, at 118, 118 ("I come to bury Model Rule 5.6(b) . . ."); Joanne Pitulla, *Co-Opting the Competition*, A.B.A. J., Aug. 1992, at 101, 101 ("[I]t appears to be fairly common in certain types of litigation to condition settlement offers on agreements by counsel not to file similar suits or bring claims against a particular defendant.").

do so with the expectation of giving each client standard service. A properly staffed law firm should be able to develop each client's case fully, to communicate with each client, and to attend to each client's unique interests or emotional needs in most cases. Our point is only that there are some cases in which the attorneys' burden of conferring repeatedly with each member of a client group, a burden imposed by the Rule's nonwaivable unanimous consent requirement, is unreasonably great.

D. Strategic Behavior

The Rule's nonwaivable unanimous consent requirement is probably the most significant barrier to settlement in mass lawsuits. It is certainly a big obstacle to global deals that extinguish all plaintiffs' claims. Critically, this requirement enables a single plaintiff to block an all-encompassing group deal unless he or she receives a disproportionately large share of the available funds. A strategic plaintiff with little at stake in a lawsuit, such as a person who was exposed to asbestos but has no disease, can therefore make a credible threat to veto a desirable group deal unless paid a disproportionately large amount. Because large-claim plaintiffs, such as mesothelioma victims, usually have the most urgent need for money as well as the most to lose (in terms of both time and money) by trying their cases, they occupy a weak bargaining position vis-à-vis small-claim plaintiffs and may have difficulty resisting a small-claim plaintiffs' extortion efforts. The Rule's nonwaivable unanimity requirement creates an intra-group bargaining game in which the most deserving plaintiffs may often be at the mercy of the least deserving.¹¹⁷

Under any less-than-unanimity rule, such as a simple majority rule, a small-claim plaintiff inclined toward strategic settlement behavior will have less bargaining power. As the percentage of plaintiffs needed to bind a group declines, the difficulty of extortion by any one member increases, and its likelihood of success therefore decreases. Under simple majority rule, any plaintiff inclined toward strategic behavior must persuade a majority of other plaintiffs to join a blocking coalition. The obvious difficulty of succeeding in this coalition-building task creates an obstacle for disgruntled, greedy, and strategic plaintiffs attempting to block settlements. These plaintiffs may therefore be less successful under a simple majority rule or any other less-than-unanimity rule than under the existing Rule.

Not surprisingly, some plaintiffs have anticipated the holdout problem endemic to group decision-making under a unanimity rule, and have agreed ex ante that majority rule will govern their settle-

117. See ABA/BNA, *Lawyer's Manual on Professional Conduct* § 51:1211 (Supp. 1996).

ment negotiations. In *Hayes v. Eagle-Picher Industries, Inc.*,¹¹⁸ eighteen plaintiffs retained a single lawyer to act on their behalf against the common defendant.¹¹⁹ In addition to addressing the usual matters like fees and costs, the plaintiffs' retainer agreement established that the decision to settle as a group would be made by majority rule.¹²⁰ Initially, the decision to include this provision appeared to be wise because the defendant made a group-level offer and the plaintiffs were divided over whether to accept it: thirteen plaintiffs voted to accept the offer and five voted to decline it.¹²¹ Collective action was possible only because the plaintiffs agreed in advance to be bound by majority rule. Even so, the will of the majority was defeated.¹²² After the group's attorney had the trial court enter the settlement on behalf of all eighteen plaintiffs, two of the dissenters appealed.¹²³ The Tenth Circuit sided with them, holding that the Rule's requirement that each plaintiff consent to the settlement after being informed of its terms could not be waived.¹²⁴

Hayes forces one to ask why the Rule requires unanimous consent to bind an entire plaintiff group instead of allowing plaintiffs to choose their own voting rules. Two distinct issues are raised by this question. One is whether and why unanimity is preferable to other social choice rules. The second issue is whether and why any decision rule should be unwaivable rather than a mere default rule that applies when parties fail to agree otherwise. The two questions must be examined separately and are discussed at length in Part IV.

