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A TYPOLOGY OF AGGREGATE SETTLEMENTS

*Howard M. Erichson**

INTRODUCTION

It is odd, considering how often lawyers engage in aggregate settlements, that no one seems able to explain what “aggregate settlement” means. It is one of the most important yet least defined terms in complex litigation. Lawyers and judges talk about aggregate settlements as though it were obvious what the term signifies and as though it describes a single thing. In fact, group settlements in multiparty litigation vary significantly. And they vary in ways that make it difficult to determine whether certain deals ought to be understood as collective settlements or simply as groups of individual settlements bundled together.

This much is clear: large-scale multiparty litigation generally settles in clusters rather than one claim at a time. With or without the judicial imprimatur of class certification—indeed, with or without formal judicial aggregation of any sort—lawyers often negotiate settlements of sizable portfolios of claims. Such settlements, in which multiple plaintiffs’ claims against a common defendant are resolved together, are what lawyers variously call aggregate settlements, group settlements, block settlements, or similar terms that emphasize the collectiveness of the deals. What such settlements have never received is a workable definition or a clear articulation of what makes them meaningfully collective.

Aggregate settlements, despite their central importance as a mechanism for resolving multiparty disputes, have received surprisingly little academic and judicial attention, except to the extent they

* Professor, Seton Hall Law School. I benefited greatly from comments by participants at the Association of American Law Schools Civil Procedure Conference, the Brooklyn/Cardozo Mass Torts Workshop, and faculty workshops at Seton Hall Law School and Vanderbilt Law School. I thank Allan Erbsen, Edward Hartnett, Samuel Issacharoff, Richard Nagareda, Jon Romberg, Charles Silver, and Jay Tidmarsh for their helpful comments on drafts. Julie von Bevern, Julie Kot, and Paul Rosenthal provided excellent research assistance, and the Seton Hall Law School Faculty Scholarship Fund provided financial support for this project.

occur in the form of class actions.¹ Because settlements in non-class actions need no court approval,² they rarely generate reported decisions. In addition, confidentiality agreements frequently prevent publication of settlement terms. For both of these reasons, aggregate settlements tend to fly under the radar of most observers.

In this Article, I develop a typology of aggregate settlements. By defining collective settlements in terms of their essential attributes, I hope to offer a more precise way of understanding and describing settlements in multiparty litigation and a sounder approach to applying the special ethical duties that attend aggregate settlements. Part I explains why settlements often come in bunches, focusing on the business imperatives that impel both plaintiffs' counsel and defendants, for different reasons, to favor collective resolutions. Part II shows that despite the frequency of group settlements, and the extent to which the term "aggregate settlement" is invoked, the term is rarely defined with clarity and never defined with adequate attention to its significance in regulating lawyer conduct. Part III offers a definition of the term based on a typology along two axes: allocation and conditionality. By looking at the essential features of group settlements, it is possible to identify those settlements that impose on client autonomy or create client-client or lawyer-client conflicts of interest and to distinguish the types of imposition and conflicts. Part IV uses the typology to delineate a sound application of the aggregate settlement rule, a rule of professional conduct that prohibits aggregate settlements in

1 Laws. Man. on Prof. Conduct (ABA/BNA) 51:376 (Feb. 3, 1999) ("The relatively small number of reported cases on the subject of aggregate settlements belies the growing importance of such settlements as a means of resolving large cases."); Roger C. Cramton, *Lawyer Ethics on the Lunar Landscape of Asbestos Litigation*, 31 PEPP. L. REV. 175, 193 (2003) ("The [aggregate settlement] rule has received very little attention in the courts or academic literature."). Articles that address aggregate settlements outside of class actions include Lester Brickman, *Lawyers' Ethics and Fiduciary Obligation in the Brave New World of Aggregative Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 243 (2001); Cramton, *supra*, at 193-96; Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 569-75; Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149 (1999); Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass Tort Cases*, 31 LOY. L.A. L. REV. 395 (1998); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465 (1998) [hereinafter Silver & Baker, *I Cut, You Choose*]; Charles Silver & Lynn Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997) [hereinafter Silver & Baker, *Aggregate Settlement Rule*].

2 Exceptions include consent judgments and settlements involving minors. Shareholder derivative suits require court approval of settlements. See FED. R. CIV. P. 23.1. For these purposes they may be understood as a species of class action.

the absence of disclosure and informed consent. Finally, although the typology primarily addresses multiparty settlements in non-class litigation, Part V explores how some of the same ideas might be applied to improve understanding of the structures of class action settlements.

I. WHY SETTLEMENTS COME IN BUNCHES

Before turning to the typology, it is worth asking why parties so often settle in bunches.³ Much litigation involves similar claims of large numbers of plaintiffs against a common set of defendants. Claims with common issues against common defendants create incentives for both plaintiffs and defendants to seek aggregate resolutions. In some areas of mass litigation, such as securities and antitrust, class actions provide a viable mechanism for litigation and settlement. Such settlements often occur in class action form, which can be understood as a particular species of aggregate settlement.⁴ Other types of cases, particularly mass torts, more often settle in non-class bunches. It is worth asking why, in the absence of class certification, such claims tend to settle in bunches rather than individually. The answer lies in the convergence of several realities of mass litigation practice: the difficulty of class certification, the collective business of mass plaintiffs' law practice, and the preference of defendants for inclusive resolutions.⁵ In addition, judges struggling with mass litigation often encourage group settlements to resolve large numbers of claims.⁶

3 I borrow the phrase "settle in bunches" from the title of Eric Green's article, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Century*, 44 UCLA L. REV. 1773 (1997); see also Geoffrey C. Hazard, Jr., *The Settlement Black Box*, 75 B.U. L. REV. 1257, 1258-59 (1995) ("[S]ome argue that personal injury cases cannot be settled justly, or at least settled justly by the bunch."). The Green and Hazard articles concern settlement class actions, but "settle in bunches" may even more aptly describe non-class collective settlements.

4 For a discussion of class settlements as aggregate settlements, see Part V, *infra*.

5 Samuel Issacharoff and John Witt make the interesting observation that forms of aggregate settlements have been a feature of tort resolutions for more than a century. They show that in non-mass torts such as auto accidents and workplace injuries, insurance adjusters and other repeat players have long treated resolutions on an aggregate basis. See Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571, 1605 (2004).

6 Judge Charles Weiner, the Multidistrict Litigation judge for all federal court asbestos cases, has overseen the resolution of over 75,000 cases. "Group settlements were and are critical to the movement of these cases," he stated. *In re* Joint E. & S. Dists. Asbestos Litig., 237 F. Supp. 2d 297, 306 (E.D.N.Y., S.D.N.Y. & Bankr. S.D.N.Y. 2002) (quoting Letter from Judge Charles R. Weiner (Oct. 15, 2002)).

Unlike in some areas of mass litigation where class actions have proved a viable mechanism for litigation and settlement, class certification is denied in most personal injury mass tort cases.⁷ Personal injury claims, most courts find, involve too many individual issues to justify class treatment. In the late 1990s, the Supreme Court's rejection of two asbestos settlement class actions in *Amchem Products, Inc. v. Windsor*⁸ and *Ortiz v. Fibreboard Corp.*⁹ drove home the difficulty of obtaining class certification for personal injury mass torts, especially for those seeking global resolutions through settlement class actions. Judicial skepticism about mass tort class actions, however, long predates the Supreme Court's decisions in *Amchem* and *Ortiz*. The 1966 Advisory Committee's note to the Rule 23 amendments cautioned against class treatment for "mass accident" cases,¹⁰ and courts for the next twenty years routinely cited that note in rejecting class certification for mass torts. In the late 1980s and early 1990s, several cases seemed to indicate an upward trend in mass tort class actions,¹¹ but a string of

7 See, e.g., *Wethington v. Purdue Pharma LP*, 218 F.R.D. 577, 590 (S.D. Ohio 2003) (denying class certification in a case involving the drug OxyContin); *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262, 276 (S.D. Fla. 2003) (denying class certification in a case involving an ephedra-containing dietary supplement); *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 216 (D. Minn. 2003) (denying class certification in the multidistrict litigation transferee court in a case involving the cholesterol drug Baycol); *Mason v. Am. Tobacco Co.*, 212 F. Supp. 2d 88, 94 (E.D.N.Y. 2002) (denying class certification in a tobacco case brought by Medicare recipients), *aff'd*, 346 F.3d 36 (2d Cir. 2003). While personal injury class actions are rarely certified, medical monitoring class certification has proved less difficult. See, e.g., *Lewis v. Bayer AG*, No. 2353, 2004 WL 1146692, at *1 (Pa. Ct. Comm. Pl. Nov. 18, 2004) (denying class certification in the Baycol mass tort litigation for personal injury claims, but granting certification of a medical monitoring class); *Scott v. Am. Tobacco Co.*, 1998-0452 (La. App. 4 Cir. 11/4/98), 725 So. 2d (certifying a tobacco medical monitoring class action).

8 521 U.S. 591 (1997).

9 527 U.S. 815 (1999).

10 FED. R. CIV. P. 23 advisory committee's note (1966 amend.). The note emphasized the difficulty of meeting the predominance and superiority requirements of Rule 23(b)(3) for personal injury claims:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.

Id.

11 See *Watson v. Shell Oil Co.*, 979 F.2d 1014, 1021 (5th Cir. 1992) (upholding class certification in an oil refinery explosion case); *In re A.H. Robins Co.*, 880 F.2d 709, 710 (4th Cir. 1989) (upholding class certification in a Dalkon Shield case); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 475 (5th Cir. 1986) (upholding class certifica-

appellate reversals in the mid-1990s¹² squelched that development and set the stage for *Amchem* and *Ortiz*. In recent years, lawyers have turned increasingly to state courts, where class certification motions have received a somewhat more hospitable reception,¹³ but even there, mass tort class actions often are rejected.¹⁴

Because of the difficulty obtaining class certification for mass torts, the cases proceed and settle largely on a non-class basis. However, even without representative litigation in the form of a class action, mass tort litigation, like other types of mass litigation, rarely goes forward on a truly individual basis. Much of the litigation is aggregated through formal non-class mechanisms such as federal multidistrict litigation¹⁵ and state court consolidation.¹⁶ Other litigation is informally aggregated by the coordinated work of the lawyers.¹⁷ Most important for purposes of this Article, the accumulation of large numbers of clients by plaintiffs' firms functions as an informal aggregation mechanism, facilitating the negotiation of group settlements.

A. *The Collective Nature of Mass Plaintiffs' Law Practice*

Notwithstanding the refusal of courts to certify class actions, mass litigation claims proceed on a collective basis. In situations involving

tion in an asbestos case); see also Paul D. Rheingold, *Tort Class Actions: What They Can and Cannot Achieve*, TRIAL, Feb. 1990, at 59, 63 ("[T]he trend in the courts seems toward the use of mandatory classes in tort actions as a means of disposing of mass litigation areas that threaten to clog the courts.").

12 See *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) (decertifying a class in a tobacco action); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1089 (6th Cir. 1996) (decertifying a class in a penile implants action); *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 779 (3d Cir. 1995) (decertifying a class in an action regarding motor vehicles); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1304 (7th Cir. 1995) (decertifying a class in an action regarding HIV-tainted blood).

13 Mark C. Weber, *Forum Allocation in Toxic Tort Cases: Lessons from the Tobacco Litigation and Other Recent Developments*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 93, 96-97 (2001).

14 See, e.g., *Liggett Group, Inc. v. Engle*, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003) (decertifying a tobacco class action), *appeal granted*, 873 So. 2d 1222 (Fla. 2004); *Lewis v. Bayer AG*, No. 2353, 2004 WL 1146692, at *1 (Pa. Ct. Comm. Pl. Nov. 9, 2004) (denying class certification for personal injury claims involving the drug Baycol).

15 28 U.S.C. § 1407 (2000).

16 See, e.g., CAL. CIV. PROC. CODE §§ 404.1-8 (West 2004); N.J. CT. R. 4:38. On the formal aggregation of mass tort litigation in state courts, see Paul D. Rheingold, *Prospects for Managing Mass Tort Litigation in the State Courts*, 31 SETON HALL L. REV. 910, 911-13 (2001).

17 See generally Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381 (2000).

widely held claims stemming from the purchase or use of mass-marketed products or services, plaintiffs' law firms often represent dozens, hundreds, or thousands of individual clients with similar claims. This results from well-established advertising and referral networks along with firms' specialization in particular mass torts.¹⁸ In some cases, unions, homeowners' associations, and other groups facilitate collective representation.

