

## NOTES

### ETHICAL RULES OF CONDUCT IN THE SETTLEMENT OF MASS TORTS: A PROPOSAL TO REVISE RULE 1.8(G)

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*The American Bar Association's widely adopted Model Rule 1.8(g) requires that attorneys handling aggregate settlements obtain the consent of each client before the settlement is finalized. This method is well suited to cases involving small-scale tort litigation with few parties, but Rule 1.8(g) does not meet the complex demands of mass torts, which can involve thousands of plaintiffs represented by a handful of law firms. Rule 1.8(g) creates a procedural obstacle to the efficient settlement of mass torts while obfuscating the ethical role of plaintiffs' counsel in these settlements. This Note proposes a modified Rule 1.8(g), drawing upon a successful procedure used in asbestos bankruptcies. By incorporating these mechanisms from the Bankruptcy Code into the Model Rules of Professional Conduct, an alternative Rule 1.8(g) would reduce the costs of mass tort settlement, improve the clarity of the aggregate settlement rule, and protect clients from ethical misconduct by their attorneys.*

#### INTRODUCTION

The resolution of mass tort claims may be the most daunting task in modern tort law. A mass tort can harm tens of thousands of individuals, with unique and distinct injuries that preclude a procedural aggregation of claims. In *Amchem Products, Inc. v. Windsor*<sup>1</sup> and *Ortiz v. Fibreboard Corp.*,<sup>2</sup> the Supreme Court weakened hopes of using the class action procedure to resolve outstanding mass tort claims.<sup>3</sup> In the absence of such a procedure, plaintiffs—except those with the strongest claims—can rarely afford to pursue their claims individually in court; thus, they face the prospect of remaining uncom-

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<sup>1</sup> 521 U.S. 591 (1997).

<sup>2</sup> 527 U.S. 815 (1999).

<sup>3</sup> *Amchem* and *Ortiz* each involved a global settlement of asbestos claims using the class action device, but the Supreme Court denied the class certification sought under Rule 23 of the Federal Rules of Civil Procedure. See *infra* notes 23–39 and accompanying text.

pensated for their injuries. Defendants, meanwhile, often cannot afford piecemeal litigation involving thousands of individual claims and cases—and potentially billions of dollars in crushing costs and damages. What remains is the unfulfilled promise of aggregate settlement.

The aggregate settlement of mass torts refers to the collective resolution of claims for injuries that are caused by one set of products or actions but are too diverse to be unified as a class action. Exorbitant transaction costs prevent the settlement of such torts through individualized negotiations. Settlement therefore requires that a limited number of plaintiffs' law firms each represent a large number of clients and coordinate the settlement on their behalf. In much of the asbestos litigation, for instance, only fifty law firms represented the majority of asbestos claimants.<sup>4</sup> By reducing transaction costs, this arrangement benefits both plaintiffs and defendants. Plaintiffs with relatively small claims obtain representation from experienced counsel who can take on additional claims at little added cost. Defendants engage in settlement negotiations because the number of parties with whom they must interact is made manageable.

In spite of the practical advantages of aggregate settlement, there remains a significant hurdle to the successful resolution of mass tort claims. The American Bar Association's (ABA) model ethical rule for aggregate settlement, Rule 1.8(g),<sup>5</sup> a version of which has been adopted in every state,<sup>6</sup> makes the aggregate settlement of mass torts unlikely, if not impossible. Under Rule 1.8(g), attorneys representing more than one client in a settlement negotiation must fulfill two requirements: They must disclose the nature of the claims covered by the settlement to every client represented in the negotiation, and they must obtain the consent of each client before finalizing the settlement agreement.<sup>7</sup> Rule 1.8(g) was designed to help preserve the integrity of

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<sup>4</sup> See Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1920 (2002) ("One of the anomalies of asbestos litigation has long been its concentration among a small number of law firms."); Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-legal Analysis*, 59 BROOK. L. REV. 961, 966 (1993) (reporting in 1993 that "[m]ost of the hundreds of thousands of claimants are represented by fewer than fifty plaintiffs' law firms that specialize in this litigation, and their law suits are concentrated in a dozen courts"); DEBORAH HENSLER ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION IN THE U.S.: A NEW LOOK AT AN OLD ISSUE 24 (2001), available at [http://www.rand.org/pubs/documented\\_briefings/DB362.0/DB362.0.pdf](http://www.rand.org/pubs/documented_briefings/DB362.0/DB362.0.pdf) (claiming that ten law firms filed fifty-three percent of claims submitted to Manville Trust, which was established by Johns-Manville Corporation to resolve asbestos claims).

<sup>5</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2003).

<sup>6</sup> PAUL J. LESTI, STRUCTURED SETTLEMENTS app. Y.1, at 980 n.8 (2d ed. Supp. 2007).

<sup>7</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2003).

the attorney-client relationship.<sup>8</sup> Indeed, the disclosure and consent requirements serve client interests well when attorneys are representing four, five, or even twenty plaintiffs. However, the provision inefficiently overregulates the conduct of law firms representing tens of thousands of injured parties, making a mutually beneficial mass settlement less likely.

This Note argues that the disclosure and consent requirements of Rule 1.8(g) are inappropriate for the aggregate settlement of mass torts and should instead permit alternative and flexible informed consent procedures. Part I describes the inherent challenges that complicate the settlement of mass torts and discusses the purpose behind, and judicial interpretations of, Rule 1.8(g). Part II then addresses the procedural and substantive problems created by the Rule. The Rule's disclosure and consent requirements raise several concerns that undermine the ability of mass tort settlements to satisfy the interests of both claimants and defendants. In Part III, the Note proposes an alternative rule of ethical conduct that adjusts the disclosure and consent requirements to make it easier to achieve mass tort settlements. For guidance, the argument draws upon the procedural mechanisms of 11 U.S.C. § 524(g), the provision of the Bankruptcy Code that deals specifically with trusts created by asbestos defendants undergoing reorganization.<sup>9</sup> This bankruptcy provision demonstrates one method of protecting claimant interests and encouraging claimant involvement while also facilitating an efficient and fair resolution of disputes.

Mass tort practitioners are still searching for ways to break down the barriers to settlement that exist in the wake of *Amchem* and *Ortiz*. Although the Supreme Court rejected the class action settlement approach nine years ago, attorneys remain burdened by rules that effectively thwart satisfactory and conclusive remedies for mass tort claimants. An amended Rule 1.8(g) could provide a procedural alternative to help resolve this dilemma.

## I

### HOW (AND HOW NOT) TO ACHIEVE AN AGGREGATE SETTLEMENT

Aggregate settlements are singular legal arrangements. They often require mastery of astoundingly complex factual circumstances and coordination among parties ranging from state health care agen-

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<sup>8</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 13 (2003) (identifying Rule 1.8(g) as corollary to Rule 1.2(a), which protects client autonomy, and to Rule 1.7, which addresses conflicts of interest).

<sup>9</sup> 11 U.S.C. § 524(g) (2000).

cies to private health care providers to multinational corporations to individual claimants spread around the entire country. This Part provides some background on mass torts and the efforts to resolve them, and then discusses the ethics of aggregate settlement under Rule 1.8(g).

### A. *The Challenge of Resolving Mass Tort Claims*

Although many scholars refrain from defining “mass tort,”<sup>10</sup> the term usually refers to conduct that causes a large set of injuries affecting a large number of individuals.<sup>11</sup> Mass torts generally share several features: the numerosity of claimants, the commonality of legal and factual issues,<sup>12</sup> and, often, the geographic dispersion of claimants and the existence of latent harms. An additional factor—the interdependence of the claims’ monetary values<sup>13</sup>—helps to explain why the resolution of mass tort disputes must be unified in a single process.<sup>14</sup> Mass tort defendants, such as the manufacturers of asbestos,<sup>15</sup> the diet drug Fen-phen,<sup>16</sup> and silicone breast implants,<sup>17</sup>

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<sup>10</sup> See PAUL D. RHEINGOLD, *LITIGATING MASS TORT CASES* § 1:1 (2006) (“There is no established agreement on what constitutes the scope of the field of law and practice called ‘mass torts.’ Nor is there any need for general agreement since the topic is malleable and . . . the definition properly can change.”).

<sup>11</sup> See Brent M. Rosenthal et al., *Toxic Torts and Mass Torts*, 59 SMU L. REV. 1579, 1579 (2006) (defining “mass torts” as “litigation involving many claims of injury allegedly caused by the same product or tortious conduct”). Mass torts are distinguished by “the commonality of issues and actors and the interdependence of the monetary values of claims.” Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 156–57 (1999). “Mass accidents” are mass torts in which the injuries are caused by catastrophic events. See *id.* at 149–50, 150 n.3 (noting early mass torts were initially referred to as “mass accidents” since they were “largely based on train and plane crashes”). “Toxic torts” involve toxic substances that often produce latent disease in exposed individuals. See Rosenthal et al., *supra*, at 1579 (“[T]oxic-tort cases frequently involve latent injuries . . .”). There is overlap among these three groups, but the conceptual focus of this Note is on mass torts.

<sup>12</sup> Hensler & Peterson, *supra* note 4, at 965. These features, of course, present a much different picture than the archetypal case addressed by much of tort doctrine—individual, isolated events resulting in one adversarial confrontation.

<sup>13</sup> *Id.*

<sup>14</sup> Unified mass tort litigation also provides to plaintiffs the “advantages . . . of economies of scale, increased leverage in settlement negotiations, and access to a small number of qualified attorneys.” Moore, *supra* note 11, at 156–57.

<sup>15</sup> *E.g.*, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

<sup>16</sup> *E.g.*, *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, No. 99-20593, 2000 WL 1222042, at \*1 (E.D. Pa. Aug. 28, 2000) (involving health effects of two related prescription diet drugs, fenfluramine and dexfenfluramine).