For now we emphasize that the unanimity requirement is a serious obstacle to group settlements that would resolve all members' claims. Since it is obvious that a single claimant could block such a deal and difficult to explain why any claimant should have this extraordinary power, parties rarely negotiate truly global deals in mass lawsuits. Instead, settlements often reflect the assumption that claimants who object will not be bound. The unanimity requirement embedded in the aggregate settlement rule leads to class-action style settlements that give claimants opt-out rights and that anticipate positive opt-out rates.

IV. THE CASE FOR WAIVABILITY

The case for amending Rule 1.8(g) to permit litigants to waive its requirements proceeds in two parts. First, should litigants be free to agree that some voting rule other than a unanimity rule will

118. 513 F.2d 892 (10th Cir. 1975).

119. *See id.* at 892.

120. *See id.*

121. *See id.*

122. *See id.*

123. *See id.*

124. *Id.* at 894-95.

govern their settlement negotiations? Second, should they be similarly free to agree that "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement"¹²⁵ will be disclosed only in specified part, or will not be disclosed at all, in the course of obtaining each claimant's consent to a settlement?

Under many circumstances, American law permits individuals to waive procedural protections established for their benefit. For example, we commonly permit litigants to waive their due process rights to notice,¹²⁶ to a hearing,¹²⁷ and to a trial.¹²⁸ One may even waive one's right to appeal a death sentence.¹²⁹ Against this backdrop, the proposition that litigants should be free to use less-than-unanimity rules to govern their collective behavior seems unremarkable, even pedestrian.

Consider, as well, that voluntary membership organizations, including social, political, economic, religious, and charitable groups, rarely make decisions under a unanimity rule.¹³⁰ They rely mainly on versions of majority rule, using it to elect officers, enact bylaws, set dues, ratify expenditures, pass resolutions, and select sites for outings. Corporations and partnerships also use majority rule to decide matters reserved for shareholders and partners.¹³¹ Because plaintiffs join litigation groups voluntarily, it seems natural that they should also have the option of using less-than-unanimity rules for making group decisions.

We would even say that it is perverse to deny mass action plaintiffs this option. In class actions and consolidations, the wishes of individual plaintiffs are regularly ignored for the sake of some larger good. Plaintiffs who may not want to sue at all are forced to sue, and plaintiffs who may prefer to sue individually are forced to sue as members of a group. In addition, plaintiffs in class

125. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1995).

126. See *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972); *National Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964).

127. See *D.H. Overmeyer Co., Inc. v. Frick Co.*, 405 U.S. 174, 185 (1972).

128. See *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969).

129. See *Gilmore v. Utah*, 429 U.S. 1012 (1976).

130. See, e.g., REVISED MODEL NONPROFIT CORP. ACT § 1.40 (1988) ("Unless the context otherwise requires in this Act: . . . 'Approved by (or approval by) the members' means approved or ratified by the affirmative vote of a majority of the votes represented and voting at a duly held meeting at which a quorum is present . . .").

131. See REVISED MODEL BUS. CORP. ACT § 7.25(c) (1991) ("If a quorum exists, action on a matter (other than the election of directors) by a voting group is approved if the votes cast within the voting group favoring the action exceed the votes cast opposing the action, unless the articles of incorporation or this Act require a greater number of affirmative votes."); REVISED UNIF. PARTNERSHIP ACT (RUPA) § 401(j), 6 U.L.A. 52 (1995) ("A difference arising as to a matter in the ordinary course of business of a partnership may be decided by a majority of the partners.").

actions and consolidations are required to accept representation by court-selected counsel and to pay court-ordered attorneys' fees. Their claims are settled without their consent and often even over their objections. In a world where members of plaintiff groups are frequently subjected to the equivalent of less-than-unanimity rules without their consent, it seems strange indeed to forbid them from using the same rules by mutual agreement for personal gain.

We also believe that mass action plaintiffs should be permitted to decide for themselves the terms on which information about their claims or proposed settlement payments will be shared with other members of the plaintiff group. Other than the aggregate settlement rule, no legal barrier prevents plaintiffs from deciding to forego information about fellow plaintiffs' claims and proposed settlement payments. Because it may be costly for plaintiffs to have to reveal information about their own claims or settlement payments to other members of the claimant group, they seem uniquely qualified to decide whether the benefits of doing so exceed the costs.

