Aggregate Settlements

What They Are and What They Aren't

By Mark J. Fucile

"Group" settlements are becoming common in many practice areas, ranging from product liability to employment. This trend, in turn, raises the question of which multiple settlements fall within the "aggregate settlement rule," the ABA's Model Rules of Prof'l Conduct R. 1.8(g) and its state counterparts. The rule imposes strict requirements:

> 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 of the claims or pleas involved and of the participation of each person in the settlement.

The distinction between simply settling multiple claims and an "aggregate settlement" is not academic. An improperly handled aggregate settlement can expose claimants' counsel to possible professional discipline and civil damage claims. *See*, *e.g.*, *In re Hoffman*, 883 So. 2d 425 (La. 2004) (professional discipline); *see*, *e.g.*, *Waggoner v. Williamson*, 8 So. 3d 147 (Miss. 2009) (civil damage claims). Indeed, defense counsel run the risk that a settlement categorized as "aggregate" cannot be enforced if it was not properly documented. *See*, *e.g.*, *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512 (N.J. 2006).

Oddly, however, neither Model Rule 1.8(g) nor its accompanying Comment 13 defines "aggregate settlement." In this column, we'll look at what does and doesn't fall within the rule.

What They Are

The ABA has acknowledged that the rule and comment fail to define "aggregate settlement" and has attempted to fashion one:

> An aggregate settlement… occurs when two or more clients who are represented by the same lawyer together resolve their claims[.] It is not necessary that all of the lawyer's clients… having claims against the same parties… participate in the matter's resolution for it to be an aggregate settlement[.] The rule applies when any two or more clients consent to have their matters resolved together.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006) at 2 (footnote omitted).

Despite its seeming breadth, the definition offered in Formal Ethics Opinion 06-438 remains tethered to Model Rule 1.8's role as a specialized *conflict* rule:

> Unlike Model Rule 1.7 of the Model Rules of Professional Conduct which is a general rule governing conflicts of interest relating to a lawyer's current clients, Rule 1.8 provides specific rules regarding… types of conflicts of interest. As noted throughout the comments to Rule 1.8, the rule supplements duties set forth in Rule 1.7.

ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 at 1.

Comment 13 to Model Rule 1.8 makes this same point by describing the aggregate settlement rule as a "corollary" to the basic conflict rule stated in Model Rule 1.7. The title to Model Rule 1.8 underscores this further: "Conflict of Interest: Current Clients: Specific Rules."

In short, an "aggregate" settlement must involve a potential conflict. The conflict can either be explicit or implicit. A classic explicit conflict arises when a settlement offer is framed as "all or nothing." In that situation, explicitly linking all of the cases together can pit the claimants against each other and can compromise their lawyer's professional judgment and duty of loyalty. An implicit, but still real, conflict arises when a lump sum is offered for multiple cases and the claimants' lawyer—rather than the clients, by prior agreement on a division or a mechanism for doing so—is left to allocate the overall amount among the clients. In that situation, the lawyer is placed in the position of choosing among his or her own clients, when the lawyer owes each client a duty of undivided loyalty.

What They're Not

Two categories of collective resolution are not included in the aggregate settlement rule. The rationale varies for each.

First, settlements allowing individual claimants to "opt out" are not "aggregate" even if they are "collective" because they do not create a conflict. For example, multiple cases involving common facts, claims, or parties are often mediated at the same time. If the individual

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claimants have the ability to say "no" without affecting other claimants, then there is no conflict because the claimants are not pitted against each other.

Second, Comment 13 to Model Rule 1.8 specifically exempts class and derivative actions from the aggregate settlement rule, and Formal Ethics Opinion 06-438 effectively puts bankruptcy claims in the same category. The reason is that settlements in these contexts all involve close court review and approval, which supplies the protection otherwise afforded by the aggregate settlement rule.

Summing Up

Group settlements—whether "aggregate" or not—can offer important benefits to claimants and defendants alike. But, counsel need to either carefully tailor multiple resolutions to avoid the aggregate settlement rule altogether or ensure compliance if it comes into play. FD