<sup>17</sup> *E.g.*, *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV94-P-11558-S, 1994 WL 578353, at \*1 (N.D. Ala. Sept. 1, 1994).

face a risk of eventual insolvency, at least near the beginning of the process.<sup>18</sup>

The settlement of mass torts is both crucial and difficult. Settlement is important because litigation costs can be overwhelming for both plaintiffs and defendants.<sup>19</sup> If plaintiffs do not settle their claims successfully, they often receive no compensation at all—many claims are too small to entice attorneys to pursue expensive trial preparation.<sup>20</sup> Likewise, few defendants could reasonably afford to accept litigation: If a defendant decides to take the risk, an adverse judgment early in the process not only could produce enormous damages but also might enable other litigants to gain recovery with the benefit of collateral estoppel, potentially bankrupting the corporation.<sup>21</sup> In those cases, as costs of litigation increase, the funds available to compensate claimants decline. Settlement is often the only feasible alternative for both plaintiffs and defendants.

But given the number of parties and the complexity of valuing claims, settling mass tort claims is also very difficult. Complicating the matter further is the Supreme Court's restriction on using the class action device of Rule 23 of the Federal Rules of Civil Procedure to achieve global settlements of mass torts. The Court has forbidden attempts to settle mass torts because the process did not meet the standards of fairness found in Rule 23. Yet class action settlements have several advantages: They offer a clear choice to plaintiffs between binding participation and opting out; they provide strong incentives for plaintiffs' counsel to advertise the settlement and expand the class, thereby including claimants who may not otherwise

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<sup>18</sup> For a brief description of the cases noted above at notes 15–17, see Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 751 (2002).

<sup>19</sup> See Jeffrey M. Davidson, *Theories of Asbestos Litigation Costs: Why Two Decades of Procedural Reform Have Failed To Reduce Claimants' Expenses*, 7 NEV. L.J. 73, 81 (2006) (“[T]he decision to litigate rather than settle is a primary driver of the overall costs of the system. That is, for purposes of analysis, the costs of settlement can be regarded as negligible.”); Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 545–46 (“Mastery of a mass tort requires an enormous amount of time and mental energy, not to mention out-of-pocket expenses and firm resources.”).

<sup>20</sup> See John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent To Give Away Their Clients' Money*, 84 VA. L. REV. 1541, 1555 (1998) (showing class action data indicating that for most individual claims, litigation costs will far exceed average expected awards).

<sup>21</sup> See Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744 & n.40 (1997) (referring to use of “bellwether” trials as way for group of plaintiffs to maximize cost containment).

pursue relief; and they offer finality to the defendant.<sup>22</sup> Restrictions on the use of the class action device therefore frustrate plaintiffs and defendants alike.

A vivid, concrete illustration of the difficulty of resolving mass tort claims is found in asbestos litigation. The Supreme Court, in two prominent cases, placed considerable restrictions on the use of class actions for the settlement of asbestos-related mass torts, partly to protect claimants from mistreatment by plaintiffs' attorneys. In the 1997 case *Amchem Products, Inc. v. Windsor*,<sup>23</sup> plaintiffs' law firms involved in ongoing asbestos litigation had marshaled their clients and the opposing defendant corporations into a settlement that would have resolved present and future asbestos claims. The circumstances surrounding asbestos litigation—years of increasing claims by plaintiffs,<sup>24</sup> a procession of bankruptcies among defendant corporations,<sup>25</sup> and an unknown number of exposed individuals who had not yet exhibited symptoms of disease<sup>26</sup>—made the need for a global class action settlement pressing. Because the class certified by the lower court was a settlement-only class never intended for trial,<sup>27</sup> no court had the opportunity to adjust the class as negotiations developed.

As a result, the Supreme Court found that heightened scrutiny of the settlement-only class was “of vital importance”<sup>28</sup> and held that the *Amchem* settlement failed to satisfy the basic requirements of Rule 23 of the Federal Rules of Civil Procedure.<sup>29</sup> According to the majority, the proposed class settlement satisfied neither the representation requirement of Rule 23(a)(4)<sup>30</sup> nor the common-question requirement of Rule 23(b)(3).<sup>31</sup> The Court found that the settlement negotiations could not adequately protect the interests of future claimants—those who had been exposed to asbestos but had not yet demonstrated evidence of asbestos-related diseases.<sup>32</sup> Though the opinion expressed

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<sup>22</sup> See generally Hensler, *supra* note 4 (discussing motivation behind class actions in asbestos context).

<sup>23</sup> 521 U.S. 591 (1997).

<sup>24</sup> HENSLER ET AL., *supra* note 4, at 4–5.

<sup>25</sup> *Id.* at 10.

<sup>26</sup> Mesothelioma, a deadly cancer that is the “signature disease” of asbestos exposure, has a very long latency period, sometimes taking forty years to develop. *Id.* at 19.

<sup>27</sup> *Amchem*, 521 U.S. at 620.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 625.

<sup>30</sup> Rule 23(a)(4) requires that “the representative parties will fairly and adequately protect the interests of the class.” FED. R. CIV. P. 23(a)(4).

<sup>31</sup> Rule 23(b)(3) requires that common questions must “predominate over any questions affecting only individual members” and that class resolution must be “superior to other available methods for the fair and efficient adjudication of the controversy.” FED. R. CIV. P. 23(b)(3).

<sup>32</sup> *Amchem*, 521 U.S. at 625–27; Hensler, *supra* note 4, at 1905–06.

sympathy for the parties, it suggested that resolution was beyond the capacity of the federal court system and better suited to a national administrative regime.<sup>33</sup>

*Ortiz v. Fibreboard Corp.*,<sup>34</sup> an asbestos global settlement case that followed two years later, confirmed the Court's approach to class certification. The *Ortiz* Court was particularly concerned with equity among class members, discussing the potential conflicts that could arise among them given their various previous settlements, exposure rates, disease progression, and litigation status.<sup>35</sup> The dissent defended the settlement on the grounds that it provided more relief than any other solution would.<sup>36</sup> The majority, however, upheld *Amchem's* interpretation of Rule 23,<sup>37</sup> stating that the settlement's fairness under Rule 23(e)—which permits a court to certify a class upon finding it to be “fair, reasonable, and adequate”<sup>38</sup>—does not “dispense with the requirements of Rule 23(a) and (b).”<sup>39</sup> The *Ortiz* Court thus signaled that the value of the settlement to most parties cannot overcome inadequacies in the representation of others.

Since *Amchem* and *Ortiz*, no attorneys have successfully achieved a global class action settlement of asbestos claims. According to one commentator, the Supreme Court “did not foreclose the possibility of a class action settlement, but [the Court] narrowed the size of the window of opportunity to do so.”<sup>40</sup> Alternatives to Rule 23 and the class action device, however, have failed to materialize. Legislation, for example, could have provided the universal resolution sought by defendants and plaintiffs alike. But Congress declined to follow Justice Ginsburg's suggestion in *Amchem* for a legislative remedy.<sup>41</sup>

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<sup>33</sup> *Amchem*, 521 U.S. at 628–29.

<sup>34</sup> 527 U.S. 815 (1999).

<sup>35</sup> *Id.* at 856–59.

<sup>36</sup> *Id.* at 867–68 (Breyer, J., dissenting) (suggesting that without class-action settlement, “most potential plaintiffs may not have a realistic alternative” because of high litigation costs, long delays, and limitations upon total amount of resources available for payment).

<sup>37</sup> *See id.* at 848 (majority opinion) (criticizing district court for failing to consider importance of structural protections of Rule 23 highlighted in *Amchem*).

<sup>38</sup> FED. R. CIV. P. 23(e)(1)(C).

<sup>39</sup> *Ortiz*, 527 U.S. at 863–64.

<sup>40</sup> Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871, 880 (2001).

<sup>41</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 628–29 (1997) (suggesting that “nationwide administrative claims processing regime” could provide fair and efficient compensation system). Congress has declined the repeated invitation by the federal courts to create a legislative scheme that would regulate how to resolve present and future asbestos claims. The Senate, in recent congressional sessions, has introduced versions of a proposed Fairness in Asbestos Injury Resolution Act, but they have never been enacted into law.

The class action device is the only means by which most mass torts could be resolved in litigation. The class action's strength lies in the scope of its application and the finality of its result: As long as potential members of the class receive notice of the litigation and choose not to opt out, they are bound by the outcome.<sup>42</sup> No other procedural device provides the same level of both finality and unification of potential claimants. As shown by the asbestos litigation, however, class actions are often unavailable in complex mass tort litigation.

Aggregate, non-class settlement is one of the few remaining options when plaintiffs cannot be unified as a class. In an aggregate settlement, the plaintiffs' attorneys each represent many clients against a common defendant. State laws permit such aggregate representation, and courts generally encourage settlement, largely for prudential reasons.<sup>43</sup> Yet attorney conduct in mass tort settlements is governed by the same rules and duties that apply to any other representation.

### B. *The Requirements of Rule 1.8(g)*

The American Bar Association's Model Rules of Professional Conduct establish a guide for ethical behavior by practicing attorneys. Model Rule 1.8 addresses conflicts of interest that attorneys may face, while section (g) in particular addresses the conflicts of interest that emerge when an attorney represents more than one client in a settlement negotiation. The Rule states the following:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement as to guilty or nolo contendere pleas, 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 or pleas involved and of the participation of each person in the settlement.<sup>44</sup>

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*See, e.g.*, S. 3274, 109th Cong. (2006) (proposing system to resolve asbestos claims with Asbestos Insurers Commission); S. 2290, 108th Cong. (2004) (proposing similar scheme).

<sup>42</sup> *See* 7A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1751 (3d ed. 2005) (surveying history and purpose of class actions); 7AA *id.* § 1786 ("Without the notice requirement it would be constitutionally impermissible to give the judgment binding effect against the absent class members.").

<sup>43</sup> *See* United States v. Cannons Eng'g Corp., 899 F.2d 79, 84 (1st Cir. 1990) ("[I]t is the policy of the law to encourage settlements."); *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1015 (D.C. Cir. 1985) ("[S]ettlement agreements are in high judicial favor.").

<sup>44</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2003).