A. *Waivability of the Unanimity Requirement*

The contention that the unanimity requirement should be made waivable could be objected to on both legal and policy grounds. In this section, we will consider both grounds. We are aware of no legal barrier to waivability of this requirement other than the Rule itself. We also believe that waivability of the unanimity requirement can be defended on policy grounds: settlement allocation conflicts and attorney opportunism can be dealt with sufficiently well by other means; and, as was explained in Part III.D. above, unanimity rules are easily subject to strategic abuse.

1. *Agency law permits the use of less-than-unanimity rules*

The simplest argument against waivability is that deeply embedded principles of law require the use of unanimity rules. Judges have asserted this, arguing that nonwaivability derives from agency law. Agency law seems a most unlikely source, however, given its strong tendency to allow principals to structure relationships as they wish.¹³² Nevertheless, this is the position taken in the two leading cases on Rule 1.8(g), *Knisley v. City of Jacksonville*¹³³ and *Hayes v. Eagle-Picher Industries, Inc.*¹³⁴ Because *Hayes* is the foundational case, we shall consider its logic here.

As explained above, in *Hayes* the Tenth Circuit declined to enforce a retainer agreement in which eighteen plaintiffs unanimously agreed that the decision to settle as a group would be made by sim-

132. RESTATEMENT (SECOND) OF AGENCY terminology (defining "unless otherwise agreed") (1958). See *supra* notes 94-102 and accompanying text.

133. 497 N.E.2d 883 (Ill. App. Ct. 1986).

134. 513 F.2d 892 (10th Cir. 1975).

ple majority rule.¹³⁵ It was the judges' opinion that this agreement to waive the Rule's unanimous consent requirement ran

contrary to the plain duties owed by an attorney to a client. An agreement . . . which allows a case to be settled contrary to the wishes of the client and without his approving the terms of the settlement is opposed to the basic fundamentals of the attorney-client relationship. Inasmuch as the attorney is merely an agent for the client in negotiation and settlement, the approval of the client is an all important essential to a settlement which is to be binding, and if this approval is not present the court is placed in a most unfavorable position in enforcing it.¹³⁶

Under the Court's logic, the Rule's unanimity requirement is the natural application of two basic agency doctrines: the rule that an agent must gain authority from a principal before acting in a manner that binds the principal;¹³⁷ and the rule that an agent cannot act contrary to a principal's wishes.¹³⁸ In combination, these two doctrines would arguably make it impossible for group members to precommit to a settlement on the basis of majority rule.

It is, of course, blackletter law that an agent must acquire proper authority before entering into a settlement or other contract on behalf of a principal.¹³⁹ Even so, this requirement does not support nonwaivability of the Rule's unanimity requirement. Agency law allows a group of principals to use less-than-unanimity rules when deciding whether to authorize an agent.¹⁴⁰ The *Restatement (Second) of Agency* states that "[a] number of persons, such as the members of a partnership, may act jointly in the authorization of an agent."¹⁴¹ There is no suggestion anywhere in the *Restatement* that co-principals can confer authority only by unanimous agreement. To the contrary, it is more accurate to say that agency law leaves co-principals free to use any decision rule they please.

The permissibility of alternatives to unanimity is well-established in the partnership context to which the *Restatement* refers. Majority rule on a one partner, one vote basis, not unanimity, is the default rule for decision making in partnerships.¹⁴² Majority rule on other bases, for example, votes weighted by years of service, size of financial contribution, or status as an equity or contract partner, is also commonly employed by agreement. Partnerships even use minority rule, appointing agents by means of executive or

135. *Id.* at 892.

136. *See id.* at 894.

137. *See* RESTATEMENT (SECOND) OF AGENCY § 7 (1958).

138. *See id.* § 369; *see also* WARREN A. SEAVEY, AGENCY § 8, at 11 (1964).

139. *See* RESTATEMENT (SECOND) OF AGENCY § 27 app.

140. *See id.* § 255 app.