The business of mass litigation dictates a collective approach. To justify the investment required to litigate mass torts and other complex litigation effectively, plaintiffs' lawyers seek to represent large numbers of clients to reduce the per-plaintiff cost of litigating and to maximize returns on sunk costs. By taking advantage of economies of scale, mass litigators can pursue claims on behalf of large numbers of plaintiffs, some of whose claims otherwise would have negative value. The amplified stakes of collective representation permit plaintiffs' lawyers to invest in the litigation at a much higher level than individual representation would justify.¹⁹

Thus, non-class mass litigation often resembles class actions in the sense that numerous plaintiffs depend on counsel with whom they have no meaningful individual relationship and whose loyalty is directed primarily to collective interests.²⁰ Each client's claim constitutes only a small fraction of the economic value of the group. Indeed, one irony of *Amchem* and *Ortiz* is that the Supreme Court was so protective of the interests of mass tort plaintiffs, so concerned that absent class members would not be treated fairly, that as a practical matter it sent most mass tort plaintiffs into non-class collective representation where they are treated much like absent class members but without the safeguards of class action procedure.

The collective nature of mass plaintiffs' law practice not only leads plaintiffs' counsel to litigate on an aggregate basis, but also leads

18 See Erichson, *supra* note 1, at 532–39. For an account of the various forms of collective representation outside of class actions, including mass representation by a single firm, see *id.* at 530–43.

19 David Rosenberg advances a forceful version of the argument that aggregation is needed in order to allow plaintiffs' counsel to make optimal investment in the litigation. David Rosenberg, *Adding a Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit*, 2003 U. CHI. LEGAL F. 19, 27–30. Elsewhere, I have argued that Rosenberg takes his point too far in concluding that mandatory class actions are needed for mass torts. See Erichson, *supra* note 1, at 550 n.117. We agree, however, on the starting point—that by litigating collectively, plaintiffs' attorneys invest in the litigation based on aggregate stakes and thus obtain a more level field with defendants.

20 I explore this connection at length in *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, *supra* note 1.

them to settle on an aggregate basis.²¹ The portfolio of a lawyer with a sizable inventory of mass tort clients ordinarily includes claims of varying strength. In addition to those with serious present injuries, the portfolio may include a much larger number of clients with weaker claims. These may include exposure-only claimants, as well as plaintiffs with evidentiary weaknesses such as exposure or causation problems, or procedural weaknesses such as statute of limitations obstacles. The plaintiffs' lawyer is apt to be more enthusiastic about settling the serious claims if the defendant is willing to offer something for the other clients as well.²²

B. Defendants' Preference for Inclusive Resolutions

If the business of mass plaintiffs' law practice explains why plaintiffs' attorneys litigate and pursue settlements on a collective basis, what explains why a defendant would agree to a large package of settlements? Defendants, of course, prefer no liability at all. But when liability is likely, or even plausible, risk-averse corporate defendants often favor settlement. This is particularly true in litigation in which a series of related cases establishes a high likelihood of liability. In mass torts, the notion of "maturity" captures the idea that at some point, the liability arguments may be well established, outcomes may be relatively predictable, and claims values may be stable and reasonably well understood by lawyers on both sides.²³ What remains unknown in some mature mass torts, however, is the strength and length of the stream of future claims, especially if the alleged harm involves a latency period.²⁴ As mass tort litigation matures, the certainty of liabil-

21 See Fred Misko, Jr., A Professional Responsibility Checklist for the Class Action and Mass Tort Practitioner (Feb. 6, 1998) (unpublished manuscript) ("The mass tort bar prefers aggregate settlements."), available at <http://www.misko.com/library/Ethics.pdf>.

22 Judge Jack Weinstein has observed that "[o]ften the pressure for block settlements comes from plaintiffs' attorneys who hope to get something for a large mass of questionable cases." JACK B. WEINSTEIN, *INDIVIDUAL JUSTICE IN MASS TORT LITIGATION* 74 (1995). In asbestos cases and other mass torts, group settlements have become a standard way of doing business. One judge, describing a case as a "fairly typical" asbestos personal injury action, noted that it involved "commencement of the lawsuit against multiple defendants, intervening bankruptcies of some, and settlement with a few, oftentimes as part of group settlements." *In re Seventh Judicial Dist. Asbestos Litig.*, 764 N.Y.S.2d 168, 174 (Sup. Ct. 2003).

23 See Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

24 Francis McGovern calls this the "elasticity" of the mass tort. See Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1827-34 (1995).

ity, combined with the uncertain extent of that liability, imposes pressure on defendants to resolve the litigation with finality.

A defendant's search for a broadly inclusive resolution reflects a desire to put the dispute in the past and get on with business. It is driven, in part, by the financial markets' demand that businesses contain the liability risk. The broader the resolution, the easier it is for a defendant to quantify the remaining risk. Defense lawyer Andrew Berry describes the pressure on defendants:

[A] mass tort defendant which accurately assesses its future liabilities by using an aggregated legal proceeding to "capture" a large number of claimants makes Wall Street happy. Certainty has value in the capital markets' analysis of a company; apparent certainty is almost as good. A company which plausibly consigns mass tort liabilities to the past by, for example, settling a comprehensive class action or announcing a "global settlement" (no matter how expensive) may be rewarded by an *increase* in its market capitalization.²⁵

As Berry explains, a settlement that binds many claimants permits a defendant "to take its hit, declare victory, and move on."²⁶

A defendant might consider several avenues for resolving mass liability on a global basis. The first is the settlement class action, but that is precisely the tool that *Amchem* and *Ortiz* render nearly unusable for global resolutions of personal injury mass torts. Settlement class actions raise substantial concerns of collusion, reverse auction, and insufficient leverage.²⁷ These problems affect the adequacy of representation, which is required for all class actions,²⁸ as well as the fair-

25 Andrew T. Berry, *Comments on Aggregation: Some Unintended Consequences of Aggregative Disposition Procedures*, 31 SETON HALL L. REV. 920, 921 (2001).

26 *Id.* at 921-22; see also Alex Raskolnikov, Note, *Is There a Future for Future Claimants After Amchem Products, Inc. v. Windsor?*, 107 YALE L.J. 2545 (1998). Raskolnikov argues in favor of a regime of mandatory class settlements of future claims, in part because with mandatory global settlements "the market will include this information in defendants' stock prices, which will therefore be higher than under conditions of uncertainty. Thus, the proposed regime will produce a net surplus in the value of defendant firms." *Id.* at 2572.

27 While the *Amchem* case made its way through the lower courts, these concerns about settlement class actions were voiced by a number of commentators. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Susan P. Koniak, *Feasting While the Widow Weeps*, *Georgine v. Amchem Prods., Inc.*, 80 CORNELL L. REV. 1045 (1995); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439 (1996).

28 See FED. R. CIV. P. 23(a)(4); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *Hansberry v. Lee*, 311 U.S. 32, 43 (1940).

ness of the settlement, which needs the court's approval.²⁹ Thus, while settlement class actions retain some viability, *Amchem* and *Ortiz* taught courts to view them with a skeptical eye.³⁰

Although some settlement class actions remain viable after *Amchem* and *Ortiz*, those two decisions make it particularly difficult to achieve the broadly inclusive resolutions craved by defendants facing severe mass tort liability. Specifically, they make it hard to obtain nationwide resolution, future claims resolution, or mandatory resolution. First, if a defendant hopes to resolve common law liability on a nationwide basis, *Amchem* makes it difficult to do so because it emphasizes the choice-of-law problem presented by nationwide state law class actions.³¹ Differences in applicable state law—which federal courts are bound to apply under the *Erie* doctrine and the Rules of Decision Act³²—interfere with several class action requirements, including predominance,³³ superiority,³⁴ and adequacy of representation.³⁵ Second, if a defendant wishes to stem its liability by resolving future claims, *Amchem* and *Ortiz* discourage such resolutions by emphasizing the multitude of problems connected to future claims resolution, including the conflict of interest between present and future claimants.³⁶ Third, whereas pre-*Ortiz* defendants may have viewed Rule 23(b)(1)(B) limited fund settlement class actions as a way to achieve mandatory global resolution of mass liability, *Ortiz* eliminates

29 See FED. R. CIV. P. 23(e); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 849 (1999); *Amchem*, 521 U.S. at 617.

30 See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1995–2005 (1999).

31 See *Amchem*, 521 U.S. at 610 n.14; see also *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996) (decertifying a nationwide tobacco class action in part based on choice-of-law concerns); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995) (decertifying a nationwide blood products class action in part based on choice-of-law concerns and decrying the “Esperanto jury instruction”). But see *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002) (Weinstein, J.) (certifying a nationwide mandatory punitive damages class in the tobacco litigation, based in part upon a choice-of-law analysis concluding that New York law would govern all claims). See generally Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547 (1996) (discussing various ways to handle the choice-of-law problem in mass tort class actions).

32 28 U.S.C. § 1652 (2000).

33 See FED. R. CIV. P. 23(b)(3) (requiring, for Rule 23(b)(3) class certification, that common issues predominate over individual ones).

34 See *id.* (requiring, for Rule 23(b)(3) class certification, that class action be the superior method for resolving the claims).

35 See FED. R. CIV. P. 23(a)(4); see also *Amchem*, 521 U.S. at 625–26.

36 See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 853 (1999); *Amchem*, 521 U.S. at 626.

whatever appeal that route may have had. Not only does *Ortiz* make it extremely difficult to meet the requirements for limited fund class certification,³⁷ but it also requires that essentially all of the defendant's assets be included in the settlement,³⁸ thus removing any incentive for defendants to use limited fund settlements as a reorganization device.³⁹

A second avenue that defendants may consider for global resolutions of liability is bankruptcy.⁴⁰ Chapter 11 bankruptcy has become the method of choice or necessity for many defendants facing massive liability.⁴¹ For some defendants, however, it is unavailable because they do not satisfy the requirements of the Bankruptcy Code.⁴² In any event, bankruptcy would hardly be most defendants' first choice as a mechanism for resolving liability. While bankruptcy offers useful mechanisms for gathering claims and for accomplishing a broadly inclusive resolution, and prepackaged bankruptcies increasingly are used as a means of resolving liability,⁴³ bankruptcy may be unappealing to defendants because of a number of direct and indirect costs.⁴⁴

37 See *Ortiz*, 527 U.S. at 842.

38 See *id.* at 849.

39 The opinion leaves open a small possibility for defendants to survive a limited fund class action. Savings in transaction costs may provide a basis for the defendant to put less than one hundred percent of its assets into the settlement. See *id.* at 860-61. Only in the direst cases, however, does it seem plausible that a defendant would find this an appealing basis on which to resolve liability.

40 Even in bankruptcy, however, defendants face the need to resolve claims by means of aggregate settlement or otherwise. See Joseph F. Rice & Nancy Worth Davis, *The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims*, 50 S.C. L. REV. 405, 428-35 (1999) (expressing skepticism about the ability of bankruptcy to resolve future claims). See generally Michael F. Perliss & Philip E. Atkins-Pattenson, *Complex Litigation in the Context of the Bankruptcy Laws*, in *COMPLEX LITIGATION IN THE CONTEXT OF THE BANKRUPTCY LAWS* (PLI Litig. Course, Handbook Series No. 254, 1984) (discussing settlement considerations from the defendant's perspective in the context of Chapter 11 bankruptcy proceedings).

41 See, e.g., *A.H. Robins Co. v. Piccinin*, 788 F.2d 994 (4th Cir. 1986) (A.H. Robins bankruptcy due to Dalkon Shield litigation); *In re Joint E. & S. Dists. Asbestos Litig.*, 129 B.R. 710 (E.D.N.Y. & Bankr. S.D.N.Y. 1991) (Johns-Manville bankruptcy due to asbestos litigation); *In re Dow Corning Corp.*, No. 95-20512, 1995 Bankr. LEXIS 1123 (Bankr. E.D. Mich. Aug. 9, 1995) (Dow Corning bankruptcy due to breast implant litigation).

42 See 11 U.S.C. § 101(32) (2000) (defining insolvency for purposes of a bankruptcy petition).

43 See Roger Parloff, *Welcome to the New Asbestos Scandal*, *FORTUNE*, Sept. 6, 2004, at 186, 186 (discussing the rise of prepackaged asbestos bankruptcies).

