

The International Comparative Legal Guide to:
Class and Group Actions 2009

A practical insight to cross-border Class and Group Actions work



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What if We Want to Settle a Mass Tort Class Action: Tried and Favoured Approaches

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Introduction

Determining whether, when, and how to settle mass tort class action litigation can present some of the most challenging and high stakes questions facing corporate defendants in United States litigation.* The legal landscape is further complicated in the wake of new requirements under the federal Class Action Fairness Act (“CAFA”), United States Supreme Court decisions circumscribing the availability of global settlements, and notable examples of mass tort class action settlement attempts gone wrong. (See Endnote 1.) Yet settlement often is an option companies may wish to consider in addressing mass tort litigation and requires creative solutions to evolving challenges.

This chapter provides an overview of the mass tort class action settlement process in the United States, and guidelines for navigating some of the most significant settlement issues. We address the following topics below:

- Considerations to weigh in determining whether to settle.
- Settlement models.
- Potentially effective approaches to settlement.
- Ethical considerations.
- Collateral attacks and traps to the enforcement of class action settlements.

Considerations To Weigh In Determining Whether To Settle

Deciding whether - and when - to settle a mass tort class action requires careful consideration of numerous factors. Broadly speaking, taking into account a host of factors, defendants must weigh the cost of litigation against the cost of settlement. The potential costs of litigation include not only the risk of compensatory and punitive damages awards at the end of a trial, but also litigation defence costs themselves, wear and tear on company personnel, and the overall impact of ongoing litigation on the company and the market. The analysis of litigation costs-versus-settlement costs is, however, rarely linear. Defendants also need to consider the risk that early settlement may “stir the pot” and encourage additional, low merit cases that might not otherwise have been filed had the company chosen to litigate existing lawsuits. Accordingly, some companies take the position, at least in the beginning of a mass tort litigation, that they are prepared to take all cases to trial. As defence costs mount, and experience with the litigation grows, settlement may become potentially viable - indeed, attractive. For example, in the Vioxx litigation, Merck undertook numerous trials and spent a reported \$1.2 billion on defence costs before deciding to settle. (See Endnote 2.)

On the other hand, relatively early settlement of mass tort litigation may provide some appealing advantages over the trial or other disposition of each suit individually. Most notably, a successful settlement may provide relatively foreseeable, fixed costs to the defendant in comparison to the potentially unknown and less limited costs of litigating numerous actions. Litigation also creates uncertainty that may adversely affect the financial condition of a corporation; successful settlement may minimise this uncertainty. An assessment of settlement costs should include not only the estimated cost of the settlement deal itself, but a realistic appraisal of whether the deal actually will be enforceable and buy “global peace” (issues we address more below). Defendants also should give early consideration to any insurance coverage they may have, including fully evaluating the relationship between the claims being made and the scope of their coverage.

Although every case is different and must be carefully assessed in context, a number of specific factors should be weighed as part of the settlement calculus. The chart below illustrates some of these considerations and how they may weigh, particularly in determining whether a mass tort is a good candidate for early settlement:

| | Early Settlement May Be More Attractive If ... | Early Settlement May Be Less Attractive If ... |
|--|---|--|
| Impact on company and product | + Little impact on company reputation, relationships with third parties, or marketability of the product | + May motivate government investigations + Substantial negative impact on company reputation, relationships with third parties, or marketability of the product |
| Status of product | + No longer on the market | + Continuing to be sold |
| Nature of injury | + Consistent between plaintiffs + “Signature injury” scientifically linked to product with few other causes | + Varies in degree or nature between plaintiffs + Common side effect with multiple potential causes |
| Potential claimants | + Known in number and/or identity | + As yet unidentified or unidentifiable |
| Likelihood of success on the merits | + Success on the merits unlikely and limiting cost of verdicts and trials is paramount concern + Success likely - if plaintiffs are therefore motivated to accept lower settlement because of their poor prospects for trial - but expected litigation costs are very high | + Success on the merits likely - if settlement more expensive than litigation |
| Location of cases | + Filed in a single class action or in a single court + Can be consolidated through multi-district process or otherwise informally coordinated across jurisdictions | + Parallel claims in state and federal courts which cannot be coordinated formally or informally. |

As the chart illustrates, early settlement may be most appealing where the product is no longer on the market (and the universe of

plaintiffs is therefore limited and “going concern” considerations are minimised), where there is a known universe of potential claimants (making costs more knowable), and there is a signature injury or few other potential causes of the alleged injury (making it easier to link the alleged injury to the product). On the other hand, the promise of actual peace through a global settlement can be very difficult to achieve where the universe of potential claimants may be too broad to permit settlement (particularly if the product at issue remains on the market), if the alleged injury has a lengthy latency period, or if there are not sufficiently clear scientific ties between the alleged injury and the product.

Perceived likelihood of success on the merits may cut both ways. On the one hand, it may strengthen the company’s resolve to defend all cases on the merits; on the other hand, it may encourage early settlement on good terms for the defendant if plaintiffs conclude that their likelihood of ultimate success is low. Coordination and logistical considerations also should be considered. A single class action in federal court may be easier to settle than global litigation filed in numerous federal and state jurisdictions around the country. Thus, while there are no hard and fast rules, these considerations should be weighed carefully in each case. We address many of these issues in more detail below.

Settlement Models

Although mass tort settlements come in many different shapes and sizes, they fit broadly into two categories: those settled through the formal class action mechanisms of Rule 23 of the Federal Rules of Civil Procedure, and those that operate outside the rubric of Rule 23.

