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Mass Tort Settlements after *Amchem* and *Ortiz*

## **A TYPOLOGY OF AGGREGATE SETTLEMENTS IN NON-CLASS MASS TORT LITIGATION\***

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Obtaining class certification for mass torts has never been easy, and the Supreme Court did not make it any easier with its decisions rejecting two asbestos settlement class actions in *Amchem Products v. Windsor* and *Ortiz v. Fibreboard*. Because of the difficulty obtaining class certification for mass tort personal injury litigation, such cases proceed and settle largely on a non-class basis.

The business of mass tort litigation, however, dictates a collective approach. With or without the official stamp of class certification, lawyers on both sides tend to approach mass tort litigation on an aggregated basis, and often settle blocks of cases collectively. To justify the investment required to litigate mass torts effectively, plaintiffs' lawyers seek to represent large numbers of clients or find similar ways to reduce the per-plaintiff cost of litigating. Much mass tort litigation is formally aggregated by non-class mechanisms such as consolidation and multidistrict litigation. Other mass tort litigation is aggregated informally by coordination among lawyers or by the representation of large numbers of plaintiffs by a single lawyer or firm. In the absence of class certification, a judgment or settlement does not bind non-parties, but non-class mass tort litigation often resembles class actions in the sense that numerous plaintiffs depend on counsel with whom they have no meaningful individual relationship and whose loyalty is directed primarily to collective interests. The irony of *Amchem* and *Ortiz* is that the Supreme Court was so protective of the interests of mass tort plaintiffs, so concerned that absent class members would not be treated fairly, that as a practical matter it sent most mass tort plaintiffs into non-class collective representation where they are treated much like absent class members but without the safeguards of class action procedure.

Given the frequency with which mass torts settle in groups, it is worthwhile to understand the nature of such settlements. Observers sometimes speak of "block settlements" or "aggregate settlements" as though it were obvious what those terms mean. In fact, such settlements vary tremendously. To understand collective settlements,

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\* Note to reader: This summary highlights the points I intend to discuss at the AALS Torts/Civil Procedure Conference panel on Mass Tort Settlements after *Amchem* and *Ortiz*. I explore some of these ideas in *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation* (forthcoming U. Chi. Legal Forum). The remaining ideas form the basis of my work in progress developing a typology of aggregate settlements.

we must look to their essential attributes. I suggest analyzing settlement structures along two axes: *allocation* and *conditionality*. By *allocation*, I mean how settlement amounts are allocated among plaintiffs – in other words, the method for determining who gets how much. *Conditionality* refers to what conditions must be met for the settlement to stick – in particular, the extent to which settlements are voidable by defendants for failure to obtain releases from all the plaintiffs.






In terms of allocation of funds, collective settlements may fall into at least five categories. First, a settlement may provide for a lump sum payment by the defendant, leaving the allocation of that lump sum to the plaintiffs, their lawyer, or a third party. In the fen-phen litigation, for example, the primary defendant reportedly has settled bundles of claims on a lump-sum basis. Second, a settlement may provide a fixed per-plaintiff amount of compensation. A recent example is the settlement of over 30,000 Norplant product liability claims for \$1500 apiece. Third, a settlement may establish a formula or matrix for determining payments based on such factors as disease, age, and risk characteristics, with a process for administering claims under the settlement. The September 11 victim compensation fund, while not formally a litigation settlement, provides the best-known recent example of a compensation matrix. Fourth, a settlement may set up a mechanism such as a claims facility or arbitration process for assigning values. Finally, a settlement may allocate specific amounts negotiated for each plaintiff.

On the axis of conditionality, settlements divide into at least four levels. In an all-or-nothing package deal, the defendant's settlement offer to each plaintiff is conditioned on acceptance by every other plaintiff in the group. In the same vein but more moderate, a settlement with a walk-away provision gives the defendant the right to abandon the settlement if more than a certain percentage of plaintiffs decline the offers. An acceptance percentage of ninety percent has been used in some mass tort settlement deals. As a variation halfway between all-or-nothing and walk-away provisions, tiered settlement agreements permit a defendant to withdraw unless the settlement is accepted by, for example, one hundred percent of the most serious category of claimants and ninety percent of the remainder. Finally, settlement offers can be entirely independent, permitting each plaintiff to accept or reject the offer individually.