44 Stephen J. Lubben, *The Direct Costs of Corporate Reorganization: An Empirical Examination of Professional Fees in Large Chapter 11 Cases*, 74 *AM. BANKR. L.J.* 509, 511-12 (2000).

Another route to global resolution is legislation, but that route has proved difficult and dangerous for most defendants. Although the airline industry achieved a stunning victory with the enactment of the September 11 Victim Compensation Fund,⁴⁵ the circumstances surrounding that legislation were exceptional. Most mass tort defendants have been unable to stem liability by statute. The asbestos industry has yet to achieve a legislative solution to its liability woes, despite years of lobbying and some bipartisan support.⁴⁶ The tobacco industry initially supported a massive legislative settlement of tobacco liability in 1997, only to lose control of the process and ultimately withdraw its support for the bill as the legislative proposal became increasingly unfavorable to the industry.⁴⁷ More recently, the gun industry failed in its attempt to avoid liability through federal legislation.⁴⁸

45 Less than two weeks after the terrorist attacks of September 11, 2001, Congress passed the Air Transportation Safety and System Stabilization Act “[t]o preserve the continued viability of the United States air transportation system.” Pub. L. No. 107-42, 115 Stat. 230, 230 (2001). The government provided the airlines fifteen billion dollars in cash and loan guarantees, limited the airlines’ liability to the amount of their insurance coverage, and established a fund to pay compensation to victims on the condition that the victims agree not to sue the airlines.

Congress created the compensation fund in the days after the terrorist attack not as solace for the families Rather, Congress sought to protect the airlines from lawsuits. The major airlines faced billions of dollars in potential claims, and legislators worried that the industry might come to a halt, if not collapse altogether.

Michael Powell & Michelle Garcia, *Eleventh Hour Approaches to Apply for 9/11 Fund*, WASH. POST, Dec. 22, 2003, at A2. “Congress, acting at the behest of powerful lobbyists, granted some immunity to some of the most likely defendants.” James Grimaldi, *After a Respectful Pause, Lawyers Line Up to Sue*, WASH. POST, Sept. 9, 2002, at E1.

46 As of this writing, the Fairness in Asbestos Injury Resolution Act, S. 1125, 108th Cong. (2003), which was voted out of the Senate Judiciary Committee in July 2003, remains in limbo, and representatives of asbestos defendants, insurers, organized labor, and plaintiffs’ lawyers continue to struggle to reach a consensus on the total amount of funds required and other issues. See 150 CONG. REC. S2987-01 (daily ed. Mar. 23, 2004) (addressing the current status of the bill and continuing efforts to achieve consensus among the interested parties). The asbestos defendants’ current effort to obtain finality through legislation began in the aftermath of the Supreme Court’s *Amchem* decision. Unable to resolve their liability by settlement class action, six asbestos defendants hired a lobbying firm to explore the possibility of federal legislation. *Asbestos Defendants Hire Lobby Firm to Seek Settlement*, MEALEY’S LITIG. REP.: ASBESTOS, Feb. 6, 1998, at 18. In May 1998, Representative Henry Hyde introduced a bill entitled the “Fairness in Asbestos Compensation Act of 1998.” H.R. 3905, 105th Cong.

47 Erichson, *supra* note 30, at 2020–22.

48 Protection of Lawful Commerce in Arms Act, S. 659, 108th Cong. (2003). Senator Diane Feinstein described the bill as “‘essentially giv[ing] the gun industry blanket immunity from civil liability cases—an immunity that no other industry has.’”

Given the difficulty of obtaining a global resolution by settlement class action or otherwise, the mass litigation defendant naturally turns to the next best thing—approaching each plaintiffs' firm about settling its portfolio of cases en masse. By settling large blocks of cases, a defendant can make strides toward reducing its liability exposure to a manageable, quantifiable level.⁴⁹ Moreover, by settling the leading plaintiff firms' entire inventories of cases, a defendant can try to rid itself of the most threatening lawyers on the plaintiffs' side.⁵⁰

Claims for injunctive remedies, such as public interest litigation seeking institutional reforms, also may settle on an aggregate basis. Although defendants often resist class certification in such cases, they may settle with a number of plaintiffs on the basis of an agreement to institute structural reforms.

In the mass tort context, one plaintiffs' lawyer puts it this way:

In the high-stakes game of mass tort litigation, defense and plaintiffs' counsel can usually agree on one thing—the best resolution of a case often comes not by way of an expensive and risky trial, but rather through a negotiated settlement. Increasingly, mass tort lawyers have come to rely on the aggregate or “global” settlement in resolving the claims of plaintiffs that typically number in the hundreds or thousands.⁵¹

From both the plaintiffs' and defendants' perspective, it makes sense that settlements come in bunches.

II. “AGGREGATE SETTLEMENT” AS AN UNDEFINED TERM

Given the frequency with which mass litigation settles in groups, it is important to understand the nature of such settlements and to define which ones are meaningfully collective. Outside of class ac-

Richard Simon & Mary Curtius, *Gun-Shy Democrats Are Giving the NRA Room to Maneuver*, L.A. TIMES, Feb. 26, 2004, at A18. The bill passed the House of Representatives in April 2003 but failed to pass the Senate.

49 Francis McGovern describes “settl[ing] with key plaintiffs' counsel” as part of the overall containment strategy of mass tort defendants. McGovern, *supra* note 24, at 1835.

50 It is unethical to offer or make “an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.” MODEL RULES OF PROF'L CONDUCT R. 5.6(b) (2002). Thus, plaintiffs' lawyers are prohibited from entering a settlement in which they agree not to represent additional plaintiffs with similar claims, and defendants may not ask them to do so. Such offers and agreements do occur in mass tort cases, however. Even without including an explicit restriction on practice in the settlement agreement, defendants likely expect that a certain number of plaintiffs' firms will move on to other matters once they have settled their entire inventory of cases against a particular defendant.

51 Misko, *supra* note 21, at 4.

tions, one can imagine thinking of a multiparty settlement as nothing more than a number of individual settlements that happen to be negotiated at the same time. What makes a bundle of settlements "aggregate"?

It matters how we define aggregate settlements because, under prevailing legal ethics doctrine, client protection depends on how a settlement is characterized. Every state has a version of the aggregate settlement rule. Under that rule, a lawyer may not make an "aggregate settlement" unless the lawyer obtains each client's informed consent after disclosing the full scope of the deal.⁵²

Most of the states' aggregate settlement rules are versions of Model Rule of Professional Conduct 1.8(g):

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.⁵³

The Model Code of Professional Responsibility includes a largely identical provision in Disciplinary Rule 5-106.⁵⁴ California's variation contains similar restrictions: "A member who represents two or more clients shall not enter into an aggregate settlement of the claims or against the clients without the informed written consent of each client."⁵⁵

52 Because the rule employs the language "aggregate settlement," it is more useful to define that term than to define various others, such as "block settlement" or "group settlement," that are used interchangeably and with equal imprecision.

53 MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2002).

54 The Code provision, under the heading "Settling Similar Claims of Clients," states:

A lawyer who represents two or more clients shall not make or participate in the making of an aggregate settlement of the claims of or against his clients, unless each client has consented to the settlement after being advised of the existence and nature of all the claims involved in the proposed settlement, of the total amount of the settlement, and of the participation of each person in the settlement.

MODEL CODE OF PROF'L RESPONSIBILITY DR 5-106(A) (1980).

55 CAL. RULES OF PROF'L CONDUCT R. 3-310(D) (1996). The rule defines "informed written consent" as "the client's or former client's written agreement to the representation following written disclosure." CAL. RULES OF PROF'L CONDUCT R. 3-310(A)(2). "Disclosure," in turn, "means informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client." CAL. RULES OF PROF'L CONDUCT R. 3-310(A)(1).

Every version of the rule leaves "aggregate settlement" undefined. The rule prohibits aggregate settlements in the absence of certain disclosures and client consent, but it never states what constitutes an aggregate settlement. The comment to the Model Rule explains that "before any settlement offer or plea bargain is made or accepted on behalf of multiple clients," the lawyer must obtain informed consent, but the comment adds nothing useful to the definition of aggregate settlement; it merely restates it as a settlement "on behalf of multiple clients."⁵⁶ The Restatement of the Law Governing Lawyers incorporates the aggregate settlement rule in a comment to its provision on concurrent client-client conflicts, but like the Model Rule comment, the Restatement simply refers to settlement "on behalf of multiple clients" without further definition.⁵⁷

This definitional void has not gone unnoticed by those who attempt to understand when the rule applies. In the ABA/BNA *Lawyers' Manual on Professional Conduct*, an oft-consulted authority on the law governing lawyers, the promising heading "What Is an Aggregate Settlement?" is followed by the disappointing news that "[n]either Model Rule 1.8(g) nor the Model Code's DR 5-106(A) defines the term 'aggregate settlement.'"⁵⁸ The *Manual* adds unhelpfully that "[c]ourts tend to use the term 'aggregate settlement' interchangeably with phrases that emphasize the group or collective nature of the agreement."⁵⁹ A Texas lawyer who developed an ethics checklist for mass tort practitioners listed several unanswered questions, including "what exactly is an 'aggregate settlement' as defined by the rule?"⁶⁰ He noted that "Texas law does not define 'aggregate settlement' and the Texas Supreme Court's Professional Ethics Committee has issued no opinions defining the term."⁶¹

Most authorities fail to define the term with any precision, but some of them do contain statements to the effect that an aggregate settlement is one in which a defendant pays a sum to settle an entire group of claims. An Oregon ethics opinion on conflicts of interest in

56 MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 13.

57 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d(i) (2002) ("Before any settlement is accepted on behalf of multiple clients, their lawyer must inform each of them about all of the terms of the settlement, including the amounts that each of the other claimants will receive if the settlement is accepted.").

58 Laws. Man. on Prof. Conduct (ABA/BNA) 51:377 (June 24, 1998).

59 *Id.* (citing cases using the term interchangeably with "package deal" and "gross settlement"); see also Silver & Baker, *Aggregate Settlement Rule*, *supra* note 1, at 737 (noting the rule's failure to define "aggregate settlement").

60 Misko, *supra* note 21, at 6.

61 *Id.*

auto accident cases, for example, states: "For purposes of this opinion, the term *aggregate settlement* means an all-or-nothing total settlement of a single sum of money for all claims pending for a group of plaintiffs."⁶² One lawyer warns that "[p]roposed 'bulk' or 'aggregate' type of settlements, wherein the defending interests proposed one lump sum of money to be somehow allocated among multiple claims on the other side present very special ethical and practical problems."⁶³ Another lawyer's description of aggregate settlements runs as follows: "Aggregate settlements arise when defendants offer a lump sum settlement to a group of jointly represented plaintiffs and require, as a condition of final resolution, that all plaintiffs participate in the settlement."⁶⁴ The *Lawyers' Manual* practice guide on the aggregate settlement rule states "[l]awyers frequently seek an all-or-nothing settlement in an effort to resolve the case once and for all," implying that this describes the settlements to which the rule applies.⁶⁵ These authorities and others⁶⁶ describe aggregate settlements as deals in which an entire block of claims is settled by a single payment by the defendant.

They describe, in other words, a lump sum package deal. Such deals, while the most obvious type of aggregate settlement, are not the

62 Or. State Bar Legal Ethics Comm., Formal Op. 2000-158, at n.1 (2000); *see also* S.C. Bar Ethics Advisory Comm., Op. 95-02 (1995).

If a lump sum of money is offered in exchange for release of all claims, the lawyer may be involved in a conflict if the parties do not agree as to how the settlement should be divided. Obviously, the lawyer would then be required to comply with the requirements of Rule 1.8(g) if an aggregate settlement is contemplated.

Id.

63 Gerald C. Sterns, *Considerations Relating to Representing Multiple Plaintiffs Involved in the Same Accident: "Adverse Interests" and "Potential and Actual" Conflicts*, in 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1681, 1690 (2003).

64 Misko, *supra* note 21, at 4 (citing James M. McCormack, *Conflicts of Interest in Complex Litigation*, in STATE BAR OF TEXAS CONFERENCE ON RECOGNIZING AND RESOLVING CONFLICTS OF INTEREST, at G-3 (1997)).

65 Laws. Man. on Prof. Conduct (ABA/BNA) 51:375 (Feb. 3, 1999). *But cf. id.* at 51:379 (acknowledging that aggregate settlements may contain individual amounts for each plaintiff).