Rule 23. The Federal Rules of Civil Procedure contemplate certifying class actions for litigation purposes and for settlement purposes.

As a general matter, mass tort personal injury cases are not well suited for class treatment for litigation purposes. Class certification under the federal rules is conditioned on the proposed class meeting certain prerequisites. First, Rule 23(a) sets forth four specific requirements for class certification: numerosity, commonality, typicality, and fair representation. *See* Fed. R. Civ. P. 23(a)(1)-(4). In other words, there must be a critical mass of plaintiffs who share claims with common questions of law and fact, and named plaintiffs must have claims that are typical of the claims of the class and “fairly and adequately protect the interests of the class.” Fed. R. Civ. P. 23(a). Second, Rule 23(b) requires that the class action be a superior vehicle for resolution of the claims than individual litigation, that the defences against the class be generally applicable to all class members, and that common questions of law or fact “predominate over” individual questions. Fed. R. Civ. P. 23(b). The requirements of Rules 23(a) and (b) can be difficult to achieve, particularly where the litigation turns on questions of individual injury and causation - as it does in the typical personal injury case - and where a nationwide class would be governed by the laws of 50 States. In addition, Rule 23 class certification early in litigation can impose cumbersome requirements on the defence; thus, defence counsel in mass tort litigation often make and win motions opposing class certification. (*See* Endnote 3.) As a result, settlement discussions in the personal injury mass tort context typically do not include class actions that have been previously certified. (*See* Endnote 4.)

Rule 23 can come into play in the settlement of mass tort litigation through the use of settlement classes. In traditional class actions, a class is certified early in the litigation process for the purpose of litigating the case. In the settlement model, class certification is sought on the condition that a proposed settlement is approved; in other words, the only purpose of class certification is settlement, not litigation. These settlements are permitted under Rule 23(e), and

require court approval before the settlement can be finalised.

In theory, an advantage of Rule 23 settlement classes is that, when successful, they can constitute a global disposition of an issue. A Rule 23 settlement necessarily includes all those who fit the definition of a class member (except those who chose to opt out of the settlement proposal and continue litigating their individual claims); class members who do not opt out should be perpetually barred from bringing claims under the principles of *res judicata* (an issue we discuss more below). Defendants who agree to a settlement proposal may retain the right to defend against the claims if settlement is not approved and to withdraw from the settlement if too many plaintiffs opt-out. (*See* Endnote 5.)

In practice, however, recent changes under CAFA and the Supreme Court’s decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) and *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), indicate that the courts have set a high bar to approving settlement classes. Other case law has cast doubt on whether even a global Rule 23 settlement will necessarily bar all future claims (issues we address below). In addition, obtaining class certification and court approval of a proposed settlement can be a lengthy process. (*See* Endnote 6), limiting the benefits of a swift resolution that settlement might normally offer.

In *Amchem*, the Court rejected a class action settlement of asbestos claims on the grounds that the interests of the different plaintiffs diverged too dramatically for them properly to constitute a class under Rule 23(b). This was particularly true because some plaintiffs had manifested asbestos-related injuries and others were “exposure-only” litigants. *Id.* at 626. This decision made class settlement of mass tort cases where plaintiffs have differentiated injuries more difficult to achieve. Thereafter, in *Ortiz*, the Supreme Court reinforced *Amchem* by rejecting a mandatory settlement class in asbestos litigation, emphasising that varying interests of class counsel and class members in asbestos litigation prevented the Rule 23(a) standards for representation from being met.

Where a class has been certified, “claims, issues, or defences” of the certified class may be settled only with court approval. Fed. R. Civ. P. 23(e). The court may grant approval only after conducting a fairness hearing and determining that the settlement is “fair, reasonable, and adequate.” *Id.* 23(e)(2). In conducting this review, the court is not a passive observer. To the contrary, at least one court has contended that that “district judge in the settlement phase of a class action suit [is] a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.” *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 280 (2002) (Posner, J.). Judges taking this approach may view their role to be “protect[ing] the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class.” *Id.* at 279.

In general, the fairness assessment turns on the “treatment of class members vis-à-vis each other and vis-à-vis similar individuals with similar claims who are not in the class.” (*See* Endnote 7.) Reasonableness requires consideration of the plaintiffs’ claims and how closely the settlement responds to those claims. *Id.* Adequacy looks to the relief granted within the class action process versus what individual class members may have received without the class action process. *Id.* For example, while “[a] class involving small claims may provide the only opportunity for relief and pose little risk that the settlement terms will sacrifice the interests of individual class members,” in contrast, a “class involving many claims that can support individual suits-ranging from claims of severe injury or death to relatively slight harms, as for example a mass torts personal-injury class-might require more scrutiny by the court to fairness.” *Id.*

In determining the propriety of a settlement, federal courts may consider an array of factors, including the following; accordingly, these matters also should be carefully considered by the parties:

- the relative advantages of the proposed settlement versus the likely outcome of trial on the merits as to liability and damages of the claims, issues, or defences of the plaintiffs;
- probable time, duration, and cost of trial and litigation generally (including an assessment of whether extensive discovery and expert witness development would be required);
- the maturity of the litigation and degree of knowledge about the underlying substantive issues, as measured by the information and experience gained through adjudicating individual actions, the development of scientific knowledge, and other factors that bear on the probable outcome of a trial on the merits and be necessary to make properly informed decision (this may depend on the stage of the proceedings and the amount of discovery completed);
- whether the settlement amount is significantly less than estimated actual damages as determined in discovery, settlement or litigation of other individual cases or whether settlement is occurring before these benchmarks can be measured;
- similar claims by other classes and subclasses and their probable outcome; whether claimants with similar allegations will receive similar treatment, taking into account any differences in treatment between present and future claimants;
- whether named plaintiffs receive exclusive or disproportionately large relief compared to unnamed class members and whether non-class members, opt-outs, and objectors with similar claims receive better terms in their individual settlements with the same defendants;
- probability that class claims, issues, or defences could be maintained through trial on a class basis. (*See* Endnote 8);
- the extent of participation in the settlement negotiations by class members or class representatives, and by a judge, a magistrate judge, or a special master; whether defendant has selected a negotiator from the ranks of plaintiffs' counsel without court approval;
- the number, character, and force of objections by class members: if the recovery is small, the fact of few objections may only reflect disinterest, not approval, while, if recovery is large, few objections may suggest general class satisfaction; courts also will scrutinise for "canned" objections by "professional objectors";
- the probable resources and ability of the parties to pay, collect, or enforce the settlement compared with enforcement of a probable judgment; the ability of the defendants to withstand a greater judgment;
- the effect of the settlement on other pending actions;
- the comparison of the results achieved for individual class or subclass members by the settlement or compromise and the results achieved or likely to be achieved for other claimants pressing similar claims;
- whether class or subclass members have the right to request exclusion from the settlement, and, if so, the number exercising that right;
- the reasonableness of any provisions for attorney's fees, including (1) agreements on the division of fees among attorneys and the terms of any agreements affecting the fees to be charged for representing individual claimants or objectors and (2) whether attorney's fees are so inappropriately high in comparison to class recovery that they suggest collusion;
- the fairness and reasonableness of the procedure for processing individual claims under the settlement;
- whether another court has accepted or rejected a substantially similar settlement;
- the apparent intrinsic fairness of the settlement terms;
- whether plaintiffs are receiving only nonmonetary relief (e.g., coupons and discounts) that may have little or no market value to the class;
- whether supposed benefits to plaintiffs are actually illusory because of overly strict eligibility criteria;
- whether defendants have claims on residual funds that may create inappropriate incentives to limit paying legitimate claims; and
- whether there is an appropriate fit between the claims in the complaint and the relief contemplated in the settlement, including whether significant issues are omitted and whether the operative complaint should be amended to better fit the actual claims made and relief sought.

(*See* Endnote 9.)

Multi-district Litigation. Rule 23 is not the only context for settling mass tort litigation. Multi-district litigation ("MDL") and non-MDL informal group settlements also may provide vehicles for global or near global settlement of individual claims. The MDL process was instituted at the federal level in 1968, when Congress established the United States Judicial Panel on Multidistrict Litigation ("JPML"), composed of federal judges from different jurisdictions around the country. *See* 28 U.S.C. § 1407. The JPML has the power to transfer related cases in complex litigation from the various federal courts in which they were filed to a single federal judge, who can coordinate or consolidate pre-trial proceedings; cases typically are remanded back to the original court for trial. (*See* Endnote 10.) In addition, numerous States have adopted MDL analogues, consolidating or coordinating cases in front of a single state-court judge for pre-trial proceedings. (*See* Endnote 11.) Unlike traditional class actions, which must meet numerous conditions for certification under Rule 23, cases must meet less stringent requirements to be transferred to an MDL for pre-trial coordination. Specifically, they must have "one or more common questions of fact" and transfer must be for the "convenience of parties and witnesses" and promote the "just and efficient conduct of such actions." (*See* Endnote 12.)

The MDL process provides numerous potential avenues of assistance to parties contemplating settlement. The MDL judge is likely to become well versed in the key issues in the litigation and may be well positioned to assist the parties in evaluating settlement issues. The MDL judge may do so by certifying a formal settlement class, by assisting coordination of the settlement of numerous individual actions pertaining to the same mass tort, or a combination of both.

Whether or not MDL consolidation is used, settlement of mass torts also can be achieved outside the Rule 23 class action framework through the use of structured inventory and aggregate settlements. (*See* Endnote 13.) Under these mechanisms, with or without MDL coordination, a mass tort defendant can establish a settlement fund to compensate claimants with the threshold condition that a certain percentage of claimants enrol and create a claims facility to orchestrate and administer the claims under the settlement. *Id.* The administrative process of the claims facility may include mechanisms to adjudicate the disputes of those dissatisfied with the resolution of their claims. *Id.*

The Vioxx Experience. The recent Vioxx litigation provides a prominent example of the potential utility of the MDL process and similar state-court devices in achieving global settlement. After Merck withdrew the prescription medication Vioxx from the market in 2004, claims on behalf of more than 46,000 plaintiffs were filed in federal and state courts. (*See* Endnote 14.) The JPML created an MDL court and transferred the federal cases to Judge Eldon E. Fallon in the Eastern District of Louisiana. A large percentage of the state-court cases were centralised in coordinated proceedings in three States: New Jersey, California, and Texas. Merck litigated numerous

trials before it was able to reach a coordinated global settlement with plaintiffs in both the federal and state courts. (See Endnote 15.) In these trials, juries reached verdicts for Merck twelve times and for plaintiffs five times; two cases resulted in mistrials. (See Endnote 16.) At that point, a settlement agreement was reached through the coordinated efforts of judges, the company, and plaintiffs' counsel in the federal and three state court litigations.