The Rule essentially imposes two requirements: disclosure of the individual claims and settlement terms to each client, and clients' consent to the settlement terms. Rule 1.8(g) is only a model rule, but it has been widely adopted by states,<sup>45</sup> most of which replicate the language of the ABA.<sup>46</sup>

The purpose of Rule 1.8(g) is to preserve the integrity of the attorney-client relationship. Indeed, courts interpreting the Rule often cite to Restatements governing principal-agent relations and lawyer loyalty.<sup>47</sup> One lurking fear is that plaintiffs' counsel will neglect the interests of individual claimants and focus instead on the total settlement amount, which determines their own ultimate contingency fee.<sup>48</sup> Another fear is that attorneys will serve only the interests of those clients with the largest claims.<sup>49</sup>

Although Rule 1.8(g) requires the disclosure of settlement terms to clients during settlement negotiations, it does not define what exactly must be disclosed. The ABA commentary accompanying the Rule states that the lawyer must reveal "all the material terms of the settlement . . . ."<sup>50</sup> According to some authorities, this means that lawyers must disclose to each claimant the amounts that other claimants would receive if the settlement were finalized.<sup>51</sup> Some courts have drawn a different line, approving aggregate settlements, though not the interplaintiff allocation, merely on the basis of the plaintiffs' informed consent as to the adequacy of the amount of the aggregate compensation.<sup>52</sup> In other cases, the amount of compensation received

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<sup>45</sup> LESTI, *supra* note 6, at app. Y.1, at 980 n.8.

<sup>46</sup> See, e.g., TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(f) (2005).

<sup>47</sup> See, e.g., *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999) (citing RESTATEMENT (SECOND) OF AGENCY § 469 (1958), according to which "agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty," and RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996), applying same rule to lawyers).

<sup>48</sup> Erichson, *supra* note 19, at 551–52, 571–72.

<sup>49</sup> The Oklahoma Supreme Court rejected one attorney's assertion that he had to consult only with his "true client." *State ex rel. Okla. Bar Ass'n v. Watson*, 897 P.2d 246, 253 (Okla. 1994) (rejecting attorney's claim that because client Philip Walker—his "true client"—unofficially represented estates of attorney's other clients, attorney's duties ran only to Walker); accord *In re Hoffman*, 883 So.2d 425, 429, 432 (La. 2004) (finding unper-  
suasive attorney's defense that duty ran primarily to client who retained law firm, paid firm's fees, and authorized disbursement of settlement funds).

<sup>50</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 13 (2003).

<sup>51</sup> E.g., *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229 (Tex. App. 1985); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d(i) (2000).

<sup>52</sup> See, e.g., *In re Guardianship of Lauderdale*, 549 P.2d 42, 46 (Wash. Ct. App. 1976) (holding that "the order approving the aggregate settlement, which no one contests, should be affirmed").

by an individual has been upheld even though not all facts regarding the treatment of other parties were disclosed.<sup>53</sup>

The Rule is also vague regarding what each client must consent to. Although the case law is minimal, the courts that have reviewed this issue generally have determined that Rule 1.8(g) does not permit *ex ante* “agreements to agree”—unanimous agreements at early stages of the negotiation to abide by the majority’s vote on the settlement’s final terms.<sup>54</sup> This is in keeping with the more general principle that clients should be able to reject a settlement until the moment it becomes final.<sup>55</sup>

Several scholars have supported this approach to Rule 1.8(g), arguing that *ex ante* agreements undermine attorney loyalty to the client.<sup>56</sup> Howard Erichson, acknowledging that attorneys in collective representation focus on the entire group, argues that clients must maintain autonomy at the moment of settlement.<sup>57</sup> According to Erichson, one of the greatest advantages of the Rule is its use as a monitoring device: “[W]ithout the aggregate settlement rule, clients have little power to monitor their lawyer’s work with regard to settlement allocation.”<sup>58</sup>

Others, however, have argued that clients should have the opportunity to bind themselves to group decisions should they choose to do so. Charles Silver and Lynn Baker describe *ex ante* agreements to

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<sup>53</sup> See, e.g., *Acheson v. White*, 487 A.2d 197, 200–01 (Conn. 1985) (affirming trial court’s conclusion that petitioner had consented to terms of stipulated judgment regarding her interests in particular property). According to the *Acheson* court, the validity of the petitioner’s consent “did not necessarily depend upon her specific knowledge of what interests in that property might be retained by other defendants not similarly situated.” *Id.* at 200; see also *In re Anonymous Member of the S.C. Bar*, 377 S.E.2d 567, 568 (S.C. 1989) (declining to impose disciplinary action, despite attorney’s admission that he failed to disclose each client’s settlement amount).

<sup>54</sup> See *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892, 894–95 (10th Cir. 1975) (holding that, in non-class action, clients cannot validly consent to be bound by majority acceptance of settlement terms); see also *Knisley v. City of Jacksonville*, 497 N.E.2d 883, 888 (Ill. App. Ct. 1986) (stating in dictum that, in joinder action, “fundamental fairness is violated when a settlement is allowed to bind parties who object” even though those parties previously agreed to be bound by majority rule).

<sup>55</sup> See, e.g., *Quintero v. Jim Walter Homes, Inc.*, 654 S.W.2d 442, 444 (Tex. 1983) (“[A] party has the right to revoke his consent at any time before the rendition of judgment.”).

<sup>56</sup> See Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1809–10 (2005) (explaining that argument for waiver is weak when there is little risk of extortionate holdouts); Moore, *supra* note 11, at 165 & n.98 (explaining that unanimity requirement encourages counsel to “develop the attorney-client relationship by regularly providing plaintiffs with as much information as possible about the progress of the lawsuit and affording them opportunities to consult regularly with members of the lawyer’s staff”).

<sup>57</sup> Erichson, *supra* note 19, at 571–75.

<sup>58</sup> *Id.* at 572.

agree as the product of client autonomy rather than of attorney abuse.<sup>59</sup>

The consequences of violating Rule 1.8(g) vary by state. In many jurisdictions, a violation can lead to a forfeiture of the attorneys' fees, even when the attorneys' clients suffered no actual damage from the failure to obtain informed consent.<sup>60</sup> Attorneys have also faced more severe sanctions for violations, such as exclusion from representing the parties involved and suspension.<sup>61</sup>

More troubling for plaintiffs and defendants in need of immediate relief or resolution, some courts have voided entire settlement agreements upon discovering a violation of Rule 1.8(g). In *Quintero v. Jim Walter Homes, Inc.*, a Texas Court of Appeals found that an aggregate settlement involving over three hundred clients was unenforceable.<sup>62</sup> A jury had returned a verdict for the plaintiffs and awarded damages. The plaintiffs' attorney then settled all the claims with the defendant, having gained his clients' consent without informing each client of the details regarding the other claims.<sup>63</sup> The Quinteros' share of the settlement was less than the jury award, and the attorney misled them into believing that their share was the same as that received by other clients. The court not only strictly applied the aggregate settlement rule but also expressed an intention to convey its importance to other practicing attorneys: "It is up to the courts to take the initial step by giving notice that careless and unethical attorneys will not be tolerated."<sup>64</sup> *Quintero* indicates that a court's choice of remedy is unpredictable and can depend on how prevalent it considers the problem of unethical attorney behavior to be.

Recently, the ABA suggested a more stringent version of the Rule.<sup>65</sup> According to an ABA opinion, the Rule should require more disclosure by settling attorneys, including not only the existence and nature of all claims but also the details of each client's participation in

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<sup>59</sup> Silver & Baker, *supra* note 21, at 771 (arguing that agency law leaves coprincipals "free to use" "less-than-unanimity rules when deciding whether to authorize an agent").

<sup>60</sup> *E.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999) (citing RESTATEMENT (SECOND) OF AGENCY § 469 (1958)).

<sup>61</sup> *See, e.g., In re Hoffman*, 883 So.2d 425, 432, 435 (La. 2004) (suspending attorney for three months for violation of Rule 1.8(g)).

<sup>62</sup> 709 S.W.2d 225, 232 (Tex. App. 1985).

<sup>63</sup> *See id.* at 229 (finding that attorney did not inform Quinteros "of the nature and settlement amounts of all the claims involved in the aggregate settlement").

<sup>64</sup> *Id.* at 232.

<sup>65</sup> ABA Comm. on Ethics and Prof'l Responsibility, *Lawyer Proposing to Make or Accept an Aggregate Settlement or Aggregated Agreement*, Formal Op. 06-438 (2006), *reprinted in* ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT (2006) (expanding disclosure requirements under Rule 1.8(g)).

the settlement and the method by which costs are apportioned.<sup>66</sup> The American Law Institute, in contrast, has developed draft rules on aggregate litigation that relax the voting requirement, permitting agreements to agree.<sup>67</sup> The future of Rule 1.8(g) remains uncertain; the following Part will address what is at stake in the debate.

## II

### THE INADEQUACY OF RULE 1.8(G) FOR MASS TORT SETTLEMENTS

Rule 1.8(g) can play a valuable role in the aggregate settlement of disputes between a small number of plaintiffs and one defendant. In a typical small-scale tort claim, the Rule empowers clients to enforce lawyer loyalty by ensuring basic levels of communication and accountability. The case law involving Rule 1.8(g) contains illustrations of plaintiffs' attorneys who appear to have colluded with defendants<sup>68</sup> and of manipulative clients who dominated their attorneys to the disadvantage of their fellow plaintiffs.<sup>69</sup> In the mass tort context, however, the Rule not only lacks the capacity to achieve its purposes but also has destructive effects on the settlement process. This Part will identify three problems with applying Rule 1.8(g) to the field of mass tort settlement: the Rule's overreaching purpose; the Rule's lack of clarity; and the Rule's unnecessary procedural hurdles.