66 *See, e.g.*, Arce v. Burrow, 958 S.W.2d 239, 245 (Tex. App. 1997), *aff'd*, 997 S.W.2d 229 (Tex. 1999); Brickman, *supra* note 1, at 270 ("In an aggregate settlement, the defendant provides a lump sum of money for distribution to the claimants in the sole discretion of plaintiffs' counsel."); Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. REV. 469, 521 (1994) ("Aggregate settlements present yet another problem of legal ethics. There is nothing that would seem on its face more unethical (or more common) in mass litigation than for a defendant to offer an aggregate settlement of all clients' claims and for plaintiffs' counsel to take it.").

only type. Describing aggregate settlements as lump sum package deals tends to obscure what makes settlements meaningfully collective. Closer inspection reveals that a lump sum package deal has two key attributes. Each of these attributes has independent significance and, I will argue, each should be sufficient to trigger the disclosure and informed consent requirements of the ethics rule. The attributes that combine to form a lump sum package deal are *collective allocation* and *collective conditionality*.

III. A TYPOLOGY OF AGGREGATE SETTLEMENTS

Spreading these attributes—allocation and conditionality—along the two axes of a grid, it is possible to create a typology of aggregate settlements. Group settlements take various forms, and their essential features can be understood in terms of different levels of collectiveness in allocation and conditionality.

By *allocation*, I mean that aspect of the deal that governs settlement amounts, the method for determining who gets how much. *Conditionality* refers to what conditions must be met for the settlement to stick, particularly the extent to which settlements are voidable by defendants for failure to obtain releases from all the plaintiffs. When authorities depict a deal in which the defendant pays an amount of money in exchange for releases of an entire group of claims, the allocation is lump sum, and the conditionality can be described as all-or-nothing.

When the lump sum package deal is understood as a combination of allocation and conditionality attributes, and when that understanding is combined with an awareness of the range of settlement structures used in multiparty litigation, it becomes evident that each of these attributes appears in forms that range from purely collective to purely independent. Allocation and conditionality can be spread along two axes to form a simple grid of settlement structures:

TABLE 1.

		Conditionality		
		All-or-nothing	Other collective conditions	Independent
Allocation	Lump sum			
	Other collective allocations			
	Individual amounts			

lump sum package deal
 individual settlements

In Table 1, the black box in the upper left represents a lump sum package deal, at the intersection of lump sum allocation and all-or-nothing conditionality. Such a deal combines the most collective form of allocation with the strongest collective condition. The settlement is struck based on a total amount to be paid, without regard to how much each plaintiff gets, and the deal is conditioned upon acceptance by the entire group. At the other extreme, the white box represents individual settlements, at the intersection of individual allocation and independent conditionality. Individual settlements involve neither collective allocation nor collective conditions. The deal is struck based on a particular amount negotiated on behalf of each individual plaintiff, and each plaintiff may accept or reject the offer without affecting anyone else's settlement. Lump sum package deals and individual settlements, however, do not exhaust the possibilities. The gray area in Table 1 represents settlements that are neither fully collective nor fully individual.

The gray area includes a variety of group settlement structures that range from highly collective deals to relatively individualized ones. Understanding what makes group settlements meaningfully collective, and applying that understanding to lawyers' ethical obligations, requires a closer examination of settlement structures. In particular, it requires an examination of the collective allocations and collective conditions in settlements that are more individualized than lump sum package deals, but more collective than individual settlements. Table 2 shows that the gray area includes a number of settle-

ment structures with collective allocations, collective conditions, or both. By looking at the terms of any group settlement along the lines of allocation and conditionality, it often should be possible to place the settlement into one of the thirty boxes in the typology shown in Table 2.

TABLE 2.

		Conditionality				
		All-or-nothing	Other collective conditions		Independent	
			Tiered: all-or-nothing/ walk-away	Walk-away	Tiered: walk-away/ independent	
Lump sum						
Allocation	Other collective allocations					
	Total cap					
	Per capita					
	Matrix or formula					
	Claims mechanism					
Individual amounts						

■ lump sum package deal

▨ other settlements with collective conditions and/or collective allocations

□ individual settlements

A. Allocation

In terms of allocation, multi-plaintiff settlements may fall into at least six categories, shown on Table 2. The most collective are those in which a defendant agrees to pay a lump sum to settle an entire group of claims, leaving the allocation of that sum to the plaintiffs and their lawyer. At the opposite end, the least collective agreements are those in which each plaintiff's settlement amount is negotiated individually. Between these extremes lie various methods of allocating settlement funds among plaintiffs: negotiating individual amounts for each plaintiff within a capped total amount, providing a fixed per capita amount for each plaintiff, determining each plaintiff's share by a

formula or matrix, or setting up a claims mechanism to determine values.

At the most collective end, lump sum deals are appealing to defendants for the finality they bring⁶⁷ and tolerated by judges as an efficient way to dispose of cases.⁶⁸ Mass tort defendants have used them to resolve entire blocks of cases with plaintiffs' firms.⁶⁹ In the diet drugs tort litigation, reports have indicated that the primary defendant settled groups of claims on a lump sum basis.⁷⁰ Lump sum offers put plaintiffs' lawyers in an awkward position. Paul Rheingold describes the scenario from the perspective of the plaintiffs' attorney:

You are handling a large number of cases arising out of the same event, let us say clients all injured by the same drug product. Defen-

67 See Laws. Man. on Prof. Conduct (ABA/BNA) 51:379 (June 24, 1998) ("More often, the proposal simply offers a lump sum to settle the entire matter."); Paul D. Rheingold, *How to Settle Your Inventory of Mass Tort Cases Ethically*, in TORTS, INS. & COMP. LAW SECTION, N.Y. STATE BAR ASS'N, FALL MEETING 165, 167 (2004).

68 See WEINSTEIN, *supra* note 22, at 74 ("Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases."); Misko, *supra* note 21, at 4 ("Judges like them because they help resolve large numbers of cases in one fell swoop.")

69 Judith Resnik noted the use of such settlements over a decade ago. Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5, 38 ("While in theory and in form each case is separate, in practice lawyers on both sides deal with the cases as a group, sometimes making 'block settlements'—in which defendants give a lawyer representing a group of plaintiffs money that is then allocated among a set of clients."). Paul Rheingold describes a fund settlement in the litigation over the 1980 MGM Grand Hotel fire:

After settlements occurred of the representative cases, a fund was created in 1984 of approximately \$168 million, not counting approximately \$30 million otherwise paid. This fund was placed in a Philadelphia bank, and was created by each case agreeing on a sum it would take to settle as an individual decision. All parties agreed that if the fund were short, each person's evaluation would be reduced *pro tanto*, but if there was more than enough available, each would be enlarged. The latter turned out to be the case and that was that.

PAUL D. RHEINGOLD, MASS TORT LITIGATION § 14:18 (1996) (citing communication from Plaintiff's Legal Committee member Leonard Ring).

70 See Mark Hamblett, *New York Firm Accused of Intimidating Clients in Fen-Phen Litigation*, N.Y.L.J., Dec. 12, 2001, at 1 (discussing a lawsuit arising from a law firm's lump sum settlement of over five thousand claims after plaintiffs had opted out of a nationwide class settlement); see also Brenda Sapino Jeffreys, *Stick to the Trial Plan*, TEX. LAW., Jan. 31, 2000, at 19 (reporting that Houston plaintiffs' lawyer Michael Gallagher settled the fen-phen claims of 1200 clients for a reported \$350–500 million, hours after winning a huge verdict for five plaintiffs in a Mississippi fen-phen trial); David J. Morrow, *American Home to Settle Some 1,400 Fen-Phen Suits*, N.Y. TIMES, Dec. 23, 1999, at C2 (reporting a \$350 million settlement of Mississippi claims prior to approval of the class settlement).

dant's counsel comes to you and says that they want to dispose of your entire inventory of cases. Either they ask how much will it take, or, if they are more aggressive, they offer you a very large sum of money to settle all your cases. They could care less how you apportion it among your cases. Their client just does not want to spend the time and money arguing over the value of the cases individually, let alone cutting individual checks.⁷¹

Plaintiffs' attorneys faced with lump sum settlement offers use various methods to allocate the money among their clients.⁷² Some lawyers allocate the funds themselves,⁷³ which raises substantial concerns about conflicts of interest and favoritism.⁷⁴ Others have used special masters, or sought the judge's involvement.⁷⁵ Another approach is to encourage the clients themselves to work out a mutually acceptable allocation.⁷⁶

71 Rheingold, *supra* note 67, at 167.

72 Silver and Baker point out that despite the wide variety of available methods for dividing settlement funds, most often the task is left to the plaintiffs' lawyer:

Members of consensual group lawsuits have experimented with many ways of allocating settlement funds. They have tried majority rule, mathematical formulas and point systems, arbitration, and client-to-client negotiation. In our experience, however, these arrangements are rare. It is far more common for plaintiffs to make no special plans and to allow their lawyers to handle the task of apportionment by default.

Silver & Baker, *I Cut, You Choose*, *supra* note 1, at 1505 (footnotes omitted).

73 In *Bailey v. Mead S. Wood Products*, 295 F. Supp. 2d 1286 (M.D. Ala. 2003), forty-one plaintiffs in a pair of related cases authorized their lawyer to settle with the defendant for a lump sum amount and "voted collectively to authorize [the lawyer] to apportion the lump sum settlement amount as best he saw fit." *Id.* at 1287. Two of the clients then objected to their allocation, one because he felt the attorney categorized him incorrectly and the other because he felt the attorney should have awarded more money to his entire category. The court found that "all of the plaintiffs covered by the settlement agreement, including Bailey and Calhoun, authorized their attorney to settle the case for a lump sum amount and authorized the attorney to divide up that amount in a manner deemed appropriate by the attorney" and enforced the agreement. *Id.* at 1289.

74 See Laws. Man. on Prof. Conduct (ABA/BNA) 51:379 (June 24, 1998) ("If the lawyer relies on his own conscience and personal evaluation of the merits of each claim to divide the offered amount among clients, charges of favoritism may result."); Rheingold, *supra* note 67, at 167 ("As many lawyers who have been in this position know, the defendant's proposal is unethical—in the making and in the accepting.").

75 See Laws. Man. on Prof. Conduct (ABA/BNA) 51:379 (June 24, 1998); Weinstein, *supra* note 66, at 521.

76 Laws. Man. on Prof. Conduct (ABA/BNA) 51:379 (June 24, 1998) (noting that this approach might make sense "[w]ith a relatively small group of clients") (citing Ohio Ethics Op. 87-6 (1987)); Silver & Baker, *I Cut, You Choose*, *supra* note 1, at 1505 & n.132 (also noting that this is "[u]sed mainly when the number of plaintiffs is small, e.g., a driver and a passenger injured in the same automobile accident").

More subtle than a lump sum deal, but with similar effect from the defendant's perspective, the lawyers may negotiate an individual settlement amount for each plaintiff, subject to a cap on the total. Such caps may be explicit or implicit. While each plaintiff's settlement is individually negotiated, the total cap imposes significant interdependence on the settlement amounts.

Another collective form of settlement is one that provides a fixed per-plaintiff amount of compensation. An example is the settlement of over 30,000 Norplant product liability claims for \$1500 apiece.⁷⁷ Such settlements bear a superficial resemblance to settlements with individually negotiated amounts, in that both types of settlements specify the amount that each plaintiff receives. The interdependence inherent in any deal in which a lawyer negotiates the same amount for each of a large group of clients, however, distinguishes per capita deals from individually negotiated settlements.