Under the terms of the Vioxx settlement, Merck agreed to pay \$4.85 billion to plaintiffs who met several prerequisites, known as "gates." (See Endnote 17.) Eligible plaintiffs must have suffered a myocardial infarction or stroke within two weeks of taking at least 30 Vioxx pills; in addition, claims must have been filed or tolled before the date the settlement was announced. Merck set other triggering conditions to ensure that settlement would in fact be near-global, and that plaintiffs' counsel could not settle weak cases and preserve strong cases for trial. For example, in order for the settlement to go into effect, at least 85 percent of eligible plaintiffs must agree to the settlement; plaintiffs' counsel were required to recommend the proposal to all their clients; and plaintiffs' counsel must withdraw from representation of any plaintiffs who would not agree to settlement. The Vioxx settlement did not cover all claims filed against Merck; as noted, it exempted not only those claims that did not meet the gatekeeping requirements, but also those that had not been filed by the date of settlement. And, of course, Merck will still have to litigate against those plaintiffs who opt out of settlement, which was about seven percent of claimants as of March 2008. (See Endnote 18.) Nonetheless, as of summer 2008, Merck believed the settlement was on track to meeting the triggering conditions. (See Endnote 19.)

Although Merck was able to coordinate almost all of the Vioxx cases against it, that success is attributable in large measure to voluntary coordination between the parties and judges supervising the federal and state coordinated cases. (See Endnote 20.) In other cases, this degree of informal coordination may not be possible—particularly where cases are dispersed among many more federal and state fora. Absent the ability to removal all mass tort cases to federal court (See Endnote 21), there is no mechanism to force coordination of cases pending in federal courts with those pending in state courts.

Potentially Effective Approaches to Settlement

Within the broad confines of the frameworks discussed above, companies have successfully employed numerous settlement models. (See Endnote 22.) Notably, these approaches may be used in tandem, at different stages in the litigation. We summarise those strategies here and discuss them further below:

| Strategy | Explanation | Examples |
|--|--|--|
| No settlement | Take all cases to trial | Bendectin (see Endnote 23) |
| Limited settlement | Settle only the most meritorious cases and take the remaining cases to trial | Vioxx (see Endnote 24) Baycol (see Endnote 25) |
| Opt-out conditions | Employ opt-out options not only at the initial stage but also at later points in settlement determinations in conjunction with placing strict limitations on the litigation options available to those who opt-out downstream and threshold limits on how many plaintiffs can opt-out (or opt-in) for settlement to be binding | Fen-Phen (see Endnote 26) |
| Bellwether trials or mediations | Conduct a sample trials or mediations early in litigation to better evaluate trial risks and settlement parameters | Vioxx (see Endnote 27) MGM Grand (see Endnote 28) Alabama DDT cases (see Endnote 29) |
| Bankruptcy | Plaintiffs abandon traditional mass tort litigation and pursue recovery through settlements in bankruptcy process | Asbestos (see Endnote 30) Silicone breast implants (see Endnote 31) |

No Settlement: Where a company defending mass tort litigation determines there is no viable basis for liability, it may decide to fight all the suits rather than settle any. One such example is the case of the prescription drug Bendectin, the only FDA-approved medication for treating morning sickness during pregnancy. Thousands of tort suits alleged birth defects from using the product even though no scientifically reliable study ever validated this connection and FDA formally determined that Bendectin did not present this risk. (See Endnote 32.) Citing a lack of scientific support for these allegations, Bendectin's maker, Merrell Dow, successfully defended against these allegations in case after case. (See Endnote 33.) Notwithstanding these legal victories, however, ultimately the costs of defending against numerous lawsuits forced not a settlement, but a decision to stop marketing the drug in the United States. (See Endnote 34.)

Limited Settlement: Where a company believes only a limited number of the claims filed against it are potentially meritorious, it may choose to settle only those claims that meet particular criteria (typically without, however, acknowledging legal liability). The three Vioxx "gates" discussed above that established settlement eligibility are one way of drawing a line between cases with a stronger causal link between the injury and the product and less meritorious cases. (See Endnote 35.) Another example of a limited settlement is the Baycol litigation, in which the company refused to engage in inventory settlements but did set specific criteria for a limited set of cases it would settle: cases involving rhabdomyolysis—what some observers reference as a rare but "signature" side effect—with adequate proof of a link to product use. (See Endnote 36.)

Opt-Out Conditions: An additional barrier to settlement is that plaintiffs may choose to opt out of proposed settlements and therefore undermine the goal of global peace. This was the case in the Diet Drug litigation, in which some 60,000 plaintiffs chose not to participate in the settlement agreement. (See Endnote 37.) Opt-out opportunities exist in almost all global settlements, both within and outside the Rule 23 framework. (See Endnote 38.) The structure of opt-out rights and the effect of the opt-out rate are factors that can be negotiated in settlement discussions and become a key part of any settlement agreement. Opt-outs can trigger walk-away rights, under which both plaintiffs and defendants can negotiate conditions under which the settlement will not bind them if a sufficient number of plaintiffs opt out. Indeed, defendants often insist that settlement will not be binding on anyone if too many plaintiffs choose to opt out. This mechanism is used frequently, including in Vioxx, discussed above, in which at least 85 percent of plaintiffs were required to participate for the settlement to become effective. (See Endnote 39.) Plaintiffs also may utilise walk-away rights triggered by too few opt outs, resulting in too many plaintiffs competing for the same settlement fund pool, and thus leaving too little money to each claimant.