#### A. *The Overreaching Purpose of Rule 1.8(g)*

Applying Rule 1.8(g) to mass tort settlements extends the Rule far beyond the limited contexts for which it was designed. The Rule is a simple set of guidelines for attorney-client relations, but the attorney-client relationship varies greatly depending on the structure of the representation.<sup>70</sup> For attorneys involved in mass torts, Rule

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<sup>66</sup> *Id.*

<sup>67</sup> AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 (Preliminary Draft No. 4, 2006) (on file with the New York University Law Review).

<sup>68</sup> See, e.g., *Quintero*, 708 S.W.2d at 227–28 (involving plaintiffs' attorney who failed to inform clients of favorable jury verdict and then accepted settlement amount from defendant that was much lower than jury award).

<sup>69</sup> *In re Hoffman*, 883 So.2d 425 (La. 2004), for example, involved a defendant who, unsatisfied with his share of his uncle's estate, retained an attorney to contest the uncle's will on behalf of his siblings and himself. Each of the siblings had received the same or similar amounts in the original will, but the defendant, who was the only family member actively engaged in the contestation, claimed over seventy-five percent of the settlement amount for himself. *Id.* at 427–29.

<sup>70</sup> For commentary on the Supreme Court's "day-in-court" ideal of client representation, see Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1576–77 (2004).

1.8(g) imposes a misguided framework on the representation and obfuscates ethical obligations rather than clarifying them.

Defenders of Rule 1.8(g) argue that the Rule preserves the integrity of the attorney-client relationship, even in the mass tort context. Many of these scholars believe that the costs of the Rule—transaction costs and potential collective action problems<sup>71</sup>—are outweighed by the benefits of giving clients greater access to and control over their attorneys.<sup>72</sup> Others emphasize the psychological benefits of a relationship in which the attorney communicates often with individual clients and attends to their specific needs and desires.<sup>73</sup>

This defense of the Rule, however, does not fit the reality of mass tort representation. Even if Rule 1.8(g) were fully satisfied, attorneys and clients would not have the relationship envisioned by these commentators—or by the Supreme Court, whose position such arguments echo. In *Amchem*, Justice Ginsburg agreed with the Third Circuit's conclusion that "[e]ach plaintiff has a significant interest in individually controlling the prosecution of [his case]" and that each "ha[s] a substantial stake in making individual decisions on whether and when to settle."<sup>74</sup> In reality, attorneys and clients in mass tort cases rarely have individual contact.<sup>75</sup> Furthermore, while plaintiffs may have control over *whether* to settle, they certainly have no say over *when* to do so; their choice is often reduced to either settling with the collective or receiving no relief at all. The language from the asbestos con-

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<sup>71</sup> See *infra* Part II.C.

<sup>72</sup> See, e.g., Erichson, *supra* note 19, at 519 ("[T]he profession's failure to recognize the collective nature of much litigation has left clients unprotected, and has engendered an ethical murkiness that leaves lawyers unsure whether they owe their loyalty to the individual or to the collective."); see also Nagareda, *supra* note 18, at 775–78 (comparing aggregate settlements, which prioritize client autonomy, to class actions, which achieve "peace at the expense of autonomy"). Howard Erichson, for example, has argued that in mass tort settlements, Rule 1.8(g) reinforces attorney loyalty and client autonomy. Erichson, *supra* note 19, at 553–54. The fact that individual claimants in a class action lack an opportunity to opt out of the class in reaction to a settlement offer has been criticized as needlessly destroying attorney loyalty and client autonomy. See, e.g., Mark C. Weber, *A Content-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155, 1158 (1998) (proposing that class actions "should not be settled unless the court gives all class members the option to reject the settlement and exclude themselves from the class at the time of the offer").

<sup>73</sup> See, e.g., Steve Baughman Jensen, *Like Lemonade, Ethics Comes Best When It's Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215, 219 (1999) ("To provide a meaningful redress to those who have suffered injuries as a result of corporate misconduct, lawyers must do more than hand them a settlement check.").

<sup>74</sup> *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 616 (1997) (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 633 (3d Cir. 1996)).

<sup>75</sup> See Davidson, *supra* note 19, at 107 ("The large number of cases means that plaintiffs do not and cannot exert real control over the course of their litigation.").

text is revealing: Practitioners refer to claims as their “inventory.”<sup>76</sup> Plaintiffs’ counsel cannot possibly monitor the advancement of individual clients’ interests, nor will defendants’ counsel do such monitoring for them.<sup>77</sup> According to Samuel Issacharoff and John Fabian Witt, this is not a recent development; the depersonalized aggregate treatment of claims has long been an institution in tort law.<sup>78</sup>

This critique of Rule 1.8(g)’s overreaching purpose should not be taken to say that mass tort attorneys should not be subject to ethical rules of obedience and loyalty. Rather, the specifications for how to meet those goals must fit the structural demands of their practice if settlements are to exist at all.<sup>79</sup> Useful rules would establish procedures that would enable the attorney “agent” to facilitate successful claim resolutions while also guaranteeing that the interests of the client “principal” remain the attorney’s focus. The following sections discuss the malfunctioning of Rule 1.8(g) and explain the need for alternative disclosure and consent procedures for the mass tort settlement context.

### B. *The Rule’s Lack of Clarity*

There is genuine confusion surrounding what Rule 1.8(g) requires of parties involved in a settlement negotiation.<sup>80</sup> Because Rule 1.8(g) is codified separately in each state, jurisdictions that have yet to review the Rule may interpret its requirements differently. This uncertainty increases the costs of settling mass tort claims: Plaintiffs’ attorneys tend to avoid the risk of violating the Rule by following the most restrictive procedures that might be required, and defendants might be reluctant to engage in settlement negotiations for fear that an agreement will be unexpectedly voided by a new interpretation of Rule 1.8(g).

One area of uncertainty is *what* exactly must be disclosed to an attorney’s clients during the settlement negotiation. Commentators

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<sup>76</sup> See *id.* (claiming that plaintiffs’ counsel “own the litigation; they are the storekeepers”).

<sup>77</sup> See *id.* (“[T]he defendant is likely to exploit the disjuncture of client and attorney to get a better deal . . .”).

<sup>78</sup> Issacharoff & Witt, *supra* note 70, at 1577 (contrasting Supreme Court’s “day-in-court” ideal expressed in *Amchem* and *Ortiz* with reality that “aggregating devices . . . have long characterized tort practice in the area of mature torts”).

<sup>79</sup> Carrie Menkel-Meadow, a legal ethicist, has argued that conventional conflict-of-interest procedures are based on an idealized version of individual attorney-client relations. Carrie Menkel-Meadow, *Ethics and the Settlement of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1172 (1995) (“Our legal system, and ethical rules, must confront the tensions between our ideals of individual justice and the reality of a need for ‘aggregate’ justice.”).

<sup>80</sup> See *supra* Part I.B (discussing various interpretations of what Rule 1.8(g) requires).

disagree about whether Rule 1.8(g) requires practitioners to provide information on what each client would receive from the settlement and how that amount was determined.<sup>81</sup> In practice, disclosure is achieved in a variety of ways.<sup>82</sup> Attorneys who are either confused by the Rule or practicing in multiple jurisdictions may unnecessarily expend resources on investigating the various ways in which Rule 1.8(g)'s vague requirements have been interpreted. Moreover, standards regarding the issue of client consent are also vague. Although courts have interpreted the Rule to require consent to the final settlement terms, it is not clear why agreements to agree are any different from other waivers of procedural protections that are thought to be unproblematic.<sup>83</sup>

Perhaps the most troubling uncertainty concerns the imposition of penalties. While the costs of noncompliance with Rule 1.8(g) are clear in cases where plaintiffs all reside in one state and that state's case law definitively specifies the relevant remedies, many aggregate settlements fail to meet those conditions. Thus, courts have fashioned a variety of penalties for attorneys who breach Rule 1.8(g): professional sanctions, including suspension from practice; revocation of attorneys' fees; and in some cases, voidance of the entire settlement.<sup>84</sup> Yet, one of the purposes of remedies is thought to be the communica-

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<sup>81</sup> Compare ABA Comm. on Ethics and Prof'l Responsibility, *supra* note 65 (requiring disclosure of every other client's settlement receipts and how costs were apportioned), and Silver & Baker, *supra* note 21, at 734 (finding that Rule 1.8(g) requires "disclosure of all settlement terms to all clients, including . . . what other plaintiffs are to receive"), with Nagareda, *supra* note 18, at 768 n.79 (admitting that requiring disclosure of information on all other client awards "is not entirely obvious from [Rule 1.8(g)'s] text" (citing Silver & Baker, *supra* note 21, at 734)).

<sup>82</sup> For instance, a special master for the court can direct the gathering of information on the claims, which is then disclosed to claimants. See, e.g., Pretrial Order No. 22, *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., MDL No. 1203 (E.D. Pa. Mar. 23, 1998), available at <http://www.fenphen1203.com/files/9235298.pdf> (ordering plaintiffs to supply to defendants information within forty-five days of discovery initiation date); Pretrial Order No. 6, *In re* Orthopedic Bone Screw Prods. Liab. Litig., MDL No. 1014, 1995 WL 925678, at \*1 (E.D. Pa. Feb. 1, 1995) (ordering plaintiffs to provide documents for defendants on rolling schedule); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 669-70, 682-84 (1989) (surveying data-collection process for claims in asbestos and Dalkon Shield personal injury suits). In other cases, a compensation grid can organize claims by type rather than identifying them individually by client. LES WEISBROD ET AL., AM. TRIAL LAWYERS' ASS'N (ATLA), 5 ATLA'S LITIGATING TORT CASES § 60:34 (2007) (noting that one method of complying with Rule 1.8(g) has parties agree to settlement values for plaintiff groups organized by demographic factors and legal issues).

<sup>83</sup> Plaintiffs can waive due process rights to notice, trial, and hearing. Silver & Baker, *supra* note 21, at 769 (citing *M/S Breman v. Zapata Off-Shore Co.*, 407 U.S. 1, 11 (1972); *D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972); *Boykin v. Alabama*, 395 U.S. 238, 243 n.5 (1969); *Nat'l Equip. Rental, Ltd. v. Szukhent*, 375 U.S. 311, 316 (1964)).