141. *Id.* § 20, cmt. f.

142. *See* UNIF. PARTNERSHIP ACT (UPA) § 18(h), 6 U.L.A. 526 (1995); REVISED UNIF. PARTNERSHIP ACT (RUPA) § 401(j), 6 U.L.A. 52 (1995).

managing partners and committees and on the basis of votes held in particular offices of large partnerships. "Basically, the assumption is that partners are competent adults, free to structure their relationship as they wish, and competent to enter into binding contractual arrangements."¹⁴³

The rule that an agent cannot act against a principal's expressed wishes is also blackletter law, memorialized in section 385 of the *Restatement*.¹⁴⁴ Does this mean that a lawyer representing a group of co-plaintiffs would act wrongly by accepting a settlement offer over the objection of a minority plaintiff? Not necessarily. Section 385(2) provides an escape hatch for an agent who is "privileged to protect his own or another's interests."¹⁴⁵ A privileged agent can properly disobey a principal's instructions.

Because the comments to section 385(2) say little about privileged agents,¹⁴⁶ it is difficult to know for certain whether the label would apply to a lawyer who was authorized by a majority of a client group to accept a settlement offer. However, sections 138 and 139 of the *Restatement* strongly suggest an affirmative answer.¹⁴⁷ Section 138 defines "[a] power given as security" as "a power to affect the legal relations of another, created in the form of an agency authority, but held for the benefit of . . . a third person and given to secure the performance of a duty . . . , such power being given when the duty . . . is created"¹⁴⁸ Section 139 entitles an agent possessing a power given as security to exercise the power even when a principal directs otherwise.¹⁴⁹

If vested in an attorney via a retainer agreement, the power to settle with majoritarian approval would appear to conform to the definition set out in section 138.¹⁵⁰ It would be a power to affect a client's legal relations, created in the form of an agency, and intended to benefit other clients who rely on the group-wide agreement.¹⁵¹ It would be given to secure performance of a client's duty to abide by a group's decision. Finally, the power and the duty would both be derived from the instrument serving as the constitution for the group.

143. ROBERT W. HAMILTON, *BUSINESS ORGANIZATIONS: UNINCORPORATED BUSINESSES AND CLOSELY HELD CORPORATIONS* 65 (1996).

144. *RESTATEMENT (SECOND) OF AGENCY* § 385.

145. *Id.* § 385(2).

146. *Id.* § 385(2) cmts. d-g.

147. *Id.* §§ 138-39.

148. *Id.* § 138.

149. *Id.* § 139(1) (discussing that security power is not terminated by revocation, loss of capacity, or (in some circumstances) death, of the creator of the power).

150. *Id.* § 138.

151. *See id.* § 139.

The power to settle with majority support over a client's objection would also serve the purposes identified in section 138.¹⁵² It would be extended to "facilitat[e] the performance, effectuat[e] the objects, or secur[e] the benefits of a contract as part of . . . the protection of a party to that contract."¹⁵³ The point of conferring the power would be precisely to protect plaintiffs who stand to benefit from a group settlement against the refusal of dissenting plaintiffs to perform.

Many professional responsibility scholars and reflective lawyers will recoil from the suggestion that a lawyer should ever be permitted to settle a claim over a client's objection. The doctrine that a lawyer must respect a client's decision not to settle is deeply ingrained.¹⁵⁴ This rule makes good sense in single-client representations, where clients bear the costs of their decisions and lawyers are protected by retainer payments, withdrawal rights, breach of contract remedies, and liens against clients' eventual recoveries. The doctrine makes considerably less sense in joint undertakings where principals stand to gain by acting collectively, design rules to facilitate collective action, and depend on each other to follow the rules.¹⁵⁵ To facilitate performance in contexts where principals who may not want to perform invite others to rely on their performance, agency law allows principals to make irrevocable grants of authority.¹⁵⁶ These grants would have considerable utility in group lawsuits run under less-than-unanimity rules.

2. *Other protections can supplant the unanimity requirement*

Rule 1.8(g) discourages attorney opportunism and helps manage allocation conflicts by constraining settlement-related activities.¹⁵⁷ Although procedural and substantive constraints could be deployed, the disclosure and unanimous consent requirements are

152. *Id.* § 138 cmt. c.