Defendants may encourage participation in a settlement agreement by creatively structuring opt-out options to apply even after the initial settlement agreement. So-called "downstream" or "intermediate" opt-outs allow plaintiffs who choose not to opt out of settlement initially to do so at a later time upon the occurrence of certain triggering events. Under this arrangement, plaintiffs may pursue claims that would otherwise have been settled subject to certain limitations, such as a prohibition on punitive damages or multiple recoveries. At the same time, defending corporations agree not to assert certain defences (such as statute of limitations) against the opt-out plaintiff. One example of the use of intermediate opt-outs was the Fen-Phen litigation. (See Endnote 40.) Another option is to provide so-called "back-end" opt-outs, under which exposure-only plaintiffs can wait until their injury manifests to decide whether to litigate or accept settlement, in

exchange for an agreement to relinquish rights to, for example, punitive damages. This option tends to be most useful where exposure-only plaintiffs can be adequately identified and notified, as in the Fen-Phen litigation. (See Endnote 41.)

Bellwether Trials and Mediation: When litigants are sufficiently unsure of what to expect from cases taken to trial or where liability is believed to turn on certain critical defences, bellwether trials or mediation may assist in evaluating trial risk and setting appropriate settlement amounts. A significant challenge, however, may be finding agreement about whether a given case is truly representative of the value of other cases, particularly where individual considerations, such as plaintiff-specific injury and causation, may be paramount in evaluating the value of cases.

Nonetheless, some observers considered early trials helpful in allowing Merck and the Vioxx plaintiffs, for example, to reach global settlement. (See Endnote 42.) To take another example, in litigation over a 1980 fire at the MGM Grand hotel in Las Vegas, the initiation of bellwether trials by the MDL transferee judge was credited with motivating the parties to settle just as the first case was about to go to trial. (See Endnote 43.) Representative case outcomes also may be ascertained by mediation or alternative dispute resolution. For example, in the Alabama DDT cases in the early 1980s, the parties and judge enlisted the help of an outside mediator who guided multiple sample cases through the discovery process in order to help counsel better understand the strength of the legal footing on which the claims rested; through this process, a substantial number of claims ultimately were dropped or dismissed. (See Endnote 44.)

Bankruptcy: For defendants facing extensive potential litigation, bankruptcy reorganisation may provide a last option for disposing of all pending claims (and possibly future claims) with a single lump-sum payment. This has been the option chosen by asbestos defendants, for example. Indeed, given the scale of that litigation, Congress created a specific section of the bankruptcy code to allow asbestos defendants to create a trust in bankruptcy out of which both present and future claims will be paid. See 11 U.S.C. § 524(g)(2)(B)(i)(I). A similar sort of bankruptcy reorganisation trust was used to dispose of some of the litigation surrounding silicone breast implants in the late 1990s. (See Endnote 45.)

Ethical Considerations

Even where settlement can be reached, counsel must take care to avoid a number of potential ethical traps. Not only can ethical violations potentially expose counsel to professional censure, but they also may jeopardise the enforceability of the settlement itself. Ethical considerations may arise not only in assessing counsel's own conduct, but also where counsel is aware of potentially unethical conduct by opposing counsel. (See Endnote 46.) Ethical questions tend to arise most frequently in the areas of attorney's fees, conflicts of interest, limitations on practice, and confidentiality.

Attorney's Fees. Attorney's fee issues can be fertile ground for ethical questions. Plaintiffs' counsel may face tensions between obtaining the best result for their clients and their own potential interest in settling swiftly to collect attorney's fees. Plaintiffs' counsel may be motivated to seek settlements that provide only nominal or illusory benefits for the claimants; defence counsel may be tempted to collude with these plaintiffs' counsel in order to achieve quick and inexpensive settlement.

Model Rule of Professional Conduct 1.5(a) provides that lawyers "shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses." *Id.*

This inquiry turns on:

- (1) the time and labour required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent. [*Id.*]

So-called "reverse auctions" pose a number of ethical questions. In a reverse auction, defendants conduct settlement negotiations with individual plaintiffs' attorneys, hoping to structure settlement around the agreement reached for the lowest dollar amount. The plaintiff's attorney with the winning settlement becomes class counsel and will collect large attorney's fees; thus plaintiffs' attorneys engage in a race to the bottom to become class counsel. (See Endnote 47.) This technique may raise serious ethical concerns, and it is subject to increased scrutiny under CAFA, which now requires reviewing courts to "make[s] a written finding that nonmonetary benefits to the class member substantially outweigh the monetary loss" for any settlements "under which any class member is obligated to pay sums to class counsel that would result in a net loss to the class member." (See Endnote 48.)

Limitations on Practice. In the effort to secure global peace, a torts defendant may wish to ensure that the most invested plaintiffs' counsel will stop filing lawsuits after settlement is reached. Model Rule 5.6(b), however, expressly precludes lawyers from "participat[ing] in offering or making... an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy." *Id.* As a comment to the rule explains, this provision "prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client." *Id.* cmt. [2]. It is less clear, however, whether it is ethically permissible as part of a settlement to require that plaintiffs' counsel advise future clients to accept the terms of the settlement. (See Endnote 49.)

Conflicts of Interest. Conflicts issues frequently arise for plaintiffs' counsel in mass tort litigation in which plaintiffs' counsel represent numerous claimants. Plaintiffs' counsel, whether formal class counsel or counsel to informally aggregated groups, must be careful where proposed settlements may be in the interests of some clients but not of others. In this regard, Model Rule of Professional Conduct 1.7 provides that absent appropriate waiver, "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest," including where "the representation of one client will be directly adverse to another client" or "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer." *Id.* In addition, Model Rule 1.8(g) prohibits counsel who represent more than one client to enter into any aggregated settlement agreement "unless each client gives informed consent, in a writing signed by the client." *Id.* The attorney's disclosure must include "the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement." *Id.* Where plaintiffs' counsel represents more than one plaintiff, defence counsel may wish to consider asking plaintiffs' counsel to submit an affidavit making assurances that these parameters have been satisfied.