One reason it matters how we define aggregate settlements is that client protection under prevailing legal ethics doctrine depends on how a settlement is characterized. If a deal is considered an "aggregate settlement" for purposes of Rule of Professional Conduct 1.8(g), the lawyer must inform each client of the full scope and nature of the claims and settlement, and obtain the client's informed consent. The typology described here may help define what settlements are governed by the "aggregate settlement rule." The following table illustrates various combinations of settlement attributes, and begins to suggest how the typology might aid analysis under the ethics rule:

### Allocation

		Lump Sum	Per-Plaintiff Amount	Matrix or Formula	Claims Mechanism	Individual Amounts
Conditionality	All-or-Nothing					
	Tiered					
	Walk-away					
	Independent					

-  aggregate settlements in allocation and conditionality
-  aggregate settlements without collective allocation
-  aggregate settlements without collective conditions
-  individual settlements
-  not applicable

The bottom right cell describes a settlement set with plaintiff-specific amounts, not conditioned on others' acceptance. In terms of the policies underlying the aggregate settlement rule, these settlements should be considered non-aggregate even if lawyers negotiate a group of such settlements at one sitting. Every other applicable combination of allocation and conditionality, however, constitutes a form of collective settlement, and probably should be subject to disclosure and informed consent requirements. But important differences remain, and the argument for applying the aggregate settlement rule differs depending on the type of settlement.

As to conditionality, the risk is a lawyer-client conflict of interest. In an all-or-nothing package deal or one that gives the defendant a basic or tiered walk-away clause, the plaintiffs' lawyer faces an incentive to get the deal done by pressuring individual clients to accept the settlement. This conflict makes it essential for plaintiffs to retain the right to decline the settlement individually after disclosure of the overall terms of the deal. While it may seem that settlements with individually negotiated compensation – those identified in the table as *individual settlements* or *aggregate settlements without collective allocation* – should be considered non-aggregate, the policies of the aggregate settlement rule compel a different conclusion. Conditioning the settlement on an overall

acceptance rate creates the conflict of interest that necessitates disclosure and informed consent, even if amounts were negotiated separately for individual plaintiffs.

Regarding allocation, however, the concern is that each client, in judging the adequacy of a settlement offer, cannot rely on plaintiff-specific negotiations as a market indicator of value. Even if each plaintiff remains free to decline the settlement and no plaintiff's settlement is conditioned on any others, disclosure of the full settlement gives each client a sounder basis on which to decide whether to accept. The aggregate settlement rule offers a key moment of client autonomy in otherwise collective litigation, and strengthens counsel's incentive to negotiate a fair settlement allocation.

The typology also may prove useful in connection with arguments over whether clients should be permitted to waive their rights under the aggregate settlement rule. As currently understood, the rule does not allow clients to agree *ex ante* to be bound by majority rule on settlement offers, for example. Some have argued in favor of permitting *ex ante* waiver, based largely on the risk that hold-outs will undermine collective action. Looking at this problem in light of the typology of aggregate settlements, the argument for waiver is strongest for settlements high on the conditionality axis, particularly all-or-nothing agreements. The argument is weaker for settlements lower on the conditionality axis, where there is little risk of extortionate hold-outs. If one expects most defendants to avoid insisting upon all-or-nothing package deals, then the argument for permitting *ex ante* waiver largely disappears.

*Amchem* and *Ortiz* made class certification more difficult, especially for settlement, but when plaintiffs' lawyers and defense lawyers are faced with mass torts, they handle them on an aggregated basis. And often, they settle them on an aggregated basis as well. But saying that post-*Amchem* mass torts settle in blocks, while true, may obscure as much as it reveals. By understanding collective settlements in terms of their key attributes – allocation and conditionality – we can apply ethical protections more rationally as well as gain a clearer picture of the variety of mass tort settlement structures currently in use.

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