153. *Id.*

154. For a discussion of the long line of precedent holding that a lawyer should not settle over the objection of a client, even when a client waives his rights as a minority party, see *supra* notes 3-5, 118, 133-36 and accompanying text.

155. For a discussion of potential complications which arise when trying to design rules to facilitate collective action in joint undertakings, see *supra* notes 12-19 and accompanying text. For examples of the difficulties and risks inherent to applying the aggregate settlement rule in multi-plaintiff suits, see *supra* notes 68-124 and accompanying text.

156. See RESTATEMENT (SECOND) OF AGENCY § 138 (1958) (stating that "[u]nless otherwise agreed, a power given as security is not terminated by . . . revocation").

157. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1995).

both procedural. They relate to the means by which settlements occur rather than to the substantive content of settlements.¹⁵⁸

By establishing procedural safeguards, the Rule reduces the need for plaintiffs and their lawyers to devise substantive or procedural protections of their own. And, because the Rule's requirements cannot be waived,¹⁵⁹ alternative safeguards that might be deployed may have limited utility. If a group of plaintiffs were to authorize a lawyer in advance to accept any group-wide settlement offer possessing certain characteristics, the group's lawyer could not act on this instruction. Under the Rule, the lawyer would have to obtain the clients' informed consent after the offer was received.¹⁶⁰ Consequently, one would not expect this particular substantive constraint to be employed in an actual case, even though it might serve some plaintiffs better than the aggregate settlement rule. Nor would one expect to find representations in which plaintiffs agreed to forego all substantive and procedural protections, even though this too could be an efficient arrangement.

Because Rule 1.8(g) inhibits the development of alternative governance structures, one can only imagine how group lawsuits would be conducted if the Rule were treated as a waivable default. This section considers some possibilities. It seems appropriate to begin by discussing the impact of the contingent fee, a structure commonly found in group lawsuits, on allocation conflicts and attorney opportunism.

a. Uniform contingent fees. The problem of favoring one client over another in a multiple-plaintiff settlement is a version of what Saul Levmore calls an "inter-principal competition."¹⁶¹ When a single agent acts for many principals, as a lawyer does when representing a plaintiff group, each principal may be concerned that others will bid more at the margin for the agent's time, creating a situation in which the agent has little incentive to maximize joint revenue and considerable incentive to put some principals' interests ahead of others.¹⁶² Both problems are mitigated, although not solved entirely, when all principals use uniform commission arrangements,¹⁶³ of which the standard contingent percentage fee is

158. A requirement that some plaintiffs receive at least ten times as much as others or that the minimum settlement amount be \$10 million would be a substantive constraint.

159. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g).

160. *Id.*

161. Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and other Agents' Rewards*, 36 J.L. & ECON. 503, 507 (1993).

162. *Id.*

163. *Id.* at 505 ("Uniformity in rewards mitigates the problem of conflicts among principals because joint revenue maximization is much more certain if an agent receives similar compensation from several principals."); *id.* at 507

an example.¹⁶⁴ This is what happens in mass lawsuits, where all plaintiffs agree to pay identical or nearly identical percentage fees to the lawyers who jointly represent them.

Even when uniform fees are employed, some danger of favoritism remains, however, because some claims are considerably more valuable than others. For example, a mesothelioma case is worth much more than a pleural disease case. A lawyer representing plaintiffs whose claims differ greatly in value may derive a larger marginal return from the larger claims and may spend more time on them, to the detriment of the plaintiffs who have smaller claims. Thus, an asbestos lawyer may spend a great deal of time preparing mesothelioma cases for trial, but far less time worrying about pleural disease cases. If settlement payments are a function of trial preparation, mesothelioma victims would be predicted to do much better in settlement than pleural disease victims.