Confidentiality. Confidentiality may become an ethical issue where secrecy agreements that typically are conditions of settlement may

be viewed as being against the interests of other plaintiffs or of the public. For example, settlements may require plaintiffs not to reveal particular evidence, or seek to have early stage court decisions vacated. While these actions may be in the interest of individual plaintiffs, they may be viewed as excessively limiting on the interest of other parties.

Collateral Attacks and Traps to the Enforcement of Class Action Settlements

If the purpose of settlement is to achieve global peace, defendants must take care to avoid common traps to enforcing a settlement. Ensuring that settlements meet the requirements outlined above may go a long way to ensuring such peace. In addition, a number of cautionary tales suggest that defendants considering the settlement of mass tort litigation pay careful attention to the following potential issues:

Perhaps one of the most vexing potential threat to global settlement is the “future claimants problem.” For a defendant, settlement becomes a much less appealing option if it will have to continue to face lawsuits in the future based on the same issues. As noted above, the Supreme Court’s decisions in *Amchem* and *Ortiz* both limited the ability of settlement to bind future claimants, focusing on the question of how well the interests of future claimants could be represented in the present litigation. The danger posed by future claimants also is well illustrated by the Agent Orange litigation in which a long latency period resulted in a flurry of litigation following what was hoped to be a global settlement. In 2003, the Second Circuit held that a 1984 settlement of a class action lawsuit by Vietnam veterans based on their exposure to Agent Orange decades ago did not bind a veteran who developed symptoms only after the settlement fund had closed. (See Endnote 50.) The effect of this decision was to inject uncertainty into almost all global settlement decisions by demonstrating that the litigation could be reopened even twenty years after a court-approved settlement.

In contrast, the recent *Vioxx* settlement provides a good example of what appears (thus far) to be a successful effort to limit future claimants. Unlike Agent Orange, *Vioxx* had a relatively short latency period and had been taken off the market several years before settlement, so there is thought to be a relatively low risk that unidentified plaintiffs would manifest symptoms of injury in the future. Similarly, in the *Fed-Phen* litigation, the court ultimately held that there could not be future claimants because everyone who took *Fed-Phen* was aware that they had done so. (See Endnote 51.) Even where future claimants emerge, courts have approved settlements that craft ways to protect their interests. One technique is to craft sub-classes to deal differently with present and future claimants, as was done in the *Inter-Op* hip replacement litigation. (See Endnote 52.)

Another potentially significant issue is claims preclusion. Settlements crafted with thorough releases allow defendants to be more confident that they have fully disposed of all claims on a particular issue. Unlike litigated claims, settlement agreements generally are treated as contracts and therefore should not be subject to common law *res judicata* principles. (See Endnote 53.) Though many settlements include liability releases that preclude future litigation, there may still be later challenges to the scope of the release. Accordingly, parties should develop a thorough record of the factual claims at issue in the settlement in order to better defend against challenges to its scope.

A number of additional potential threats to settlement should be considered, depending on the circumstances of a given case:

- **Notice:** Failure to comply with the strict new notice provisions of CAFA may jeopardise settlement. CAFA requires that, before settling a class action, timely notice must be provided to appropriate federal and state officials, and these entities must have an opportunity to weigh in before settlement is approved. See 28 U.S.C. § 1715.
- **Disclosure of side deals:** Settlements cannot be approved under Rule 23 unless all “agreement[s] made in connection with the proposal” are disclosed in a statement filed with the court. Fed. R. Civ. P. 23(e)(3). This includes any agreements between the parties concerning, for example, attorney’s fees and future cases. Failure to disclose these agreements can expose the settlement to later litigation and possibly invalidation.
- **Coupon settlements:** Coupon settlements have been viewed as a common tactic for plaintiff’s counsel to inflate their own fees at the expense of class members; this perceived problem resulted in CAFA coupon settlement reforms. See 28 U.S.C. § 1712. CAFA provides strict limits on the use of coupon settlements in federal class actions, requiring that where a settlement provides that attorney’s fees will be a percentage of the coupon settlement, those fees must be calculated not based on the total value of coupons that could be redeemed under the settlement but rather based on the value of the coupons that actually are redeemed. *Id.* § 1712(a). Where a coupon settlement does not provide for attorney’s fees as a percentage of the coupons, attorney’s fees must be calculated based on the reasonable number of hours expended by the attorneys on the action, *id.* § 1712(b)(1), and the court must approve any fee under such an arrangement, *id.* § 1712(b)(2). CAFA specifically requires a hearing and written finding by the judge that a coupon settlement is “fair, reasonable, and adequate for class members.” *Id.* § 1712(e). Thus, the use of coupon settlements, even within these new rules, may trigger heightened scrutiny or skepticism by a judge conducting a fairness hearing and thus jeopardise the settlement.
- **Fairness issues:** In addition to coupon settlements and side deals, judges may look for other signals that a proposed settlement may not be in the interest of the class. See *supra*. Some tactics that may be considered triggers for heightened judicial skepticism include: restrictions on claims and the reversion of unclaimed funds to defendants; the award of injunctive rather than monetary relief to class members; and release of liability without remedy.
- **Unanticipated Costs:** Another potential problem is higher-than-anticipated costs—which threatens a chief benefit of settling (i.e., achieving knowable costs). For example, as noted above, the *Fed-Phen* settlement allowed a trio of opt-outs (initial, intermediate, and back-end opt-outs) to ensure that plaintiffs could litigate their claims if they were dissatisfied with the settlement. Although the impetus behind including these provisions was to create an incentive to settle, a perhaps unintended consequence was that early cost projections of litigating non-settling claims were low. (See Endnote 54.)
- **Subrogation claims:** Where an injured plaintiff’s medical treatment relating to the subject of the litigation has been paid for by a third-party governmental or private entity, consideration should be given to ensuring that settling with the plaintiff will effectuate global peace with those entities as well.