<sup>84</sup> See *supra* notes 60-64 and accompanying text.

tion of the relative costs of compliance and noncompliance so that parties can choose the most economically efficient option.<sup>85</sup> Given this uncertainty, wise plaintiffs' attorneys will avoid the possibility of harsh penalties by engaging in costly disclosure and consent practices that would be unnecessary were the Rule more clear.

### C. *The Rule's Unnecessary Procedural Hurdles*

A third problem with Rule 1.8(g) is that the consent requirements create a set of conditions that enables holdouts to engage in strategic behavior and prevents some settlements from occurring. The settlement negotiation process involves significant transaction costs and opportunities for manipulation by individual claimants, and Rule 1.8(g) makes it more difficult to unify a group of plaintiffs to their own advantage. Unlike class actions, in which class members inevitably become bound by judgments or court-approved settlements,<sup>86</sup> Rule 1.8(g) permits claimants to opt out of aggregate settlement negotiations at any point until the actual signing of the agreement.<sup>87</sup>

Rule 1.8(g) also keeps defendants from achieving "finality"—that is, the resolution of all claims that might arise from the mass tort. Finality is a prime motivator for defendants,<sup>88</sup> but the current Rule enables plaintiffs to use defendants' desire for finality against them.<sup>89</sup> Individual claimants may reject the settlement terms at the final stage of negotiation, putting the goal of finality out of reach and destroying the value of the settlement.<sup>90</sup>

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<sup>85</sup> Cf. Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089, 1089–98 (1981) (discussing "efficient breach" theory of contract law, in which optimal contract performance occurs "under certainty").

<sup>86</sup> See Erichson, *supra* note 19, at 522–23 (arguing that class action is only device whereby all parties similarly situated are bound by settlement agreed to by representative).

<sup>87</sup> Some scholars analogize aggregate settlements to class actions. See, e.g., *id.* at 526–28 (exploring "plausible applications" of class action concepts for guidance in non-class mass litigation); see also John C. Coffee, *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 904–05 (1987) (discussing interplaintiff competition by means of strategic opt-out decisions in class action context). This analogy, however, fails to account for the procedural structures created by Rule 1.8(g).

<sup>88</sup> Of course, defendants will not achieve complete finality if the injuries from the alleged tort have not yet emerged. Aggregate settlements typically resolve only current claims, rather than future claims. Nagareda, *supra* note 18, at 752 ("Aggregate settlements afford little long-term peace to defendants . . . for they cannot resolve future claims.").

<sup>89</sup> The desire for finality is what brings defendants to the negotiating table in the first place, and it can yield greater benefits for plaintiffs. Silver & Baker, *supra* note 21, at 760 ("[D]efendants who settle these lawsuits want finality and are willing to pay for it.").

<sup>90</sup> See *infra* notes 100–04 and accompanying text (discussing incentives for strategic decisions made by individual stakeholders with strong and weak claims).

These procedural hurdles to unification and finality can have troubling effects on aggregate settlement outcomes. One such consequence is the dilution of strong claims. To frame how this dilution occurs, I will now discuss how the weaknesses of Rule 1.8(g) exacerbate two related phenomena: damage averaging and strategic holdouts.

Aggregate settlements generally include some “damage averaging”—that is, the standardization of the value of claims despite their varied sizes and strengths.<sup>91</sup> Damage averaging dilutes the value of strong claims: Those with strong claims receive less than they would if they pursued their claims through successful litigation or if the settlement allocation were based on the merit of individual claims.<sup>92</sup> Meanwhile, weak claimants benefit disproportionately, receiving more than they would if they proceeded on their own. In one asbestos settlement, for example, even though smokers had weaker claims than non-smokers, each claimant with lung cancer received \$13,000.<sup>93</sup>

Negotiating parties may also want to minimize transaction costs by averaging the claims rather than by performing individualized calculations. The payoff to small claimants may reflect the value to the defendant of eliminating these claims rather than the weight of the evidence or gravity of the injury.<sup>94</sup> The greatest beneficiaries of aggregate representation, therefore, are claimants who would not pursue individual representation outside of the collective. This includes plaintiffs whose damages would be too small to justify individual representation and those for whom the evidence of harm and causation is too weak for litigation.<sup>95</sup>

This damage-averaging effect stems from two conditions. First, although defendants offer to pay out less on strong claims than they

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<sup>91</sup> Moore, *supra* note 11, at 168 & n.110. In class actions in a variety of areas of law—antitrust, employment discrimination, and securities—judges often approve settlements that average damages rather than allocating them based on the strength of individual claims. Coffee, *supra* note 87, at 918 & n.104.

<sup>92</sup> See Coffee, *supra* note 87, at 915 & n.93, 916 (referring to empirical work demonstrating that litigants earn more in individual litigation than in class actions and suggesting one “possibility is that bargaining . . . tends to disfavor the plaintiff with disproportionately high stakes in the action”).

<sup>93</sup> Silver & Baker, *supra* note 21, at 760–61.

<sup>94</sup> Interview with Gabrielle Wolohojian, Partner, Wilmer, Cutler, Pickering, Hale & Dorr, in Boston, Mass. (July 25, 2007).

<sup>95</sup> Coffee, *supra* note 87, at 918–19 (citing cases in which parties made “nuisance value” payments to subclasses with weak claims on grounds that “an early settlement benefits all”); see also Moore, *supra* note 11, at 168–69 (“[T]hose who *benefit* most from damage averaging are the victims whose claims are the smallest or the most questionable.”).

would probably have to pay after individual litigation,<sup>96</sup> the holders of these claims face powerful incentives not to proceed alone: Their litigation costs will be lower due to economies of scale,<sup>97</sup> and by joining forces with a wider scope of claimants, they will be more likely to achieve a resolution with defendants eager to reach a universal settlement.<sup>98</sup> Second, parties have asymmetrical access to information. Defendants do not have access to the same claim details as do plaintiffs' attorneys and therefore often cannot determine which of the claims are strong, weak, or meritless.<sup>99</sup> Plaintiffs' counsel, knowing that defendants will often pay a high price in order to keep the cases out of court, thus have incentives both to maintain this information advantage and to include as many claims—both strong and weak—as possible.

Rule 1.8(g) adversely affects this dynamic by giving greater power to “holdouts,” those clients who try to extort greater rewards by threatening to drop out of the settlement altogether.<sup>100</sup> Consider how two scenarios are affected by Rule 1.8(g)'s requirement that claimants cannot waive their right to reject the settlement's final terms. The first scenario involves a defendant who is committed to settling strong claims and chooses to do so in combination with weaker claims. In this context, strong claimants could exploit their power to reject the final terms in order to gain a larger portion of the settlement.<sup>101</sup> Their participation is, after all, more valuable to the defendant than that of other claimants, and their compensation is often lower than it would be in a successful litigation.<sup>102</sup> Strong claim-

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<sup>96</sup> Moore, *supra* note 11, at 168; *see also* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1743 (2002) (identifying quiet settlement of most “dangerous” cases as major strategy of many defendants).

<sup>97</sup> Hensler & Peterson, *supra* note 4, at 1042–43 (noting that plaintiffs' counsel can spread costs of litigation and maximize fees by identifying more claims); *see also* Coffee, *supra* note 87, at 904 (addressing incentives faced by plaintiffs whose claims are “independently marketable”).

<sup>98</sup> For a discussion of the dynamics of achieving a near universal settlement, *see* Silver & Baker, *supra* note 21, at 765.

<sup>99</sup> Interview with Gabrielle Wolohojian, *supra* note 94.

<sup>100</sup> *See* Silver & Baker, *supra* note 21, at 767 (arguing that Rule 1.8(g)'s nonwaivable unanimous consent requirement “enables a single plaintiff” “with little at stake in a lawsuit . . . [to] make a credible threat to veto a desirable group deal unless paid a disproportionately large amount”). Rule 1.8(g) has been interpreted to require unanimous approval of negotiated settlements. *See supra* note 54 and accompanying text.

<sup>101</sup> John Coffee discusses how this would play out in the class action context. If class actions permitted strong claimants to exit the settlement after the terms had been negotiated, this would turn the existing pattern “on its head, and the problem becomes not that the high stakes plaintiffs will be exploited, but that they could arguably acquire too much leverage.” Coffee, *supra* note 87, at 925.

<sup>102</sup> *See supra* note 92 and accompanying text.

ants have exit options: If they walk away from the aggregate settlement, they can try to settle individually with the defendant or pursue litigation.<sup>103</sup> Other claimants, on the other hand, have few options outside of aggregate settlement. Claimants without outside options will be forced to bargain away their share to keep potential holdouts from rejecting the aggregate settlement altogether.

The second scenario involves a defendant who places a great value on achieving finality through universal settlement. Here, the weak claimants have nearly as much leverage as strong claimants because the nonparticipation of even a few weak claimants could induce the defendant not to settle. A weak claimant could thus become a holdout, extracting settlement funds from the other claimants in return for participating.<sup>104</sup>

To defend the current application of the Rule, one could argue that a de facto unanimous consent requirement is not actually unfair to strong claimants. After all, at any stage they can opt out and pursue their claims independently.<sup>105</sup> The breakup of the claimant group, however, tends to harm the interests of holders of both litigable and nonlitigable claims. Strong claimants who leave an aggregate settlement may indeed find the sort of representation required for a litigation assault on a wealthy corporation, but they run the risks of losing the case at trial or winning smaller damages than the settlement would have provided. Other claimants may suffer too: As large claimants evacuate, the defendant may back out of negotiations. If the defendant is still willing to make an offer, that offer will be substantially lower absent inclusion of the strongest claims. The risk of costly post-settlement litigation also reduces the value of settlement to the defendant and thus reduces the settlement amounts available to individual claimants.