Third, a settlement may establish a formula or matrix for determining payments based on such factors as injury, age, and risk characteristics, with a process for administering claims under the settlement.⁷⁸ Such settlements permit reasonably individualized valuations, but with greater efficiency and predictability than individual plaintiff-by-plaintiff negotiations. Settlement matrices have been used in mass torts including DES⁷⁹ and asbestos.⁸⁰ The same general approach can be used for legislative resolution of mass liability, as evi-

77 Andrew Harris, *Ruling Finishes Off Norplant Suits*, NAT'L L.J., Sept. 30, 2002, at B6.

78 See, e.g., RHEINGOLD, *supra* note 69, § 14:26 (describing the use of schedules or grids to settle mass torts). In addition to the type of disease or injury, factors may include age, degree of disability, and special damages. See *id.*

79 In the DES litigation, Eli Lilly negotiated a matrix settlement with a plaintiffs' firm handling approximately 170 New York cases. *Id.* § 14:15. Over the course of months, counsel for Eli Lilly and plaintiffs' counsel negotiated over categorizing the injuries, determining payment amounts for each type of injury, deciding which legal defenses applied, and other matters. "After many negotiating sessions, the process led to creation of a matrix of major injury categories and subcategories. Ultimately a standard payment was assigned to each subcategory and modifications were then made as to the above factors, such as defenses or strength of proof." *Id.* After the defendant and its insurers were satisfied with the settlement, the plaintiffs' firm presented it to its individual clients, approximately ninety-five percent of whom accepted it. *Id.*

80 See *id.* § 14:26 (noting that "the asbestos schedules paid more for mesothelioma than for asbestosis, which paid more than for pleural plaques"); Deborah Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1914 (2002) (noting the post-*Amchem* use of asbestos settlements that pay claimants "on a per capita basis or on the basis of an injury 'grid'").

denced by the September 11 Victim Compensation Fund⁸¹ and the proposed asbestos legislation.⁸² In sexual abuse litigation against the Archdiocese of Louisville, the parties reached a settlement involving 243 plaintiffs, most of whom were represented by a single lawyer.⁸³ Although some of the participants suggested an equal distribution for each plaintiff, the lead plaintiffs' lawyer, along with an attorney appointed by the court to oversee the settlement, divided the victims into three categories based on the type of abuse, with award ranges for each category.⁸⁴

Fourth, a settlement may set up a mechanism such as a claims facility or arbitration process for assigning values.⁸⁵ A two-judge review process, for example, was used to resolve the Love Canal toxic

81 See Pub. L. 107-42, 115 Stat. 230 (2001).

82 See Fairness in Asbestos Injury Resolution Act of 2003 (FAIR Act), S. 1125, 108th Cong. Interestingly, a similar approach can be used even in cases ordinarily viewed as individual rather than mass litigation, as Issacharoff and Witt demonstrate in connection with the settlement of automobile accident claims by repeat-player insurance adjusters. See Issacharoff & Witt, *supra* note 5, at 1605.

83 See Laurie Goodstein, *Archdiocese of Louisville Reaches Abuse Settlement*, N.Y. TIMES, June 11, 2003, at A18.

84 See Gregory A. Hall, *26 Object to Sex-Abuse Settlement*, COURIER-JOURNAL (Louisville), Oct. 2, 2003, at B1. The settlement plan, which was submitted for court approval, spelled out the categories of harm and the factors for determining amounts within each range:

The first includes abuse in which the victim was an adult. It involves nongenital sexual touching, exposure of genitals and a clothed abuser pressing against a clothed victim. Awards would range from \$25,333 to \$30,000.

The second class includes genital touching and masturbation, with awards ranging from \$75,750 to \$110,000.

The third includes rape, sodomy, oral sex and digital penetration, with awards ranging from \$150,750 to \$175,000.

Where plaintiffs would fall within those ranges would be determined by such factors as age, duration of the abuse and aggravating circumstances such as the involvement of drugs or alcohol in the abuse.

Id. Apparently the Louisville settlement was negotiated initially as a total amount of \$25.7 million, with the expectation that the allocation would be addressed subsequently with the court's involvement. See Peter Smith, *Archdiocese to Pay Victims \$25.7 Million for Sex Abuse*, COURIER-JOURNAL (Louisville), June 11, 2003, at A1 (reporting the \$25.7 million settlement and quoting plaintiffs' attorney William McMurry on the allocation: "The court will determine the methodology for apportioning the money to the victims. . . . It is unknown at this time what the precise methodology will be"). Thus, although the ultimate allocation plan involved a compensation matrix, the settlement has the character of a lump sum deal.

85 In *University Mechanical & Engineering Contractors, Inc. v. York International Corp.*, No. B161853, 2003 WL 22114173 (Cal. Ct. App. Sept. 12, 2003), three contractors in a construction dispute with the county were represented by a single law firm. Prior to settling with the opposing parties, the three entered into a Liquidating Agreement,

tort litigation.⁸⁶ A simple version of this type of allocation is the use of a third party such as a mediator or special master to determine settlement amounts.⁸⁷ A Boston church settlement of 542 sexual abuse claims, for example, assigned a mediator to determine individual amounts within the agreed range of \$80,000 to \$300,000, based on the type and duration of abuse.⁸⁸

Finally, deals may allocate specific amounts negotiated for each plaintiff. As a mass tort treatise puts it, “[t]he old fashioned way to arrive at settlement, where there is no congregation to sidetrack things, is for the parties to sit down and negotiate one case at a time.”⁸⁹ In the Baycol pharmaceutical litigation, Bayer agreed to negotiate settlements with individually determined amounts for each plaintiff as part of a mediation program in the multidistrict litigation.⁹⁰ In the church abuse cases, in contrast to the Louisville matrix settlement, the Diocese of Covington, Kentucky, settled with twenty-four plaintiffs represented by a single attorney for \$4.4 million; amounts were “negotiated individually based on such factors as the severity of the abuse and its impact on the victims.”⁹¹ In practice,

under which “the Contractors agreed to arbitration to apportion any recovery.” *Id.* at *2.

86 RHEINGOLD, *supra* note 69, § 14:22.

The funds in Love Canal were to be distributed after non-adversarial review by two judges of the claims. Some claims contained big questions regarding causation, for example, women claiming for varicose veins. Even before knowing the amount to be awarded, almost 1,337 named plaintiffs agreed to settle. Only nine refused.

Id.

87 *See id.* at § 14:16 (“Another method to establish case values, seemingly more fair than others, but more expensive, is to use a neutral agent to appraise cases.”).

88 *See* Fox Butterfield, *Church in Boston to Pay \$85 Million in Abuse Lawsuits*, N.Y. TIMES, Sept. 10, 2003, at A1; Katie Zezima, *People Claiming Priest Abuse Learn of Settlement Amounts*, N.Y. TIMES, Dec. 21, 2003, at 39.

89 RHEINGOLD, *supra* note 69, § 14:12. Rheingold observes that even in case-by-case negotiation, both sides use information about settlement values in other cases:

In a mass tort situation, the defendant may have devised a payoff scale that will not, of course, be disclosed to plaintiffs. Nonetheless, plaintiffs’ lawyers will share information on previous cases and rely on their general experience, reports of any jury verdicts, and any other information gleaned from payment schedules in other portions of the case.

Id.

90 *See In re Baycol Prods. Litig.*, MDL 1431 (D. Minn. Feb. 14, 2003) (Order No. 64), available at http://www.mnd.uscourts.gov/Baycol_Mdl/pretrial_minutes/baycol64.ord.pdf.

91 Peter Smith, *Covington Diocese Will Pay \$5 Million*, COURIER-JOURNAL (Louisville), Oct. 12, 2003, at A1 (quoting attorney Angela Ford, who represented all twenty-four of the settling plaintiffs).

mass settlements, even if individually negotiated, necessarily resemble matrix or formula settlements. The lawyers involved in any mature mass tort know the range of values based on past trials and settlements, and therefore cannot really think of settlement values without reference at least to an implicit matrix or formula based on strength of claim, severity of harm, age, and other factors. There is a difference, however, between a settlement in which the lawyers strike the deal by agreeing on the matrix or formula, with the idea that each plaintiff's settlement can be computed accordingly, and a settlement in which the lawyers negotiate each plaintiff's amount individually, even if the latter is based on common understandings of values.

These six categories along the allocation axis do not exhaust the possible techniques for allocating settlement funds. Undoubtedly some approaches are not encompassed by these categories, and still other settlement structures will be devised in the future, requiring rethinking or expansion of the categories. Nor should the typology be taken to imply that these allocation categories are neatly distinct from each other. A settlement may combine features of multiple allocation categories. For example, a lump sum fund may be divided based on a matrix, and the process of placing claimants into the matrix may be handled by a claims facility.⁹² In a global settlement of dozens of lawsuits over the collapse of Philadelphia's Pier 34, the families of the three women who died in the collapse each received a fixed amount of \$7.4 million, and another \$7.4 million was to be distributed to the forty injured plaintiffs by a process of binding arbitration.⁹³ The settlement thus combined a per capita allocation for one set of claimants with a claims mechanism for the remaining claimants. The categories of the typology, moreover, may apply in layers. For example, if a matrix settlement prescribes ranges rather than fixed dollar amounts, then the determination of individual amounts within the applicable ranges may be subject to individual negotiation or may use a claims mechanism such as mediation. The typology is intended to facilitate a more precise understanding and description of collective settlements, not to limit or oversimplify them.

B. Conditionality

Along the axis of conditionality, as shown on Table 2, settlements divide into several levels. The most collective are all-or-nothing deals,

⁹² See RHEINGOLD, *supra* note 69, § 14:26.

⁹³ See L. Stuart Ditzen, *Deal Reached in Pier Collapse*, PHILA. INQUIRER, Jan. 29, 2004, at A1; Shannon P. Duffy, *Philadelphia's Pier 34 Lawsuits Settle for \$29.5 Million*, LEGAL INTELLIGENCER, Jan. 30, 2004, at 1.

in which the agreement fails unless it is accepted by every plaintiff within the group. The least collective are independent settlements, in which each client may accept or reject the agreement without affecting the others. Between these two extremes are agreements with provisions that permit parties to abandon the agreement if too few parties agree to participate.

In an all-or-nothing deal, the defendant's settlement offer to each plaintiff is conditioned on acceptance by every other plaintiff in the group. Such deals, driven by defendants' desire for finality,⁹⁴ are most feasible when a single lawyer or firm represents the group of plaintiffs.⁹⁵ The *Lawyers' Manual* comments that "[l]awyers frequently seek an all-or-nothing settlement in an effort to resolve a case once and for all."⁹⁶

In the same vein but more moderate, a settlement with a walk-away provision gives the defendant the right to abandon the settlement if more than a certain percentage of plaintiffs decline the offers.⁹⁷ Despite defendants' preference for total peace and plaintiffs' lawyers' desire to resolve their clients' claims, both sides understand that successful group settlements often require a safety valve that lets

94 See *supra* text accompanying notes 23–51.

95 A group of eighty-six sexual abuse plaintiffs represented by a single lawyer, for example, settled their claims against the Archdiocese of Boston for ten million dollars, apparently on an all-or-nothing basis. See Pam Belluck, *\$10 Million Accord Backed by Plaintiffs in Boston Case*, N.Y. TIMES, Sept. 19, 2002, at A26 (reporting that all eighty-six plaintiffs had accepted the deal after spending the prior two weeks discussing their options with their lawyer); Fox Butterfield & Pam Belluck, *Boston Church Sees Settlement in Abuse Case*, N.Y. TIMES, Sept. 4, 2002, at A1 (quoting Cardinal Law's lawyer as saying that the agreement was still "tentative" because only eighty-five of the eighty-six plaintiffs had approved it).

96 Laws. Man. on Prof. Conduct (ABA/BNA) 51:375 (Feb. 3, 1999). Describing offers of aggregate settlements, the *Manual* notes the frequency of such conditional settlement deals: "The proposal typically offers an 'all or nothing' deal which will go through only if all of opposing counsel's clients in the matter, or at least a specified high percentage of clients, accept the agreement." *Id.* at 51:379.