It is not necessarily bad for lawyers handling claims of different sizes to invest more time and effort in the larger claims. To the contrary, it can be, and probably is, efficient for them to do so. Lawyers have limited time and must decide how to spread it across the many cases in which they are involved. Under uniform commission arrangements, lawyers would have incentives to act as a single holder of all claims; that is, to use their time to maximize the joint return on the group of claims. As Levmore puts it, "[w]ith [] a uniform commission structure in place, the agent will do the efficient thing when, for instance, \$100 of further effort can be expected to yield an extra \$3,000 in the sale of one property or an extra \$2,000 in the sale of another."¹⁶⁵

Still, one must wonder whether claims of lesser value receive the attention they deserve. There are reasons for optimism on this score. First, when large and small claims contain common legal and factual elements, it is difficult for lawyers to discriminate against small-claim plaintiffs. In the Brenham, Texas, explosion case, for example, issues such as the defendants' knowledge of the likelihood of gas leaks and the reasonableness of precautions taken to prevent them were common to all claims.¹⁶⁶ When developing information and theories on these matters, the lawyers necessarily helped all their clients at once. Second, most mass lawsuits contain small percentages of high-value claims and large percentages of low-value

("Moreover, uniformity has the virtue of reducing the need or inclination for each principal to investigate and monitor the agent's performance.")

164. *Id.* at 521-22 (observing that personal injury lawyers "are often compensated through contingency fees, which are of course commissions by another name").

165. *Id.* at 506.

166. See Fisher, *supra* note 13. See *supra* notes 69-73, 82-85 and accompanying text.

claims.¹⁶⁷ For example, the asbestos settlement described above contained the following numbers of plaintiffs in each disease category.¹⁶⁸

DIS-EASE	NUMBER OF PLAINTIFFS	NUMBER OF CASES	PAYMENT	PERCENTAGE OF TOTAL SETTLEMENT	% OF TOTAL SETTLEMENT*
Asbestosis	9	10	\$25,000	1.25%	.06
Pleural Disease	11	12	\$13,000	1.17%	.12
Other Lung Disease	4	4	\$9,600	0.86%	.03
Pulmonary Asbestosis	92	100	\$8,000	0.73%	.61
Other Asbestos-Related Diseases	43	43	\$4,800	0.43%	.17
TOTAL	153	153	\$57,400	5.14%	.99

*Column does not sum to 1.00 due to rounding

The great majority of plaintiffs (88 percent) had pulmonary asbestosis or pleural disease, the two mildest conditions. Because there were so many of these claims, the marginal return in fees from investments in issues common to them was large enough to get the lawyers' attention. The fact that these plaintiffs received the bulk of the money (78 percent) is some evidence that their interests were well served. Claims of lesser value may make up in volume for what they lack in size.

b. In search of a few good lawyers. By themselves, uniform contingent fees may fail to reduce the risk of attorney opportunism to a sufficiently low level. Fortunately, there are other means of monitoring attorney behavior. The most important supplement to uniform contingent fees, in our judgment, is market regulation of the choice of lawyers to lead mass suits.

Attorneys' character, integrity, and attitude toward risk are crucial determinants of outcomes for plaintiffs. It is therefore important to put diligent, honest, and risk-neutral lawyers in charge of mass lawsuits. Such lawyers are likely to wind up at the helm much of the time because, as we explained above, the referral market plays an active role in selecting lawyers to lead client groups.¹⁶⁹

When clients are referred, forwarding lawyers retain fee interests in the cases, usually in the form of a percentage of the percent-

167. John C. Coffee, Jr. has commented on the predominance of low-value claims in class actions. John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877 (1987).

168. Anonymized Table provided by Reaud, Morgan & Quinn Law Firm (on file with authors).

169. Stephen J. Spurr, *Referral Practices Among Lawyers: A Theoretical and Empirical Analysis*, 13 L. & SOC. INQUIRY 87, 108 (1988).

age fee charged to the successful client. The connection between the size of the referral fee and the amount recovered by the clients gives forwarding lawyers incentives to select lead attorneys who are likely to recover larger rather than smaller amounts. To attract cases, lawyers who rely on referrals for income need to cultivate reputations for superior performance. Competition for blocks of cases can be intense, and a track record of success in mass litigation is an advantage. Forwarding lawyers thus have incentives to send their cases to good lawyers, and receiving lawyers have incentives to act as good lawyers should.