It is possible that the “holdout” prospect has been overstated.<sup>106</sup> The holdout strategy works for small claimants only if a condition of the settlement agreement is that all or a substantial majority of the

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<sup>103</sup> The vulnerability of such claimants in class action suits, caused by their powerlessness to opt out after certification, is what spurs Coffee to suggest that class actions should permit claimants to opt out not only at the moment of class certification but also after the final settlement negotiation. Coffee, *supra* note 87, at 925.

<sup>104</sup> See Silver & Baker, *supra* note 21, at 767 (theorizing that small claimants have ability to extort “disproportionately large” amounts due to unanimous consent requirement).

<sup>105</sup> Nancy Moore argues this point, claiming that strong claimants can turn to “boutique” law firms that specialize in pressing forward with only the very strong claims from a mass tort. Moore, *supra* note 11, at 168.

<sup>106</sup> For one set of criticisms of Silver and Baker’s predictions regarding class actions, see Weber, *supra* note 72, at 1196–97, which argues that small claimants’ threats are not credible since they have no way of getting compensation outside of the class.

plaintiffs consent to the terms. In many mass torts, defendants do demand a large threshold of claimant participation before they close the agreement.<sup>107</sup> But claimants with weak or small claims will have leverage only if they can act collectively: One such claimant could not destroy a settlement agreement by herself. If such a claimant did attempt a veto, the defendant could painlessly proceed with the settlement.

If the defendant does not require a threshold level of participation, then dissident claimants will not disrupt the resolution prospects for the other parties. One cannot, therefore, make blanket statements about how the unqualified power to drop out of the settlement will actually be used by claimants, whether small or large, weak or strong. But this feature of aggregate settlement under Rule 1.8(g) does create the possibility of abuse by clients who seek to use their bargaining positions to extract a larger share of the settlement.

Ultimately, the practice of damage averaging—and the corresponding holdout problem—creates inequity. If one were to evaluate the results of an aggregate settlement against the baseline of what each claimant would receive in the absence of any such deal, it becomes clear that the plaintiffs whose claims are too weak to be litigated benefit the most from aggregate settlement. The extent of the problem, though, is unclear. Strong claimants whose presence at the negotiating table is particularly valuable may use their leverage to extract a greater settlement package. Does the holdout power of numerous weak claimants reduce the likelihood of such manipulation? In the end, both weak and strong claimants—depending on the negotiating position of the defendant—can take advantage of the consent requirement of the current Rule 1.8(g).

### III

#### REVISING AGGREGATE SETTLEMENT FOR THE PRACTICE OF MASS TORTS

Given the problems created for settlements by Rule 1.8(g), attorneys and their clients pursuing mass tort settlements are in need of alternative procedural mechanisms. This Part considers how one procedural mechanism used under § 524(g) of the U.S. Bankruptcy Code<sup>108</sup>—the provision that regulates the reorganization of corporate defendants in asbestos litigation—could shed light on the reform of

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<sup>107</sup> See Silver & Baker, *supra* note 21, at 765 (explaining that desire for near-universal settlements is “why mass settlements usually contain walk-away provisions” for defendants).

<sup>108</sup> 11 U.S.C. § 524(g) (2000).

Rule 1.8(g). Section 524(g) provides a guide for how to facilitate settlement negotiations and also provides ethical guideposts to the plaintiffs' attorneys involved in them. This Note is not the first proposal to expand the application of § 524(g) beyond the bankruptcy context,<sup>109</sup> nor is it the first consideration of the ethics of asbestos settlements.<sup>110</sup> But it is the first analysis that explicitly considers the relationship between the procedures of asbestos bankruptcies and the ethics of aggregate settlements more generally.

### A. *The Bankruptcy Code's § 524(g)*

Facing mounting costs and damages, many corporations entangled in asbestos litigation have been forced to file for bankruptcy.<sup>111</sup> In 1994, as it became increasingly apparent that the risks of future liability were constraining the ability of such corporations to reorganize, Congress passed 11 U.S.C. § 524(g). The law serves both to shield bankrupt asbestos defendants from continued litigation and to allow future claimants to secure some amount of compensation.<sup>112</sup>

#### 1. *Claim Resolution Under § 524(g)*

Section 524(g) creates a procedure by which reorganizing corporations can establish trusts to deal with all present and future asbestos claims, thereby discharging their entire tort liability. The statute empowers courts to enjoin asbestos claims against the reorganized debtor (and its third-party affiliates) provided that certain conditions are met.<sup>113</sup> The trust itself must perform four tasks: assume the liabilities of the debtor in asbestos actions; have funding from at least one of the debtors in the case; assume ownership of a majority of the voting shares of the debtor (or its parent or subsidiary); and use its assets or income to pay claims and demands.<sup>114</sup> The district court will

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<sup>109</sup> Francis McGovern has proposed that § 524(g) be expanded to other mass tort settlements. Francis McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809, 1810, 1818–19 (2006). McGovern's contributions are very valuable, but his proposal does not directly address the ethical constraints of Rule 1.8(g) in its current formulation.

<sup>110</sup> See, e.g., Lester Brickman, *Ethical Issues in Asbestos Litigation*, 33 HOFSTRA L. REV. 833 (2005) (analyzing several asbestos-related ethical issues).

<sup>111</sup> HENSLER ET AL., *supra* note 4, at 10. Over fifty corporations have filed for bankruptcy as a result of asbestos-related liabilities. AM. ACAD. OF ACTUARIES, OVERVIEW OF ASBESTOS ISSUES AND TRENDS 17 (2001), available at [http://www.actuary.org/pdf/casualty/mono\\_dec01asbestos.pdf](http://www.actuary.org/pdf/casualty/mono_dec01asbestos.pdf).

<sup>112</sup> Francis E. McGovern, *Asbestos Litigation II: Section 524(g) Without Bankruptcy*, 31 PEPP. L. REV. 233, 241 (2003); Kenneth Pascuale & Arlene G. Krieger, *Combustion Engineering and the Interpretation of Section 524(g)*, in NORTON ANNUAL SURVEY OF BANKRUPTCY LAW 149, 149, 153–55 (William L. Norton, Jr. ed., 2007).

<sup>113</sup> 11 U.S.C. §§ 524(g)(1)(A)–(B), (4)(A)(ii) (2000).

<sup>114</sup> *Id.* § 524(g)(2)(B)(i).

not certify the trust, however, unless further factual predicates exist: The debtor will face future demands arising out of the same conduct or events; the actual amounts and numbers of future demands cannot be determined; pursuit of these claims outside the trust will threaten the ability of the plan of reorganization<sup>115</sup> to deal equitably with claims and future demands; and the plan provides reasonable assurance that it can pay present and future claims.<sup>116</sup>

The § 524(g) trust provides one of the few avenues through which asbestos defendants can achieve finality for claims against them. For example, the *Ortiz* settlement tried to achieve finality for Fibreboard, a manufacturer of asbestos, by creating a trust fund and distribution plan that would have allowed it to pay present and future claimants.<sup>117</sup> When the Supreme Court rejected the settlement, the Bankruptcy Code's provision for asbestos defendants was the sole "remaining legal vehicle" for achieving finality.<sup>118</sup> Generally, once a corporation's asbestos liabilities exceed its assets, it can take measures to fit itself into the statute.<sup>119</sup> This has facilitated the development of "prepackaged bankruptcies," in which a defendant corporation can negotiate reorganization before filing for bankruptcy, ensuring that it will know the outcome in advance.<sup>120</sup>

The elements of § 524(g) that could be most relevant to a revised Rule 1.8(g) are the bankruptcy statute's disclosure and voting requirements. For disclosure, § 524(g) requires that the terms of the proposed trust be set out in the plan of reorganization and in "disclosure statements" supporting the plan.<sup>121</sup> The disclosure statement is a synopsis of the reorganization plan and must be sent to all interested parties in preparation for a vote on the plan.<sup>122</sup>

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<sup>115</sup> For background information on the contents of a plan of reorganization, see 11 U.S.C. § 1123(a) (2000).

<sup>116</sup> See § 524(g)(2)(B)(ii) (setting forth preceding criteria in precise terms).

<sup>117</sup> *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 824–25 (1999).

<sup>118</sup> McGovern, *supra* note 112, at 246.

<sup>119</sup> See *id.* ("Most companies are reluctant to file for bankruptcy except as a last resort. They wait until their assets have been diminished so greatly that bankruptcy is the only alternative.").

<sup>120</sup> See *id.* ("A prepackaged bankruptcy occurs . . . when a company negotiates a plan of reorganization, sends out a disclosure statement, and conducts a vote all prior to actually filing for bankruptcy."). Debtor corporations and creditors pursue prepackaged bankruptcies to reduce costs for all parties involved. See Samuel Issacharoff, "Shocked": *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1939 (2002) ("These prepackaged bankruptcies dramatically lower the transaction costs associated with conventional bankruptcies . . ."). For further discussion of prepackaged bankruptcies, see McGovern, *supra* note 112, at 245–52.

<sup>121</sup> § 524(g)(2)(B)(ii)(IV)(aa).

<sup>122</sup> McGovern, *supra* note 112, at 237.

The consent requirement is also a fundamental part of asbestos bankruptcies. According to § 524(g), at least seventy-five percent of voting tort claimants must vote in favor of the plan for it to be approved.<sup>123</sup> The Third Circuit, facing a debtor's challenge to this voting requirement, strongly affirmed the provision's importance: "The Legislative History of this Amendment fully supports the proposition that the 75% vote requirement is an integral and an indispensable part of § 524(g)."<sup>124</sup> This requirement, as noted by bankruptcy scholars, has provided asbestos claimants with a veto power that they previously lacked. "This phenomenal increase in tort claimants' bargaining power" has altered the asbestos negotiation process by giving the claimants themselves a much more central role than they otherwise would have had.<sup>125</sup> In contrast, the voting element in aggregate settlements outside of the bankruptcy context is coordinated entirely by plaintiffs' counsel, with little external supervision and no structure.