Conclusion

When faced with the prospect of mass tort class action litigation, defence counsel should carefully consider the potential for settlement at all stages of the litigation. As detailed above, in some cases, settlement may be appropriate early in the litigation process;

for other cases, settlement may not make sense until much later, after a sufficient record has been established and even then, perhaps only for a sub-set of carefully delineated cases. Finally, mass tort defendants should consider potential changes to the legal landscape which may affect the settlement calculus. (See Endnote 55.)

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Endnotes

- * This article focuses on general aspects of settling mass tort class actions in United States federal courts. Specific considerations, of course, will vary depending upon a number of factors, including the law of a given jurisdiction and the nature of an individual case.
1. See, e.g., Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4, 11 (2005) (codified in scattered sections of 28 U.S.C.); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997); *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2001), *aff'd by an equally divided court*, 539 U.S. 111 (2003). As discussed below, in addition to its well-known provisions expanding federal jurisdiction for certain class actions and mass actions, CAFA made several amendments to Rule 23 that bear on class action settlement, including: governing coupon settlements; barring settlements that result in a net monetary loss to class members absent court findings; barring discrimination among class members based only on geographic location; and requiring notice to state and federal officials of proposed settlements and allow time for them to object. See 28 U.S.C. §§ 1711-15.
 2. Alex Berenson, *Merck is Said to Agree to Pay \$4.85 Billion for Vioxx Claims*, N.Y. TIMES (Nov. 9, 2007).
 3. See, e.g., *Zehel-Miller v. AstraZeneca Pharms., LP*, 223 F.R.D. 659, 660 (M.D. Fla. 2004) (denying motion to certify class action regarding prescription drug Seroquel; claims were “clearly unsuited for class action treatment”); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 216 (D. Minn. 2003) (denying motion to certify class action regarding prescription drug Baycol).
 4. An exception to this rule was the Agent Orange litigation, in which a class was certified for litigation purposes, *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983), and settlement was later achieved, see 597 F. Supp. 740 (E.D.N.Y. 1984).
 5. Before *Amchem*, settlement class actions were used effectively in the early 1990s to dispose of numerous mass tort cases. See, e.g., *Bowling v. Pfizer, Inc.*, 143 F.R.D. 138 (S.D. Ohio 1992) (certifying settlement class in heart valve litigation while general class certification motion was pending); *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, MDL 926, 1994 WL 114580 (N.D. Ala. Apr. 1, 1994) (settling silicone breast implants litigation in \$4.23 billion class settlement). Of course, because these cases predated *Amchem*, it is not clear that in its wake they would have been similarly successful. For a detailed discussion of five settlement class actions in the 1990s, see Jay Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies*, FED. JUDICIAL CENTER (1998).
 6. See, e.g., Richard Arsenault et al., *Settlement Strategies for Complex Litigation*, 43 TRIAL 40, 43 (Dec. 2007).
 7. DAVID F. HERR, ANNOTATED MANUAL FOR COMPLEX LITIGATION (hereinafter “MCL”) § 21.62 (4th ed. 2007).
 8. Under *Amchem*, however, where a class is certified only for settlement purposes, the district court may “not inquire whether the case, if tried, would present intractable management problems . . . for the proposal is that there be no trial.” 521 U.S. at 620.
 9. See, e.g., MCL § 21.62 (citing cases); *In re Prudential Ins. Co. Am. Sales Prac. Litig. Agent Actions*, 148 F.3d 283, 317-24 (3d Cir. 1998).
 10. For a general discussion of the history and use of MDL proceedings, see Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2209-13 (2008).
 11. These States include: California, Colorado, Connecticut, Illinois, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Oklahoma, Oregon, Pennsylvania, Texas, Virginia, and West Virginia. See Yvette Ostolaza & Michelle Hartmann, *Overview of Multidistrict Litigation Rules at the State and Federal Level*, 26 REV. LITIG. 47, 69-75 (2007).
 12. 28 U.S.C. § 1407(a); see generally Ostolaza & Hartmann, *supra*, at 50-63.
 13. See generally MCL § 22.922.
 14. Press release, *Merck Agreement to Resolve U.S. Vioxx Product Liability Lawsuits: Agreement Provides for \$4.85 Billion Payment*, Nov. 9, 2007, available at http://www.merck.com/newsroom/press_releases/corporate/2007_1109.html (hereinafter, “Merck Nov. 9, 2007 Press Release”).
 15. For further discussion of how the settlement agreement was reached in a coordinated state-federal process, see Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is not Possible*, 82 TUL. L. REV. 2205, 2213-16 (2008).
 16. Merck Nov. 9, 2007 Press Release.
 17. *Id.*
 18. Merck Says 44,000 Sign for Vioxx Settlement, Mar. 3, 2008, available at <http://www.msnbc.msn.com/id/23452135>.
 19. Press Release, *Merck Extends Enrollment Deadline in Program to Resolve U.S. Vioxx Product Liability Lawsuits*, May 1, 2008, available at http://www.merck.com/newsroom/press_releases/corporate/2008_0501.html.
 20. See Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action is Not Possible*, 82 TUL. L. REV. 2205, 2214 (2008).
 21. CAFA’s expansion of federal jurisdiction over certain class actions and mass actions has enhanced the possibility of certain cases being filed in or removed to federal court and transferred to an MDL proceeding. See, e.g., 28 U.S.C. § 1332(d). Indeed, CAFA reportedly has resulted in a 72 percent increase in the number of class action suits in federal court. See Emery G. Lee III & Thomas E. Willging, *The Impact of the Class Action Fairness Act of 2005 on the Federal Courts*, FEDERAL JUDICIAL CENTER (April 2008), available at [http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/\\$file/cafa0408.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/cafa0408.pdf/$file/cafa0408.pdf). Despite this enhanced federal jurisdiction, however, many class actions and other mass tort cases still are not removable to federal court.
 22. See, e.g., Francis E. McGovern, *A Proposed Settlement Rule for Mass Torts*, 74 UMCK L. REV. 623, 632-33 (2006) (outlining settlement strategy case studies).
 23. See Gina Kolata, *Controversial Drug Makes a Comeback*, N.Y. TIMES, Sept. 26, 2000, available at <http://www.nytimes.com/2000/09/26/science/26SICK.html?ex=1223006400&en=20c0142e4289923d&ei=5070>; *In re Bendectin Prods. Liab. Litig.*, 102 F.R.D. 239 (S.D. Ohio), *vacated by*, 749 F.2d 300 (6th Cir. 1984).
 24. See, e.g., Merck Nov. 9, 2007 Press Release.
 25. See, e.g., *Bayer Opposes Proposal to Dissolve Baycol MDL*, 8 No. 12 Andrews Drug Recall Litig. Rep., at 3 (May 19, 2005)