An important means of signaling good performance is by using objective evidence to show that one obtained good money for claims. In areas like asbestos litigation where claim values are well-established, forwarding lawyers can readily identify receiving lawyers who settle claims too cheaply. It is more difficult to do this in less mature litigation areas, but not necessarily impossible. In the Brenham case, for example, client groups led by different attorneys were suing the same defendants on parallel tracks.¹⁷⁰ It was therefore possible to draw comparisons across the groups and to discover whether individual attorneys obtained significantly different recoveries on similar claims.

Interest groups also help provide quality control. Labor unions have been sources of innumerable clients for asbestos and silicosis lawyers, as well as for lawyers who represent workers injured in explosions and other industrial accidents.¹⁷¹ After a Coca-Cola truck crashed into a school bus in South Texas, a staff lawyer for the League of United Latin American Citizens served as a middleman for many parents whose children were injured or killed.¹⁷² Because these groups are more experienced in dealing with lawyers than most plaintiffs are, their participation makes it more likely that good lawyers will be selected.

c. *Malpractice threats.* Malpractice liability is a third force that discourages lead lawyers from acting arbitrarily or opportunistically, although its strength as a deterrent may vary greatly from case to case. By agreeing to an allocation formula that significantly undervalues some plaintiffs' claims relative to others, a lead attorney risks being sued for malpractice by the plaintiffs who are harmed. To succeed on a malpractice claim, a plaintiff would have to show that his or her claim was worth more relative to other settled claims than he or she received. This may be relatively easy to

170. See *supra* notes 69-73, 82-85 and accompanying text.

171. See, e.g., Peter Passell, *Plaintiffs Win Right to Sue Lawyers in Malpractice Case*, N.Y. TIMES, Sept. 11, 1997, at A11.

172. See J. Michael Kennedy, *Grief, Greed and the Lawyers Aftermath: The School Bus Tragedy Was Just the Beginning. Then Lawyers Moved in and Divided a Texas Town*, L.A. TIMES, May 2, 1990.

show in areas like asbestos litigation where other mass settlements provide ready standards for comparison, but it may be difficult if there is an absence of similar litigation.¹⁷³ Even in asbestos cases, the range of reasonable settlement values will be fairly broad, so plaintiffs are likely to prevail only when lead attorneys act egregiously.

d. Sophisticated versions of majority rule. Certain kinds of attorney opportunism can also be policed by voting rules that, like majority rule, facilitate collective action, but may be less subject to abuse. Under simple majority rule, for example, an attorney could get a cheap settlement accepted by allocating all of it to fifty-one percent of the clients. The remaining forty-nine percent of the client group would then be sold out. Likewise, a defendant could potentially exploit plaintiffs who agreed to be governed by simple majority rule by offering a settlement attractive to the fifty-percent-plus-one members of the plaintiff group with the smallest claims. Obviously, a voting rule that makes collective action too easy could be a source of strategic weakness for many members of a plaintiff group. But this does not mean that unanimity should be the only decision rule permitted.

Some other less-than-unanimity rules are less easily manipulated than simple majority rule. Requiring eighty or ninety percent of the client group to vote for a proposal is the most obvious way of reducing the number of clients in danger of being sold out. Tiered voting arrangements could also be devised. For example, in the East Austin Tank Farm case, a few plaintiffs alleged personal injuries and a far larger number sued only to recover lost property value.¹⁷⁴ A voting rule that required approval by a majority of the property damage claimants *and* a majority of the personal injury claimants would have protected the latter from the risk that their interests would be sacrificed for the sake of the more numerous property damage class. Tiered voting and supermajoritarian requirements could also be combined to provide even greater protection to minorities.

Obviously, any choice of voting rule requires that one balance the risk that one will be in the minority against the risk that collective action, including the acceptance of *any* settlement offer, may be impossible. Unanimity maximally protects each client's individual interests, but greatly impedes collective action. Minority rule, requiring approval by only a single client, would maximally facilitate collective action, but would create a serious risk that a majority of group members would be "sold out." Voting arrangements between

173. See *Arce v. Burrows*, 1997 WL 528639 (Tex. App. 1997) (involving malpractice plaintiffs who alleged that the lawyers settled their claims too cheaply).

