Multi-Plaintiff Settlements At Risk

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The case would have been messy to try. A group of plaintiffs, some sympathetic, some not, and a Fortune 500 company. The attorneys hammered out a global settlement. Then, up pops a dissenter. His own claim is weak and the damages small, but he refuses to sign the release, saying that he would never agree to his allotted share. The fee agreement he signed contains a formula for dividing settlement proceeds and makes it a condition of the representation that if a majority of the group agrees to settle, the minority will go along with it. But he won't budge.

The company won't offer more money, since it would encourage other plaintiffs to make similar demands. The other plaintiffs won't forego any part of their allotted share so that he can get a disproportionate share. A deal's a deal, right?

Wrong. The settlement's dead. The court won't enforce it. But why not?

The ABA Speaks

The American Bar Association recently issued an ethics opinion on this topic. *Lawyer Proposing To Make Or Accept An Aggregate Settlement Or Aggregated Agreement,* ABA Formal Ethics Opinion No. 06-438 (2006). The opinion construes Rule of Professional Conduct 1.8, and particularly, Rule 1.8(g), which provides:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the client … unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims … involved and of the participation of each person in the settlement.

The opinion points out that the rule can apply to representation of multiple plaintiffs or multiple defendants. It emphasizes that one purpose is to ensure that the attorney does not favor the interests of one of the clients over those of the other(s). It states that the attorney must disclose to each client, *in a writing signed by the client*, the total of the aggregate settlement (and that client's share); the existence and nature of each clients' claims or defenses; the benefit provided by the settlement to each *other* client, whether monetary or non-monetary; the total fees paid to the attorney, if payable from settlement proceeds or by the opposing side; and how all costs will be apportioned between the clients.

Most important, the opinion asserts that there is nothing that can be done in advance to head off the problem of the settlement dissenter:

> These detailed disclosures must be made in the context of a specific offer or demand. Accordingly, the informed consent required by the rule cannot be obtained in advance of the formulation of such an offer or demand.

Illinois Law Is In Accord

The ABA opinion echoes the outcome of the decision of the Fourth District Appellate Court in *Kinsley v. City of Jacksonville,* 147 Ill.App.3d 116, 497 N.E.2d 883, 100 Ill.Dec. 705 (1986). In that case, the court rejected the idea that the attorney could obtain the consent of sixty-one clients by having them agree, at a meeting, to follow the will of the majority. Quoting at length from *Hayes v. Eagle-Picher Industries, Inc.,* 513 F.2d 892 (10th Cir. 1975), the court accepted these conclusions:

- A "majority rule" standard permits an attorney to settle a case against the wishes of the client and without the client approving the terms of the settlement.
- Devices which establish a basis for making settlement decisions in advance cannot satisfy the requirement of informed consent.
- An attorney who represents clients who differ on the question of settlement will necessarily be acting in a manner that is adverse to at least one of them.

Opinions in a number of jurisdictions mostly reach the same conclusion.

A Limited Exception

One exception is *Scamardella v. Illiano,* 126 Md.App. 76, 727 A.2d 421 (1999), where an attorney represented two victims in a personal injury case. When the policy limits were offered, the clients agreed with the attorney to settle the case and address the question of how the proceeds would be allocated between them later. The agreement called for a good faith negotiation on this allocation and, absent agreement, submission of the question to the court for resolution.

Acceptance of an aggregate settlement amount turns an aggregate settlement from a potential conflict situation into a palpable conflict. The allocation of settlement proceeds is a zero-sum game in which one client's benefit is the other client's detriment. Finding the allocation decision to be within the authority of the court's inherent power to foster settlement, the Maryland court approved the arrangement. The *Kinsley* court, citing *Hayes,* distinguished the settlement problem before it from a class action settlement and observed that one important difference was that in a class action, settlement is permitted only once the court finds it to be fair, reasonable and in the interests of all affected. So the courts in Illinois may be open to the outcome of that case. But ABA Ethics Opinion No. 06-438 expressly and specifically rejects *Scamardella.*

Both Sides Are Affected

Nor is this just the problem of the attorney representing the multiple clients. *Kinsley*, like most of the decisions, arose out of proceedings to enforce a settlement that an attorney with multiple clients entered into without a full appreciation of this problem. Such settlements are typically found by the courts to have been entered into without proper authority or to be against public policy, and thus not enforceable.