## 2. *Relevance for Mass Torts Outside of Bankruptcy*

The Bankruptcy Code's procedures for asbestos mass torts need not be limited to that particular context. Indeed, the circumstances that gave rise to the creation of § 524(g) are shared by plaintiffs and defendants in other mass tort litigations. Regardless of which industry is involved, risk-averse defendants fear that bankruptcy will result if they have to satisfy all outstanding claims.<sup>126</sup> In most situations, there is also a lack of feasible procedural alternatives. In asbestos cases, settlements cannot be achieved through class actions,<sup>127</sup> and plaintiffs' counsel cannot obtain the unanimous consent of all claimants. Similarly, plaintiffs in non-asbestos mass torts are often unable to satisfy Rule 23's requirements for joint actions and need procedures that will enable aggregate settlement.<sup>128</sup> The § 524(g) procedural mechanism has improved the ability of bankruptcy claimants to obtain some compensation from the defendants and may offer hope in other contexts as well.

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<sup>123</sup> § 524(g)(2)(B)(ii)(IV)(bb).

<sup>124</sup> *Walter v. Celotex Corp. (In re Hillsborough Holdings Corp.)*, 197 B.R. 372, 379 (Bankr. M.D. Fla. 1996).

<sup>125</sup> McGovern, *supra* note 112, at 242; *see also* Issacharoff, *supra* note 120, at 1939 (noting that § 524(g) bankruptcies "have the salutary effect of putting the injured claimants front and center in the workout process").

<sup>126</sup> *See* Erichson, *supra* note 56, at 1775–76 ("As mass tort litigation matures, the certainty of liability, combined with the uncertain extent of that liability, imposes pressure on defendants to resolve the litigation with finality.").

<sup>127</sup> *See supra* text accompanying notes 23–39 for a discussion of *Amchem* and *Ortiz*.

<sup>128</sup> *See* Erichson, *supra* note 56, at 1772 (contending that "class certification is denied in most personal injury mass tort cases" because such mass torts have "too many individual issues to justify class treatment").

A number of § 524(g) trusts, however, have encountered two problems. First, when approving a plan of reorganization, current claimants' interests may be at odds with those of future claimants against the trust.<sup>129</sup> Second, because claimants without current asbestos-related illnesses may vastly outnumber all others, the trusts end up "significantly shortchanging" future claimants with serious illnesses.<sup>130</sup> But this is a problem particularly germane to diseases that have long incubation periods—such as those related to asbestos exposure. Many mass torts involve products or conduct that impose immediate or rapidly maturing harms;<sup>131</sup> mass torts with shorter development periods such as these are unlikely to result in the insolvency of a settlement fund.

### B. Applying § 524(g) to Mass Tort Settlements

Although § 524(g) emerged out of the highly specialized needs of asbestos litigation and bankruptcy, must the consent and voting requirements be restricted to that context? If it is considered fair that asbestos trusts achieve finality without unanimous consent, perhaps we could accept other settlement agreements achieved in the same manner.<sup>132</sup> This Section explores how the procedures of § 524(g) could inspire an alternative to Rule 1.8(g)'s current regulation of mass tort settlements. Three elements of § 524(g) could be adapted for broader application: the circumstances in which settlements will be governed by this special version of the Rule; the disclosure requirements imposed on settling attorneys; and the voting requirements for present and future claimants.

#### 1. The Proposal

This Note does not argue that the current version of Rule 1.8(g) is never appropriate. Indeed, in small-scale settlement negotiations, the Rule's disclosure and consent requirements serve an important role in preserving both the quality of attorney representation and client involvement. This Note does argue, though, that an alternative version of Rule 1.8(g) should apply to the mass tort context. This pro-

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<sup>129</sup> Brickman, *supra* note 110, at 867–68.

<sup>130</sup> *Id.* at 868.

<sup>131</sup> See RHEINGOLD, *supra* note 10, § 1.1 (offering "expansive listing" of mass tort categories, many of which—such as aviation and railroad disasters—result in immediate effects); Hensler & Peterson, *supra* note 4, at 969–1013 (listing major mass tort litigations between 1960 and 1992, which include mass accident cases, such as hotel fires, and food poisoning cases, such as salmonella outbreaks from contaminated dairy products).

<sup>132</sup> See McGovern, *supra* note 112, at 260 (arguing that applying principles of § 524(g) more broadly "has the potential to create a statutory end game for asbestos litigation").

posal sets out four main provisions: (1) the circumstances that permit aggregate settlements to qualify for the alternative Rule; the alternative Rule's (2) disclosure and (3) voting requirements; and (4) penalties for attorneys who fail to comply with the Rule's provisions.

Circumstances qualifying a case for the alternative Rule would parallel those in the bankruptcy context. Section 524(g), for example, does not apply to all bankruptcies of all asbestos defendants. Rather, parties who seek the benefits of § 524(g) must meet certain additional requirements.<sup>133</sup> Similarly, the alternative Rule 1.8(g) would be available only in situations that meet the following three requirements. First, the tort that gives rise to the claims would have to qualify as a *mass* tort. This, of course, requires agreement on an explicit definition of "mass tort."<sup>134</sup> A possible threshold would be a requirement that the settlement involve a minimum of one hundred claimants represented by one attorney or law firm. Second, claimants must not be eligible for certification as a class under Rule 23 of the Federal Rules of Civil Procedure. The class certification device solves many of the problems raised in this Note, and the alternative Rule 1.8(g) settlement procedure should not be extended to those claimants and defendants who can already benefit from Rule 23. Third, taking a cue from § 524(g), the settlement would qualify for the revised Rule only if the individual pursuit of claims outside of the agreement would threaten to undermine its purpose.<sup>135</sup> An example of such a circumstance would be a mass tort in which the global resolution of claims is crucial to the defendant's ability to compensate for harms created by the tortious conduct. This requirement has two rationales. First, it guarantees that the alternative Rule only applies to situations in which some claimants have a *credible* threat to veto the settlement. Second, this requirement limits the alternative Rule's application to situations in which the interests of the claimants are truly at risk: If other parties withdraw from the settlement, and it therefore collapses, some claimants may be left with no resolution of their claims.

These threshold requirements, however, may leave some mass torts, such as asbestos, with unsatisfactory settlement procedures. The fundamental problem of the asbestos settlement negotiations (and consequent litigation in *Amchem* and *Ortiz*) was that future claimants were unaware of their exposure and could not have known of the

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<sup>133</sup> See *supra* notes 113–16 and accompanying text.

<sup>134</sup> See *supra* notes 10–14 and accompanying text.

<sup>135</sup> Cf. 11 U.S.C. § 524(g)(2)(B)(ii)(III) (2000) (requiring determination that "pursuit of such demands outside the procedures prescribed by such plan is likely to threaten the plan's purpose").

need to participate in an aggregate settlement negotiation.<sup>136</sup> But unlike the class settlements in *Amchem* and *Ortiz*, aggregate settlements under the alternative Rule 1.8(g) would bind only current claimants. Asbestos defendants hoping to resolve both present and future claims would have to resort to the bankruptcy mechanisms of § 524(g).

An alternative Rule 1.8(g) should also specify in more detail the disclosure requirements for the aggregate settlement of a mass tort. A revised Rule should maintain the disclosure requirement under the current version of Rule 1.8(g),<sup>137</sup> but should specify that attorneys can satisfy this requirement by identifying the different types of injuries suffered and the corresponding settlement amounts provided for each. Consider, for example, class action settlements of mass torts, where a common practice is to create a compensation grid of claim types and settlement amounts.<sup>138</sup> In the non-class context, permitting similar systematic disclosures makes it less likely that individual claimants will benefit unfairly from personal access to their attorneys. It also increases the likelihood that the allocation will reflect the reasonable expectations of all claimants—that payments should correlate with the injuries suffered rather than the claimant's relationship with or influence over the negotiating attorney. If privacy is a concern, then the grid can identify injury alone and omit all identifying personal information.

As to consent, the alternative Rule's voting provision would permit a supermajority's approval of the settlement terms. Like the bankruptcy procedure,<sup>139</sup> Rule 1.8(g) could require that seventy-five percent of claimants approve of the settlement's terms. If three-quarters of the group approve the settlement, the remaining quarter would be obliged to participate in the settlement and comply with the defendant's requirements (which often include an agreement not to pursue further litigation of claims). In other words, there would be two crucial moments of consent: At "Time 1," the decision to enter into settlement negotiations together—and abide by the supermajority's final decision—would require unanimous consent; at

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<sup>136</sup> See *supra* text accompanying notes 32–33.

<sup>137</sup> The current Rule provides that "[t]he lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2003).

<sup>138</sup> For example, the silicone breast implant class settlement involved a grid with two axes: disease and age. Parties could appeal the classification of a claim to a claims administrator and then to a district court. JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 80 (1998).

<sup>139</sup> 11 U.S.C. § 524(g)(2)(B)(ii)(IV)(bb) (2000); see also *supra* text accompanying note 123.

“Time 2,” the decision to accept the final terms of the settlement negotiation would require consent by seventy-five percent of the group. Claimants at this latter stage will know how the settlement affects their own compensation—for example, where they are placed within a compensation grid. One difference between these two moments is the claimants’ ability to opt out of the settlement altogether. At Time 1, any claimant can opt out from the settlement negotiation; only those who consent at Time 1 proceed to later stages of the process. In contrast, all of the claimants at Time 2—though they can *vote* against the settlement negotiation—are bound by the settlement’s terms if seventy-five percent of the group approves them. This is contrary to some class action settlements, where class members may have a second opportunity to opt out of the settlement<sup>140</sup> after seeing their placement in the compensation grid.<sup>141</sup>

Some might argue that the seventy-five percent threshold fails to provide adequate protection of clients in the minority. To address this concern, the Rule should require that each of the attorney’s clients—one hundred percent—consent to be bound by whatever settlement terms are approved by seventy-five percent of the claimants who so agree.<sup>142</sup> Legalizing the waiver of the right to reject a settlement approved by a supermajority should not be a controversial proposal. After all, parties can waive many procedural due process rights.<sup>143</sup> Permitting such waiver in the mass torts context simply extends the logic presented in § 524(g) to a broader claim-resolution context.