174. See *supra* note 33 and accompanying text.

these two extremes will balance the protection of the individual and the facilitation of collective action in different ways. Although any arrangement short of unanimity entails some risk that a minority will be sold out at settlement, alternatives that protect clients to their satisfaction can be devised.

It is entirely realistic to think that sophisticated voting systems could be successfully employed in this context. Walk-away provisions are voting regimes imposed by defendants that provide for the cancellation of a deal unless a specified number of plaintiffs vote for it, and the two-tiered provision discussed above set one settlement threshold for mesothelioma victims and a second for the entire group of asbestos claimants. If plaintiff groups can operate under sophisticated voting rules imposed by defendants, they can surely impose such rules on themselves with no less success.

B. *Waivability of the Disclosure Requirement*

As stated above, Rule 1.8(g)¹⁷⁵ itself is the only legal impediment to the use of other disclosure requirements including, at the extreme, no disclosure at all. The basis for this assertion is that, as a general matter, lawyers and clients can competently decide for themselves how much information lawyers must provide their clients. The default rule outside of the mass lawsuit context requires a lawyer to communicate all information a client reasonably needs to make an informed settlement decision. And this rule can be altered by agreement. For example, a client can authorize a lawyer to accept any settlement the lawyer deems reasonable in the exercise of his or her professional judgment without further correspondence with the client.

The *Restatement of the Law Governing Lawyers* supports our account of the law in general. Although it encourages lawyers to communicate extensively with clients and anticipates that they will ordinarily do so, it recognizes that the duty to provide information exists only "[t]o the extent that the parties have not otherwise agreed"¹⁷⁶ The *Restatement* further specifies that, when it comes to decisions to be made by a client, including the decision to settle, "a lawyer must bring to the client's attention the need for the decision to be made, unless the client has given and not revoked contrary instructions."¹⁷⁷ The detail in which a lawyer must explain a matter to a client depends, inter alia, on "how much advice the client wants"¹⁷⁸

175. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.8(g) (1995).

176. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 31 cmt. b (1996).

177. *Id.* cmt. e.

178. *Id.*

CONCLUSION

We have considered four major respects in which the aggregate settlement rule can complicate the settlement of mass lawsuits: by invading plaintiffs' privacy; by preventing plaintiffs from offering defendants finality; by generating expense and delay; and by encouraging strategic behavior within plaintiff groups that frustrates global deals. By emphasizing these potential disadvantages of the Rule, we have tried to make the case for allowing plaintiffs' to waive its disclosure and unanimous consent requirements. Less costly arrangements, including more limited disclosures and less-than-unanimity voting rules, may protect plaintiffs sufficiently well. There is no obvious reason to prohibit plaintiffs in mass actions from employing these arrangements and enjoying the benefits they provide.

That said, we are less concerned about persuading readers on the waivability point than we are eager to commence a sophisticated debate about the aggregate settlement rule and group settlement behaviors. Rule 1.8(g) has real consequences for real people whose fortunes and fates are wrapped up in group lawsuits. This includes the lawyers who handle mass actions as well as the plaintiffs they represent. In view of the diverse ways lawyers handle settlement negotiations and the diverse structures of the deals they consummate, there is reason to doubt that a single set of disclosure and consent requirements will work well in all cases. But the more fundamental questions are these: What settlement-related behaviors should be encouraged in mass lawsuits? And why? We have barely scratched the surface of these questions.

We are certain of one thing. To answer these deeper questions, one must begin with a structural understanding of mass lawsuits and settlement dynamics and reason to a set of professional norms. One cannot simply begin with selected norms and postulate what lawyers should do. Professional responsibility scholars must acknowledge at the outset that powerful economic forces are at work in mass lawsuits and mass settlements. Scholars who fail to understand these forces are likely to advocate norms of conduct that have no effect or that have unintended and adverse consequences for the clients they seek to protect. We must ask lawyers what they are doing and strive hard to understand why before propounding professional norms to govern their work.