97 Laws. Man. on Prof. Conduct (ABA/BNA) 51:379 (June 24, 1998) (describing, as an alternative to an "all or nothing" deal, a deal that proceeds only if "a specified high percentage of clients" accepts the agreement). Other names for the same type of clause include "blow" or "blowout" provisions, or "right-to-withdraw" clauses. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.922 (2004) (describing the use of "blow-out" clauses in opt-out class settlements); Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 217 (2003) (describing, in the context of class settlements, "a 'right-to-withdraw' clause: a provision in the settlement that empowers the defendant to withdraw from the deal 'if, in its judgment, a substantial and material proportion of the class members have requested exclusion'" (quoting 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 12:12, at 304 (4th ed. 2002))).

dissatisfied plaintiffs decline the deal. They also know that an all-or-nothing deal gives each plaintiff the power to extort additional payment by threatening to hold out. "Knowledgeable counsels will not paint themselves into a corner whereby all of their clients must agree to the plan. Given human nature and the variable way people see the world, it is predictable that not all clients will take a predetermined offer, no matter its seeming reasonableness."⁹⁸ An acceptance percentage of ninety percent has been used in some mass tort deals.⁹⁹ Another settlement in the Boston church abuse litigation included a requirement of eighty percent acceptance;¹⁰⁰ ultimately, only ten out of 552 plaintiffs declined the settlement.¹⁰¹

At the other extreme, settlement offers can be entirely independent, permitting each plaintiff to accept or reject the offer without affecting the deal for others. This is the form of settlement most consistent with traditional norms of client autonomy.¹⁰²

Between these points on the axis, hybrid forms of settlements combine aspects of the others. By structuring a settlement in tiers, parties can impose different conditions on subgroups. As a variation halfway between all-or-nothing and walk-away provisions, a tiered settlement agreement may permit a defendant to withdraw unless the settlement is accepted by, for example, one hundred percent of the most serious category of claimants and ninety percent of the remainder. This structure has been used in asbestos litigation, in which defendants have agreed to settle only if all or nearly all mesothelioma plaintiffs accept the deal, but with a lower threshold of acceptance for non-mesothelioma plaintiffs.¹⁰³ It was used, as well, in the settlement of 1337 claims in the Love Canal toxic tort litigation. The Love Canal settlement was tiered based on the claimants' severity of injury: "For the scheme to become binding, a set percentage of plaintiffs had to execute a release. Of those seriously injured, none could opt out. For less seriously injured, opt-outs were allowed, and overall there had to be 90% acceptance."¹⁰⁴

98 Rheingold, *supra* note 67, at 170.

99 *See id.*

100 *See* Butterfield, *supra* note 88 ("At least 80 percent of them must accept [the settlement] terms within 37 days for it to go into effect.").

101 *See* Zezima, *supra* note 88 (reporting that 542 victims had signed the agreement and only ten did not participate).

102 *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1999).

103 *See* Silver & Baker, *I Cut, You Choose*, *supra* note 1, at 1531 ("[D]efendants often condition aggregate settlements on acceptance by a very high percentage of plaintiffs with high-value claims. If more than two or three mesothelioma victims decline a defendant's offer, an entire settlement may collapse.").

104 RHEINGOLD, *supra* note 69, § 14:22.

Alternatively, parties could negotiate the opposite variation: a tiered settlement combining a walk-away portion and an independent portion. In such a settlement, some of the plaintiffs could accept or reject the deal independently, but the deal would be voidable if less than a certain percent of some subgroup accepted the settlement.¹⁰⁵

IV. THE TYPOLOGY AND THE AGGREGATE SETTLEMENT RULE

The typology described above helps define which settlement structures should trigger the disclosure and informed consent requirements of the ethics rule. By identifying those aspects of a settlement that make the deal collective, the typology also suggests what information must be disclosed to clients to obtain their informed consent. The aggregate settlement rule can be understood as a particular application of the rule on concurrent conflicts of interest. Both prevent lawyers from trading off client interests against each other without the clients' consent.¹⁰⁶ The comment to Model Rule 1.8(g) aptly describes it as a corollary to both Rule 1.7, which addresses concurrent conflicts of interest, and Rule 1.2(a), which protects client autonomy to decide whether to accept a settlement.¹⁰⁷

The top left cell of the grid represents lump sum package deals. These are the quintessential aggregate settlements and the most problematic in terms of conflicts of interest. Lump sum package deals clearly implicate the aggregate settlement rule.¹⁰⁸

The bottom right cell represents a set of settlements with plaintiff-specific amounts, not conditioned on others' acceptance. In other

105 One could imagine a further variation on tiered settlements, in which a subset of the settlements is all or nothing, and the remaining settlements are independent. For example, an asbestos defendant settling a group of cases with a lawyer might condition the deal on acceptance by all of the lawyer's mesothelioma clients, leaving the remaining clients free to accept or reject the settlement without affecting the overall deal. Whether such an all-or-nothing/independent tiered settlement structure should be considered more or less collective than a settlement with a straight percentage walk-away provision depends on the relative size and importance of the all-or-nothing subset, as well as the percentage requirement in the walk-away clause.

106 Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. CHI. LEGAL F. 581, 584 ("The purpose of the [aggregate settlement] rule appears to be to prevent attorneys from trading off the interests of clients without their informed consent."); Silver & Baker, *Aggregate Settlement Rule*, *supra* note 1, at 734; *see also* Laws. Man. on Prof. Conduct (ABA/BNA) 51:378 (June 24, 1998) (discussing the purposes of the aggregate settlement rule).

107 *See* MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 13 (2003).

108 *See* N.J. Advisory Comm. on Prof'l Ethics, Formal Op. 616 (1988); Or. State Bar Legal Ethics Comm., Formal Op. 2000-158 (2000); S.C. Bar Ethics Advisory Comm., Op. 95-02 (1995).

words, the amount for each plaintiff was negotiated individually on behalf of that client, and each client is free to accept or reject the settlement without effect on other clients. In terms of the policies underlying the aggregate settlement rule, these settlements should be considered non-aggregate even if lawyers negotiate a number of settlements at one sitting and thus conceive of the settlements as a group. Some bundles of apparently individual settlements involve implicit caps or other tradeoffs and thus should be understood as aggregate deals,¹⁰⁹ but not every bundle of individual settlements constitutes an aggregate settlement.¹¹⁰

But lump sum package deals and individual settlements do not account for the entire universe of settlements. Many settlements fall somewhere between fully collective and fully independent on the axes of allocation and conditionality, and defining the characteristics of those settlements is essential to understanding whether they should trigger the obligations of the aggregate settlement rule.

Disaggregating the attributes of collective settlements helps clarify the justifications for the rule and counsels a relatively broad application. Aside from individual, independent settlements, every other applicable combination of allocation and conditionality constitutes a form of collective settlement and should be subject to disclosure and informed consent requirements. But important differences remain, and the argument for applying the aggregate settlement rule differs depending on the type of settlement. Table 3—the most complete depiction of the typology—shows the various types of aggregate settlements based on collective conditions and collective allocations.

A. *Collective Conditions as a Basis for Defining Aggregate Settlements*

Any settlement with collective conditions should be governed by the aggregate settlement rule because collective conditions create lawyer-client and client-client conflicts of interest. In an all-or-nothing package deal, or one that gives the defendant a basic or tiered walk-away clause, the plaintiffs' lawyer faces an incentive to get the deal done by pressuring individual clients to accept the settlement.¹¹¹ This pits the lawyer's self-interest, as well as the interest of other clients,







109 See *infra* text accompanying note 135.

110 See *infra* text accompanying notes 134–38.

111 Judge Weinstein observes that despite the client's theoretical autonomy in deciding whether to participate in the settlement, lawyers wield enormous power over their clients' decisionmaking in this regard. "Theoretically, each client has the option of rejecting his share of a settlement In practice the attorney almost always can make a global settlement and convince the clients to accept it." Weinstein, *supra* note 66, at 521 n.212.

TABLE 3.

		Conditionality				Independent	
		Collective conditions					
		All-or-nothing	Tiered: all-or-nothing/ walk-away	Walk-away	Tiered: walk-away/ independent		
Allocation	Zero-sum interdependence	Lump sum	[Solid black]				[Diagonal lines]
		Total cap					[Diagonal lines]
	Linked allocation	Per capita	[Dotted]	[Dotted]	[Dotted]	[Dotted]	[Circular pattern]
		Matrix or formula	[Dotted]	[Dotted]	[Dotted]	[Dotted]	[Circular pattern]
		Claims mechanism	[Dotted]	[Dotted]	[Dotted]	[Dotted]	[Circular pattern]
	Individual amounts		[Triangle pattern]	[Triangle pattern]	[Triangle pattern]	[Triangle pattern]	[White]

-  aggregate settlement based on collective conditions and zero-sum allocation
-  aggregate settlement based on collective conditions and linked allocation
-  aggregate settlement based on zero-sum allocation
-  aggregate settlement based on linked allocation
-  aggregate settlement based on collective conditions
-  individual settlements

against the interest of a client who does not wish to accept the settlement. This conflict makes it essential for plaintiffs to retain the right to decline the settlement individually after disclosure of the overall terms of the deal. Each client should understand that the lawyer may have an eye on more than the individual client's interest.

Even in a single-client settlement, of course, a lawyer's interest may conflict with a client's interest in maximizing recovery, particularly where the cost and risk of going to trial are borne disproportionately by the lawyer. The aggregate settlement rule, however, reflects an important difference between individual and collective settlements. It may be presumed that each client understands that her lawyer has an interest in her case and an interest in obtaining a fee. Without the disclosure required by the aggregate settlement rule, however, it may not be presumed that the client understands that the lawyer has an interest in a number of *other* cases and that the lawyer's

interest in those other cases may have affected the negotiation of this client's settlement.¹¹²

All-or-nothing deals present the most extreme form of the conflict because they give the lawyer a powerful incentive to pressure every client—even those who are most dissatisfied with the settlement—to accept the agreement.¹¹³ Walk-away settlements include the safety valve of permitting some clients to decline their share of the settlement without spoiling the deal for the other clients and for their lawyer. Nonetheless, in terms of what makes a settlement meaningfully collective, there is no bright line between all-or-nothing settlements and walk-away or tiered walk-away settlements. All of them involve collective conditions and thus present the lawyer-client and client-client conflicts of interest. A settlement with a walk-away provision set at ninety-nine percent, for example, functions almost identically to an all-or-nothing settlement in that the lawyer has a strong self-interest in ensuring that virtually every client accepts the deal, and clients who favor the settlement are pitted against those who do not. The higher the proportion permitted to decline the settlement, the

112 I thank Suzanna Sherry for this insight.

113 A New Jersey attorney, representing a number of plaintiff employees in a toxic chemical case, sought ethics committee advice concerning a "contingent blanket offer" made by the defendants' lawyers. "The defendants' attorneys advised that they would not make the offer unless they could be assured that every plaintiff would accept the proposal." N.J. Advisory Comm. on Prof'l Ethics, Formal Op. 616 (1988). The inquiring attorney stated that the defense lawyers told him "that if the proposal were rejected by any more than an extremely inconsequential number of plaintiffs, they would not recommend such payment to their clients." Rather, if the agreement were not accepted by virtually all the plaintiffs, the defendants would make individual offers to certain plaintiffs but would move to dismiss about one hundred plaintiffs on statute of limitations grounds. *Id.* The lawyer communicated the offer to his clients. He described their reaction as follows:

[T]here was reluctance on the part of a fairly substantial number of plaintiffs to accept the settlement. However, when it was explained that if the settlement offer was not accepted, perhaps a hundred of their co-workers might have their claims dismissed, all but a very inconsequential number of plaintiffs accepted this settlement, and a separate settlement conference was held to resolve the claims of those few plaintiffs who had not accepted the settlement proposal.

Id. The committee simply advised the lawyer that the situation was governed by Rule 1.8(g). For purposes of the present Article, what is most interesting about Opinion 616 is how the inquirer's story demonstrates the pressure that can be brought to bear on clients to accept a settlement when the deal incorporates strong collective conditions such as an all-or-nothing provision or a walk-away clause with a high acceptance requirement.

larger the safety valve, but the meaningful line is between settlements with collective conditions and those without.¹¹⁴

It may seem that settlements with individually negotiated compensation but collective conditions—those identified in Table 3 as *aggregate settlements based on collective conditions*—should be considered non-aggregate. Indeed, some courts have expressed an understanding of the aggregate settlement rule that might be interpreted to exclude settlements with individually negotiated amounts of compensation.¹¹⁵ The policies underlying the aggregate settlement rule, however, compel a different conclusion. Conditioning the settlement on an overall acceptance rate creates a conflict of interest that necessitates disclosure and informed consent, even if compensation amounts are negotiated individually for each plaintiff.

B. Collective Allocation as a Basis for Defining Aggregate Settlements

For different reasons, any settlement with collective allocation should trigger the rule. Whereas the primary concern with collective conditions is a lawyer-client conflict of interest, the primary concern with collective allocation is a client-client conflict of interest. Individual clients may fare better or worse than others in a collectively allocated settlement.¹¹⁶ While this problem finds its most severe manifestation in lump sum deals, the concern pervades settlements

114 One could argue, with plausible symmetry, that a settlement with a walk-away provision set at one percent would function almost identically to a settlement in which each client is free to accept or reject the settlement without any collective conditions. On this argument, there is no bright line at either end of the conditionality axis; it is simply a matter of varying degrees of independence or interdependence. The flaw in this argument is that the very reason to include a walk-away provision in a multiparty settlement is for the defendant to ensure that enough plaintiffs accept the settlement to give the defendant some finality. As a practical matter, therefore, walk-away provisions' acceptance requirements always fall closer to one hundred percent than zero.