- (discussing settlement issues).
26. See, e.g., *In re Diet Drugs*, 369 F.3d 293 (2004).
 27. See Merck Nov. 9, 2007 Press Release.
 28. See *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913 (D. Nev. 1983).
 29. See Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 402-04 (1986) (discussing Alabama DDT cases); MCL § 22.91 (discussing use of mediation or arbitration generally).
 30. See, e.g., 11 U.S.C. § 524(g)(2)(B)(i)(I) (addressing asbestos bankruptcy litigation); *In re Johns-Manville Corp.*, 517 F.3d 52 (2d Cir. 2008).
 31. See, e.g., *In re Dow Corning Corp.*, 244 B.R. 721 (E.D. Mich. 1999).
 32. See, e.g., Louis Lasagna, *The Chilling Effect of Product Liability on New Drug Developments*, in *THE LIABILITY MAZE* 334, 337-41 (P.W. Huber & R.E. Litan eds., 1991); FDA, *Determination that Bendectin Was Not Withdrawn From Sale For Reasons of Safety or Effectiveness*, 64 Fed. Reg. 43190 (Aug. 9, 1999); *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 582 (1993); Kolata, *supra*.
 33. See, e.g., Kolata, *supra*.
 34. See, e.g., *id.*; Lasagna, *supra*, at 340-41.
 35. See, e.g., Merck Nov. 9, 2007 Press Release.
 36. See, e.g., *Bayer Opposes Proposal to Dissolve Baycol MDL*, *supra*, at 3.
 37. See, e.g., Daniel Fisher, No Deal, FORBES, Feb. 16, 2005, available at http://www.forbes.com/2005/02/16/cx_df_0216_wyeth.html.
 38. Rule 23 does allow for mandatory class actions, in which class members do not have opt-out rights. Fed. R. Civ. P. 23(b)(1), (b)(2).
 39. See, e.g., Merck Nov. 9, 2007 Press Release.
 40. See generally *In re Diet Drugs*, 369 F.3d 293 (3d Cir. 2004).
 41. See generally *id.*
 42. See generally Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323, 2332-40 (2008) (discussion of the Vioxx bellwether trials by the MDL transferee judge and two of his clerks).
 43. See generally *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913 (D. Nev. 1983).
 44. See Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394, 402-06 (1986).
 45. See *In re Dow Corning Corp.*, 244 B.R. 721 (E.D. Mich. 1999).
 46. See, e.g., Model Rules of Professional Conduct R. 8.3 (Reporting of Professional Misconduct) (“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.”) and 8.4(a) (Misconduct) (“It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.”).
 47. See Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 558-59 (Spring 2006).
 48. 28 U.S.C. § 1713; see Redish & Kastanek, *supra*, at 558 n. 43.
 49. See generally MCL § 13.24.
 50. See Stephenson, *supra*.
 51. See *In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 147 (3d Cir. 2005).
 52. See *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 339, 343 (N.D. Ohio 2001).
 53. See, e.g., *Williams v. GE Capital Auto Lease*, 159 F.3d 266, 274 (7th Cir. 1998) (“It is not at all uncommon for settlements to include a global release of all claims past, present, and future, that the parties might have brought against each other.”). In contrast, res judicata principles typically apply in litigated class judgments. See, e.g., *Cooper v. Fed. Reserve Bank*, 467 U.S. 867, 874 (1984); *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 489 n.19 (Mass. 2004). Accordingly, care should be taken that a release does not incorporate common law res judicata principles which may subject the release to avenues of attack not available as a matter of contract.
 54. See Robert Lenzner & Michael Maiello, *The \$22 Billion Gold Rush*, FORBES, Apr. 10, 2006, at 86, 89, available at <http://www.forbes.com/forbes/2006/0410/086.html> (discussing Fen-Phen litigation costs).
 55. See, e.g., Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809, 1826 (2006).

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