A final recommended element of this alternative Rule 1.8(g) is the imposition of a harsh penalty upon attorneys who fail to comply with the disclosure and consent requirements. One failing of the current system is that plaintiffs’ attorneys do not face standardized penalties for mistreatment of their “inventory.”<sup>144</sup> Because the integrity of the attorney-client relationship and the fairness of the settlement process (to claimants and defendants alike) are at stake, violators of the Rule should be forced to sacrifice the entirety of their attorneys’ fees.

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<sup>140</sup> The first opportunity to opt out, of course, is the “notice” stage of class certification. FED. R. CIV. P. 23(c)(2).

<sup>141</sup> The silicone breast implants settlement permitted claimants to opt out after seeing how claims were “ratcheted down” to account for limitations in total settlement funds available. TIDMARSH, *supra* note 138, at 80.

<sup>142</sup> Requiring that all parties, including the minority, be bound by the final vote responds to the concern that pursuing claims outside of aggregate settlement undermines the purposes of the settlement. *See supra* text accompanying notes 88–90.

<sup>143</sup> *See, e.g.*, D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 185 (1972) (“The due process rights to notice and hearing prior to a civil judgment are subject to waiver.” (citing Nat’l Equip. Rental, Ltd. v. Szukhent, 375 U.S. 311, 315–16 (1964))); *see also supra* note 83.

<sup>144</sup> *See supra* notes 75–78 and accompanying text.

## 2. *Improving Aggregate Settlements*

By adopting this proposed revision of Rule 1.8(g), states could solve the problems, discussed in Part II, that the current Rule creates.<sup>145</sup> First, the reform would transform the current Rule's overreaching purpose into one that matches the structure of aggregate representation. As this Note has argued, part of the problem with the current version of the Rule is that it applies equally to aggregate settlements involving two, two hundred, or two thousand plaintiffs.<sup>146</sup> This proposal, by bifurcating the aggregate settlement rule into different versions for different-sized claimant groups, can achieve the more targeted purpose of improving attorney-client relations in *mass* actions.

Second, the reform would also supply clear guidance in situations that qualify as "mass tort settlement negotiations." As a first step, the quantitative definition of "mass tort settlement" would clearly signal to plaintiffs' attorneys as to whether the new set of ethical obligations apply to their current multiple-client matters. The new Rule would also inform members of the plaintiffs' bar of an efficient and potentially lucrative procedure that they may pursue in future matters if they are prepared to accept the consequent responsibilities. For example, by meeting the threshold number and qualifying as a mass tort settlement, plaintiffs' attorneys would benefit from the Rule's facilitation of unity and finality. On the other hand, they would also have to consider that qualifying as a mass tort settlement would implicate clear and harsh penalties for misconduct. The proposed Rule also improves the clarity of consent and disclosure requirements. Not only does this clarity reduce transaction costs, it also would make it easier for courts to lift the veil that currently surrounds settlement coordination by plaintiffs' attorneys and review negotiations that are alleged not to meet the Rule's ethical standards.

Finally, in addition to making the settlement process more manageable, this Note's proposed revision of the Rule would also make it more fair. As demonstrated in Part II.C, the combination of the consent requirement in the current version of the Rule and defendants' need for finality allows some claimants to extract greater individual benefits by threatening to veto the settlement. This Note's proposed revision of the Rule—permitting a supermajority to approve the final

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<sup>145</sup> Part II identified three main problems with the current version of Rule 1.8(g) in the context of mass torts: the disjunction between the Rule's overreaching purpose and the reality of aggregate settlement; the Rule's lack of clarity; and the obstacles it creates for parties seeking the resolution of claims.

<sup>146</sup> See *supra* Part II.A.

settlement agreement—weakens the power of individuals to manipulate the settlement process. Those individuals who genuinely fear that the group will not ultimately reach a settlement plan that benefits them in the way they feel is deserved could choose to pursue individual litigation or negotiation with the defendant corporation—although for many claimants this is an impracticably costly option.

### 3. *Protecting Client Interests*

This Note's proposal to revise Rule 1.8(g) does more than resolve the problems raised by the current version of the Rule. It also better serves the ultimate purpose of the Rule: protecting client interests from attorney abuse. In several ways, this Note's proposed Rule combines procedural features that protect both clients in the majority and those in the minority, who must abide by an agreement that they voted to reject. First, before the final stages of settlement negotiation, clients will have the power to choose whether to be bound by an agreement-to-agree mechanism for settlement. Introducing the *ex ante* agreements does not undermine the complete autonomy of claimants in choosing whether to become members of these claimant groups.

Second, the private market of plaintiff representation could fill the gap left by this modification of the Rule. In other words, those claimants who prefer the unanimity model throughout the settlement negotiation may still have access to that alternative. These claimants, for instance, may not meet the threshold of one hundred claimants suggested in this Note.<sup>147</sup> Even larger claimant groups, however, could opt out of this Note's alternative Rule 1.8(g); the proposal here would establish the minimum procedures required in aggregate settlements, but individuals would remain free to contract for *greater* procedural protections. Law firms could offer to negotiate settlements only with unanimous client consent at every stage of the settlement negotiation, thereby adequately serving those claimants who choose not to take advantage of the agreement-to-agree device. The claimants most likely to seek out such representation are strong claimants who have a greater ability to pursue their claims among smaller plaintiff groups, outside of the aggregate settlement context. They also may have the most to lose in a seventy-five percent voting model; claimants with the most severe injuries can be the "minority" in a mass tort, while the majority consists of weak claims.<sup>148</sup> Of course, claimants who opt out

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<sup>147</sup> See *supra* text accompanying note 134.

<sup>148</sup> See, e.g., Brickman, *supra* note 110, at 868 n.142 ("[I]n the asbestos context . . . a voting majority can be made to consist of non-malignant claimants whose interests may be

of the agreement to agree may be a significant and powerful subset of the claimants. Consequently, even with this alternative, negotiations may still fail to satisfy defendants committed to a universal resolution of claims. In these cases, where plaintiffs cannot reach universal agreement at Time 1 (the agreement to agree) because some claimants choose not to relinquish control, defendants and plaintiffs will still have the option of negotiating a settlement without an *ex ante* agreement in place.

A third source of protection is that the agreement at the final stages will still require the approval of a supermajority of the claimant group, based on their identity as claimants rather than on the value of their claims. Some proposals for expanding § 524(g) have considered the elimination of the vote altogether.<sup>149</sup> This Note's proposal demands that, unless a particular compensation scheme is legislatively mandated, all claimants bound by the settlement shall have unanimously voted to proceed under the alternative Rule 1.8(g) and that a supermajority is required for the settlement to be finalized.

### C. Responding to Possible Objections

Despite the benefits for both plaintiffs and defendants of a revised Rule 1.8(g) in the mass tort context, some objections could be raised to this proposal. First, one might argue that the Rule will fail to make settlement easier. For example, there is no *requirement* that claimants opt into the structured settlement agreement. Also, the "future" claimants so central to the Court's objections in *Amchem* and *Ortiz* cannot participate in settlements governed by the modified Rule. These concerns, however, are unjustified. Though claimants are not required to opt into the settlement, most will have strong financial incentives to do so, given the financial burden of litigating or settling claims individually.<sup>150</sup> Moreover, the concern about future claimants is unique to diseases that have long incubation periods, such as those caused by asbestos exposure. Most personal injury torts, in comparison, have immediate or rapid effects as well as a more fully inclusive group of present claimants.

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adverse to those of claimants with more severe injuries.'" (quoting *In re Combustion Eng'g, Inc.*, 391 F.3d 190, 244 (3d Cir. 2004)); see also STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION xxiv (2005), available at [http://www.rand.org/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/pubs/monographs/2005/RAND_MG162.pdf) ("The fraction of claims that asserted nonmalignant conditions began to grow in the early 1990s, rising to more than 90 percent of annual claims in the late 1990s and early 2000s.").

<sup>149</sup> See McGovern, *supra* note 109, at 1825 (suggesting that one could "eliminate the need for a vote altogether" if courts had expanded authority over "issues that might have been resolved by negotiation").

<sup>150</sup> See *supra* note 20 and accompanying text.

Another potential objection is that defendants may choose not to enter this type of out-of-court settlement. After all, defendants usually fight class certification very strongly, and the modified Rule 1.8(g) makes aggregate settlements look more like class actions than they once did. The modified Rule, however, has features distinct from class actions that make this scheme more enticing to defendants. For example, the number of claimants will be smaller than in class actions. Not all individuals who fit the qualities of a specified “class” will be included—only those who have been actively engaged by legal representation. Presumably, the total number of settlement classes therefore will be smaller. Moreover, in true mass torts with a large number of viable claims, defendants tend to prefer aggregate procedural devices like class actions—as the global settlement processes in *Amchem* and *Ortiz* demonstrate.<sup>151</sup>

A final objection might be political: Some may dispute that state legislatures would ever pass this revised Rule. The plaintiffs’ bar in many states is a powerful lobbying presence, and making settlements easier in this way could be seen as pro-defendant. In response, this Note argues that the proposal benefits plaintiffs and defendants equally and will facilitate compensation for plaintiffs who otherwise would receive no relief. A reform that decreases the costs of tort litigation while also clarifying ethical obligations may easily be embraced across the political spectrum.

#### CONCLUSION

The litigation and settlement of mass torts requires innovation because the typical rules of civil procedure and tort law fail to accommodate the massive scope of the undertaking. Rule 1.8(g) in particular does not meet the needs of mass tort disputants. Yet scholars and practitioners have been unable to articulate an alternative to the Rule that would protect the integrity of the attorney-client relationship. By drawing upon the procedural mechanisms for asbestos bankruptcies, we can construct a successful alternative for mass tort settlements more generally.

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<sup>151</sup> See *supra* notes 23–39 and accompanying text (describing *Amchem* and *Ortiz* settlements in which defendants preferred global class settlements).