Malpractice Exposure

This does not exclude the risk of malpractice claims against the attorney representing multiple clients, however. In *Arce v. Burrow,* 958 S.W.2d 239 (Tex.Ct.App. 1998), the dissenting clients first acquiesced in a settlement made without proper disclosures, then brought an action to recover all of the attorneys' fees. The court recognized fee forfeiture as a viable remedy—not requiring any proof of causation or damage to the client—although it held that partial, not total, forfeiture was in order.

Strategies For Dealing With The Problem

In addition to the concern that the attorney will favor one client over another, *Arce* noted that where the attorney is employed under a contingent fee, there is also a nascent conflict in the fact that a quick settlement provides the attorney with a substantial benefit for minimal effort, while the client's interest may lie in pressing the claim to judgment. More often, however, the problem is a client who is just unrealistic.

- The best solution is for the clients to be on the same page about settlement. This requires educating the clients on the subject starting at the first meeting. Preach the benefits of mutual cooperation in both the litigation and the settlement negotiation process. Each client should be asked if s/he can be fair and reasonable about settlement with the others, while also being informed that it is always the client who has the final word in those decisions. The attorney should maintain an effective professional relationship with each client. Good relations between the clients themselves can be very helpful: peer pressure can improve the chances of agreement on both the aggregate settlement and the allocation.
- When undertaking representation of multiple clients, the attorney should still only accept clients on a one-by-one basis. It is unwise to succumb to the pressure to accept every member of a group if it means taking on any client with unreasonable expectations. This problem is one reason why.
- The lawyer's initial disclosure to prospective clients should describe the problem discussed here as one of the risks associated with the joint representation.
- Do not overlook the solution called for by the rules. Each client, or group of clients, may secure separate representation. Where there are signs of differences among the clients, other attorneys can provide representation specifically to advise clients or groups of clients on settlement. The group attorney can bring the "settlement counsel" up to speed on the case with relatively little expense. Independent counsel solves the ethical problem.
- Setting up a fee agreement under which the settlement decisions are controlled by a steering committee or majority vote is not a solution. *e.g.*, *Abbott v. Kidder Peobody & Co.,* 42 F.Supp.2d 1046 (D. Colo. 1999); *In Re Hoffman*, 883 So.2d 425 (La. 2004); *Tax Authority, Inc. v. Jackson Hewitt, Inc.,* 377 N.J.Super. 493, 873 A.2d 616 (2005).

- The use of an intermediary, either a mediator or a settlement judge, to manage the negotiations, particularly among the clients, can be useful. The attorney representing the multiple clients cannot make the allocation decision. The attorney is necessarily conflicted in even discussing the allocation among the clients and should not give any advice on that question. But a third person can discuss any differences among the clients openly and offer suggestions that the lawyer should not.

- The *Scamardella* decision suggests that it may be possible for the parties to agree to the aggregate settlement and then discuss allocation separately, leaving the ultimate decision to the court if agreement is not forthcoming. There is risk in this approach, since the decision itself relied on the fact that the aggregate settlement amount was one on which there was no serious room for difference. In Illinois, the *Kinsley* case suggests that informed consent to a settlement may only be made with all the elements of settlement on the table.

- Another approach is to have the clients agree in advance *among themselves* to the mechanism by which they will make settlement decisions—without the attorney being involved in any way. The rigidity of the rule is perverse, as has been observed in scholarly commentary, *e.g.*, Silver & Baker, *Mass Lawsuits and the Aggregate Settlement Rule,* 32 Wake Forest L. Rev. 733 (1997); Jack Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Northwestern L. Rev. 469 (1994). The rules governing what lawyers may and may not do in relation to their clients should not preclude the clients themselves from making such agreements in advance and being held to them. We permit clients to do so in, for instance, agreeing to arbitration or when a group of individuals starts a business venture and adopt standards which will govern their relations *inter se.* However, in light of ABA Opinion No. 06-438, *Kinsley*¸ and the decisions in a number of courts around the country, there is reason to question whether even an agreement made independently among the clients will be honored and enforced by a court.