115 See, e.g., *Scrivner v. Hobson*, 854 S.W.2d 148, 152 (Tex. App. 1993) (describing an aggregate settlement as one "for which no individual negotiations on behalf of any one client were undertaken by the attorney" in the context of applying the aggregate settlement rule to an issue of attorney-client privilege); see also *Attorney Grievance Comm'n v. Engerman*, 424 A.2d 362, 368 (Md. 1981) (finding insufficient evidence to prove that an attorney made an aggregate settlement because separate payments were received for individual clients).

116 Charles Silver and Lynn Baker examine these inter-plaintiff conflicts in aggregate settlements and acknowledge their seriousness, but conclude that "lawyers representing both consensual and nonconsensual litigation groups must be allowed to make inter-plaintiff tradeoffs in the course of litigation and should also be allowed to participate in the allocation process." Silver & Baker, *I Cut, You Choose*, *supra* note 1, at 1468.

with collective allocations, whether lump sum, total cap, per capita, matrix, formula, or claims mechanism. Without disclosure of the scope and terms of the deal, clients lack sufficient information to judge the adequacy of collectively allocated settlement offers, because they lack plaintiff-specific negotiations to rely on as an indicator of value. In addition, collective allocation sometimes presents a lawyer-client conflict, particularly in situations where the lawyer stands to benefit by favoring certain clients.

As shown on Table 3, collective allocations can be divided into two categories. Both involve connected settlement amounts, but they differ in the nature of the connection. Lump sum settlements and settlements subject to a total cap involve *zero-sum interdependence*. In these types of settlements, the more one client receives, the less others receive.¹¹⁷ Other collective allocations involve *linked allocation*. In these types of deals, though not zero-sum, plaintiffs' settlement amounts are nonetheless linked to each other. In one sense, the linked allocation in per capita and matrix settlements is nearly the opposite of zero-sum interdependence. In a per capita deal, the more one client receives, the more the others receive. Similarly, in a matrix deal, a higher amount for one client means a higher amount for others, at least within the same matrix category. This contrasts with lump sum deals, in which one client's gain is another's loss. On the other hand, some matrix deals may be zero-sum in terms of overall tradeoffs, but involving conflicts between groups rather than between individuals. On either view, all types of collective allocation involve tradeoffs and thus create conflicts of interest that trigger the disclosure and consent requirements of the aggregate settlement rule.

In a per capita settlement, each plaintiff gets the same amount of compensation. It is uncommon, however, for each plaintiff's claim to be identical to the others.¹¹⁸ If some plaintiffs' claims are stronger

117 Unlike lump sum settlements, aggregate settlements with a total cap are truly zero-sum only if the cap is reached. Below the cap, there remains room to expand or reduce the total settlement amount. As a general matter, however, it is fair to characterize these settlements as involving an interdependence in which a greater settlement amount for one client diminishes the settlement position of the others.

118 Consumer antitrust and consumer fraud cases in which each consumer purchased the same good or service may present the strongest situations for per capita settlements. Microsoft recently has settled consumer antitrust class actions with identical vouchers for each consumer who purchased particular products. See Dan Christensen, *Consumers to Get \$202M in Coupons from Microsoft Class Action*, BROWARD DAILY BUS. REV., Dec. 15, 2002, at 11 (describing a Florida settlement in which "the company will issue coupons to purchasers worth \$5 to \$12 for each product that was bought during the period covered by the litigation"); Brenda Sandburg, *Microsoft Settlement Getting Another Look*, THE RECORDER, Mar. 30, 2004, at 1 (describing a Califor-

than others because of differences in harm or available defenses, then the settlement overcompensates some while undercompensating others.¹¹⁹ To make an informed decision about the acceptability of the settlement, each plaintiff needs to know that others are receiving the same deal and that the amount was not negotiated individually.

Similarly, settlements in which funds are allocated pursuant to a formula, matrix, or claims mechanism involve tradeoffs that may leave some clients better off than others. Because such settlements use collective methods of allocating funds, rather than plaintiff-by-plaintiff settlement negotiation, clients must understand the deal as a whole in order to make an informed decision on whether to accept it.¹²⁰

The most serious concern involves lump sum settlements that leave the ultimate allocation to the plaintiffs' lawyer. Such arrangements present a risk of favoritism, especially if the lawyer has a financial interest that conflicts with equitable allocation of the settlement. For example, the attorney may be entitled to the entire fee from clients who came directly to the firm, but entitled to only part of the fee from clients who were referred by other lawyers. Paul Rheingold explains the potential client-lawyer conflicts:

A law firm with a large inventory has some cases referred to it, whereby it has to give up a forwarding fee. Other cases came directly from the client. The more the settlements are paid to those who have no forwarder, the more the law firm makes. The law firm will, therefore, be more inclined to favor those clients who came directly to the law firm. Other examples of favoring one client over another include favoring a "squeaky wheel" client, favoring a relative, or favoring a friend of the family.¹²¹

nia settlement under which "Microsoft is providing up to \$1.1 billion in vouchers to 14 million Californians who indirectly purchased Microsoft software from 1995 to 2001"). In mass tort cases, while a per capita settlement for personal injuries would be difficult to justify, such a settlement might work for exposure-only claims to the extent they are permitted under applicable tort law. Even exposure-only claims, however, may involve different levels of risk for individual plaintiffs.

119 Not only do plaintiffs' claims differ in strength on the facts and law, but plaintiffs differ in their willingness to settle or proceed to trial. Silver and Baker make this point in the context of showing the similarity between class representation and allocation of settlement payments: "Every litigation group contains plaintiffs with different attitudes toward risk, with different views on the time-value of money, and with different desires for relief." Silver & Baker, *I Cut, You Choose*, *supra* note 1, at 1492.

120 Paul Rheingold describes the reaction of his clients to a settlement of 170 DES cases, in which about ninety-five percent of the clients accepted the settlement values established by a matrix of disease categories and other factors: "Important to their decision was that all women who had a similar case factually would get the same sum." RHEINGOLD, *supra* note 69, § 14:15.

121 See Rheingold, *supra* note 1, at 396-97.

A similar conflict may arise if lawyers use a sliding scale contingent fee¹²² rather than a fixed percentage. If the fees will be paid on a decreasing scale, then the lawyer has an incentive to spread settlements more evenly by reducing the allocations for plaintiffs with the strongest claims in order to keep individual settlements under certain break points.

Lump sum package deals raise such significant conflicts that they generally should be avoided. Because they present the most extreme version of both sets of conflicts—those associated with collective allocation and those associated with collective conditionality—lump sum package deals are the most problematic type of aggregate settlement.¹²³

Excessive focus on the dangers of lump sum package deals, however, can obscure the conflicts presented by lesser forms of collective allocation. Thus, in seeking settlement methods to avoid the problems of lump sum deals, lawyers must be careful not to assume that other allocation techniques get around the informed consent requirement of the aggregate settlement rule. One lawyer, teaching an ethics session at a continuing legal education program on asbestos litigation, described efforts to avoid the rule: “Many attorneys attempt to overcome the problems of Rule 1.8 through the appointment of

122 See, e.g., N.J. Ct. R. 1:21-7 (imposing a statutory contingent fee cap for tort cases on a downward sliding scale).

123 From the perspective of rational dealmaking for defendants, any settlement with a lump sum allocation is likely to include all-or-nothing conditionality, or at least a walk-away provision with a high acceptance requirement, as it is implausible that any defendant would offer a lump sum to settle an undetermined number of claims. If a defendant were to offer a lump sum to settle a block of cases, but each plaintiff were free to decline without affecting the overall deal, then the plaintiffs' lawyer might urge clients with strong claims to decline the deal and divide the funds among the remaining clients. The deal would make no sense for the defendant unless the defendant had some knowledge or control over the allocation among plaintiffs, or unless the defendant had a reasonable expectation that all or nearly all of the plaintiffs would accept the deal. Thus, if a settlement appears on the surface to be a lump sum deal in which the defendant did not participate in allocating settlement amounts, and in which claimants independently accept or reject the offer (i.e., a settlement that apparently would fit in the upper right box on Table 3: “Lump sum, Independent”), the settlement may well contain either an unstated agreement as to allocation or an understanding between counsel that all of the plaintiffs are expected to accept the deal. On the allocation axis, if the settlement includes an implicit agreement as to the allocation of settlement amounts based on injury categories or other factors, then it is better described not as a lump sum settlement, but rather as an implicit matrix settlement. On the conditionality axis, if the settlement includes an implicit understanding that the deal fails unless all of the claimants accept it, then it is better described as an all-or-nothing deal rather than independent.

special masters to set damage amounts, or through the use of elaborate consent procedures authorizing counsel to settle within a range of numbers or approving a specific number within a specified range.”¹²⁴ Paul Rheingold, a plaintiffs’ lawyer and the author of a treatise on mass torts, agrees that lawyers can avoid the requirements of the aggregate settlement rule by allowing a third party to allocate the funds:

A third way to do an aggregate settlement which has met with some approval is to shift some of the decision making to some impartial person—judge, magistrate, special master, mediator, or the like. . . . It would appear that, if properly handled, this method of using a mediator or some other impartial person will generally avoid the stricture against aggregate settlements. At least the attorney alone is not making the divisions of a round sum.¹²⁵

Although these authors correctly note that it is helpful to insulate the attorney from single-handed allocation decisions, they are wrong in thinking that the aggregate settlement rule is not implicated by settlements that use third party decisionmakers or other collective allocation mechanisms. Using a knowledgeable third party to allocate funds among multiple plaintiffs can be an excellent way to increase the likelihood of a reasonable allocation and to inspire confidence among clients that they are being treated fairly. It is also a sensible way for plaintiffs’ lawyers to take some pressure off of themselves and to reduce any concerns that the lawyers may use the settlement allocation to play favorites or to manipulate fees. It is not, however, a way to avoid the requirements of disclosure and informed consent. Delegating the allocation decisions to a third party removes the lawyer-client conflict and the risk that the lawyer will play favorites, but most of the client-client conflict remains. On Table 3, these are the settlements in the fifth row, in which allocation is achieved by a claims mechanism. Such settlements are not prohibited, but as with other settlements involving collective allocation, clients need to know the terms of the deal in order to make an informed decision about whether the settlement treats them fairly and whether they choose to accept it.

124 Richard C. Stanley, *Ethics in Asbestos: An Oxymoron?*, ALI-ABA COURSE OF STUDY: ASBESTOS LITIGATION IN THE TWENTY-FIRST CENTURY 369, 378 (2003). Stanley cautions that these approaches are not foolproof: “These methods, while widely used, have not been extensively reviewed in ethics opinions, and thus entail some degree of risk if not done properly.” *Id.*

125 Rheingold, *supra* note 67, at 170; *see also* RHEINGOLD, *supra* note 69, § 14:16 (“If the neutral can create categories of cases, set at least relative values on those cases, and slot each case into the appropriate category, the result should be acceptable both to the parties and ethical rules.”).

Rheingold has proposed another settlement technique, which he calls the "three-step grid" method,¹²⁶ for avoiding the mandates of the aggregate settlement rule.

Step one is to meet with defense counsel and work out some sort of grid for the injuries involved in the group of cases. . . . Defense and plaintiffs' counsel tentatively assign a sum of money to each pigeon-hole in the grid.

Step two is to meet with your clients, individually or in a group . . . , and to work toward an agreement as to what pigeon hole each will fall in and to show them what amount they would get—and then to get their consent to the sum. . . .

Step three is for counsel to return to the defendant and negotiate a total settlement. This depends of course upon an agreement as into which category each case fits.¹²⁷

Rheingold describes the typical negotiation process, in which plaintiffs' counsel may demand more money "on the basis that the clients were not happy with the sums in the grid,"¹²⁸ and defendants may demand a high acceptance rate. "A common approach is to set a percentage which must accept the plan before it goes into effect."¹²⁹

This three-step approach may be a highly effective way to achieve settlements, but treating it as a way to circumvent the aggregate settlement rule is both erroneous and unnecessary. Rather than providing a way to avoid the aggregate settlement rule, the three-step approach can provide a structure for complying with the rule. Examination of the three-step grid technique in light of the typology reveals both collective allocation and collective conditions. The allocation is set collectively using a matrix; settlement amounts are not negotiated plaintiff-by-plaintiff. The conditionality is established by a walk-away provision that requires a certain acceptance rate before the payment program takes effect. In other words, the three-step grid method, as described by Rheingold, fits squarely in an aggregate settlement box of the typology as shown on Table 3—matrix allocation and walk-away conditionality. The approach does not eliminate the need for informed consent, but the necessary disclosure and consent can be incorporated into the process. After the deal is negotiated in step three, plaintiffs' counsel must disclose the final terms of the deal to the clients, including the categories in the compensation matrix and the settlement amounts for each category and subcategory, as well as any

126 See Rheingold, *supra* note 1, at 403; Rheingold, *supra* note 67, at 169.

127 Rheingold, *supra* note 67, at 169–70.

128 *Id.* at 70.

129 *Id.*

collective conditions and other material provisions. Depending on how step two is handled, much of this information may already be familiar to the clients. Each client may choose whether to accept the settlement, and those who accept it must put their consent in writing.¹³⁰

Excessive focus on lump sum package deals also may be to blame for the misconception that the aggregate settlement rule requires unanimity. Indeed, this “unanimity” mindset may be what has driven commentators to suggest ways to avoid the rule, which sometimes is described misleadingly as a prohibition on aggregate settlements¹³¹ when it is better understood as a disclosure and consent requirement. Plaintiffs’ lawyer Fred Misko, for example, writes: “The consent requirement has been construed to require unanimity among all plaintiffs. Thus, in theory an aggregate settlement fails if even one client out of the entire group of plaintiffs refuses consent.”¹³² He complains that unanimity is difficult to achieve in a mass tort case: “While consulting with and gaining the unanimous consent of several plaintiffs is relatively manageable, doing the same where there are hundreds or thousands of plaintiffs in a mass tort case can be an extremely difficult and expensive undertaking.”¹³³ The aggregate settlement rule, however, does not require unanimity, at least not in the sense Misko suggests. Rather, it mandates that no party be bound by a settlement unless that party agrees to it after full disclosure. This amounts to a

130 See MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (1983). The particulars, such as the requirement of a signed writing, may vary depending on the state’s version of the aggregate settlement rule.

131 See, e.g., Rheingold, *supra* note 67, at 477 (“[W]e must come up with alternatives that at least seek to satisfy the reasons underlying the rule against aggregate settlements”); Weinstein, *supra* note 66, at 521.

There is nothing that would seem on its face more unethical (or more common) in mass litigation than for a defendant to offer an aggregate settlement of all clients’ claims and for plaintiffs’ counsel to take it.

....

Even though bulk settlements may technically violate ethical rules, judges often encourage their acceptance to terminate a large number of cases.

Id.

132 Misko, *supra* note 21, at 4; see also Silver & Baker, *I Cut, You Choose*, *supra* note 1, at 1469 (describing the rule as requiring “unanimous consent”). Because Professors Silver and Baker treat the rule largely as requiring unanimity, they devote significant attention to the risk of extortionate holdouts. See Silver & Baker, *Aggregate Settlement Rule*, *supra* note 1, at 767 (“A strategic plaintiff with little at stake in a lawsuit . . . can therefore make a credible threat to veto a desirable group deal unless paid a disproportionately large amount.”); Silver & Baker, *I Cut, You Choose*, *supra* note 1, at 1520, 1532.

133 Misko, *supra* note 21, at 4.

“unanimity” requirement only in an all-or-nothing deal. At other points along the conditionality axis, nonunanimity does not void the deal, but simply positions a particular client outside the transaction.

In sum, collective allocation methods can provide fair and efficient ways to divide settlement funds among a group of clients, but that does not render the aggregate settlement rule inapplicable. On the contrary, whenever a settlement is allocated collectively, the client still retains the right to decide whether to accept the deal. For that decision to be meaningful, the client must be informed of the basis on which the individual amount was determined and above all must understand that the amount was not negotiated individually on behalf of that client.

C. *Individual Settlements*

Not all settlements negotiated by a multi-plaintiff lawyer should be deemed aggregate settlements for purposes of the ethics rule. If the amounts are negotiated individually for each plaintiff, and if the settlements are not conditioned on others' acceptance, then the deal ordinarily should be considered non-aggregate. Lawyers may negotiate a group of such settlements at one sitting, but that does not make them aggregate.¹³⁴ Sometimes, a bundle of individual settlements is simply a bundle of individual settlements.

This definition of non-aggregate settlements presents a risk that lawyers may try to avoid the strictures of the aggregate settlement rule by presenting their deals as bundles of individual settlements. It is important, therefore, when courts and ethics authorities face questions about the propriety of particular settlements, that they look behind lawyers' descriptions of their deals. Determining whether a deal constitutes an aggregate settlement requires looking at whether the settlement amounts were established by a collective allocation such as

134 The *Lawyers' Manual* suggests that certain settlements with individual amounts may constitute aggregate settlements: "Aggregate settlement proposals sometimes specify the amounts for each client. A lawyer who receives such a proposal may not alter the sums offered to each client without telling them." *Laws. Man. on Prof. Conduct (ABA/BNA)* 51:379 (June 24, 1998) (citing *La. Ethics Op.* 94-056 (1994)). Perhaps the *Manual* assumes a defendant's offer to plaintiffs' counsel with specific amounts offered to each plaintiff. To the extent the amounts were not reached by plaintiff-specific negotiation, or are subject to collective conditions, it makes sense to treat the offer as a type of aggregate settlement. See *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 128 cmt. d(i), illus. 2 (2000). However, if the settlement specifies amounts for each client that are subject to plaintiff-specific negotiation and that are unburdened by collective conditions, the policies underlying the aggregate settlement rule do not require such a settlement to be considered aggregate.

a grid or formula rather than by individual plaintiff-specific negotiation and whether the lawyers have an explicit or implicit side deal that imposes collective conditions on the settlements.

The typology of aggregate settlements in Table 3 lays out a grid of thirty categories of settlements, based on five levels of conditionality and six types of allocation, with the understanding that hybrids and variations make the reality more complex than those thirty categories. For purposes of defining which settlements are subject to the disclosure and informed consent requirements of the aggregate settlement rule, however, the typology treats two lines as more significant than the others: the line that separates independent from collective conditionality and the line that separates individual from collective allocation. The result is to define independent, individual settlements as non-aggregate and all others as aggregate.

While the typology highlights the significance of these two lines, in reality, neither line is particularly bright. Along the axis of allocation, settlements may appear as individual amounts but more realistically be negotiated on a collective basis due to implicit caps or an implicit matrix. Even without an explicit cap on the sum of a group of settlements, lawyers may negotiate with an understanding of how much the defendant is willing to spend to settle a group of claims. The implicit threat of bankruptcy, too, can operate as an aggregate cap on settlements. Thus, the distinction between "individual amounts" and "total cap" allocation may be less meaningful than it appears. Moreover, in any mature mass litigation, even if lawyers negotiate each plaintiff's settlement individually, they conceive of settlement values in terms of ranges based on the factors relevant to valuation, even if the deal is not formally structured as a matrix or formula. Thus, the line between "individual amounts" and "matrix or formula" allocation, too, may be less meaningful than it appears.

Similar boundary problems occur along the conditionality axis. Even if a deal does not appear to contain an all-or-nothing or walk-away provision, similar conditions may be unstated. The lawyers may share an expectation that the plaintiffs' lawyer will persuade all or nearly all of the clients to accept the deal and an expectation that the lawyer will not take on new clients in the same litigation.¹³⁵ Thus, the line between independent and collective conditionality may be no more satisfying than the lines between types of allocation.

An intriguing question is whether aggregate settlements can include not only simultaneous settlements of claims, but also settle-

135 On the ethical prohibition against restricting future law practice, see *supra* note 50.

ments that occur *seriatim*.¹³⁶ The typology, as developed in this Article, works on the assumption that aggregate settlements involve the resolution of multiple claims at the same time, as part of a single broader deal. Related claims, however, may be settled over the course of time and may be subject to implicit caps or matrices. Settlement of a series of individual clients' claims thus may implicate client-client conflict concerns similar to those in simultaneous settlements. In sum, a seemingly individualized cluster of case-by-case settlements, whether simultaneous or *seriatim*, may involve allocation tradeoffs. Extending the aggregate settlement rule to facially individual settlements, however, is difficult enough even for a simultaneous group of settlements. Extending the rule even further to *seriatim* settlements would be unworkable. When collective representation leads to a series of related settlements, the sounder approach is for the lawyer to obtain informed consent at the outset to the conflicts of interest.¹³⁷

Given the fuzziness of the lines separating independent, individual settlements from collective ones, it may appear tempting to define aggregate settlements where the lines may appear brighter—at the explicit lump sum package deal.¹³⁸ But the policies of the aggregate settlement rule—both as to conflicts of interest and as to the duty to give clients the information they need in order to decide whether to accept a settlement—dictate that the rule apply to all settlements in which collective conditions or allocations create conflicts of interest or affect the information clients need in order to understand the settlement. Application of the disclosure and informed consent requirements should not be restricted to only the most obvious type of aggregate settlement.

D. *Required Disclosures*

To satisfy the informed consent requirement of the aggregate settlement rule, a lawyer must disclose “the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.”¹³⁹ The typology identifies the aspects of a group settlement that may create client-client and lawyer-client conflicts of interest and thus points to the information that clients need in order to make an informed decision.

136 I thank Allan Erbsen and Jill Hasday for raising this issue.

137 See Erichson, *supra* note 1, at 558–67.

138 This may explain why some authorities, attempting to define aggregate settlements, describe lump sum package deals. See *supra* notes 62–66 and accompanying text.

139 MODEL RULES OF PROF'L CONDUCT 1.8(g) (1999).

Suppose, for example, a lawyer represents two hundred plaintiffs with related claims against a single defendant. The lawyer negotiates with the defendant to settle the two hundred claims based on a compensation matrix, with a ninety-five percent walkaway provision, and suppose a particular client would receive \$100,000 under the deal. The deal is an aggregate settlement based on a linked allocation and a collective condition. Under the aggregate settlement rule, the lawyer may not simply tell the client that the defendant has offered \$100,000, which the lawyer believes is a fair settlement. Rather, the lawyer must explain to the client that the offer constitutes part of a broader deal. At a minimum, the lawyer's disclosure should inform the client of the terms of the matrix on which settlement amounts are based and should inform the client that the settlement is conditioned upon ninety-five percent acceptance by the group of two hundred clients. By disclosing those aspects of the deal that make it collective, and thus the aspects that involve tradeoffs among competing interests, the lawyer gives the client the information necessary for the client to make a reasoned decision about whether to accept the settlement notwithstanding the conflicts of interest inherent in an aggregate settlement.

E. Waiver and the Problem of Holdouts

The typology also may prove useful in connection with arguments over whether clients should be permitted to waive their rights under the aggregate settlement rule. As currently understood, the rule does not allow clients to agree *ex ante* to be bound by majority rule on settlement offers, for example.¹⁴⁰ Charles Silver and Lynn Baker have argued in favor of permitting *ex ante* waiver, based largely on the risk that holdouts will undermine collective action.¹⁴¹

Looking at this problem in light of the typology of aggregate settlements, the argument for waiver is strongest for settlements high on the conditionality axis, particularly all-or-nothing agreements. The argument is weaker for settlements lower on the conditionality axis, where there is little risk of extortionate holdouts. If one expects most defendants to avoid insisting upon all-or-nothing package deals, and

140 See *Hayes v. Eagle-Picher Indus.*, 513 F.2d 892 (10th Cir. 1975); see also *Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046 (D. Colo. 1999) (voiding a "steering committee" arrangement under which the committee could enter a binding settlement on behalf of all plaintiffs).

141 See Silver & Baker, *Aggregate Settlement Rule*, *supra* note 1; see also Silver & Baker, *I Cut, You Choose*, *supra* note 1, at 1500-06 (outlining the economic results flowing from conflicts and *ex ante* waivers).

plaintiffs' lawyers to steer clear of them,¹⁴² then the argument for permitting ex ante waiver largely disappears. In any particular set of cases, one does not know in advance whether the parties will strike a deal on an all-or-nothing basis. Thus, the strength of the ex ante waiver argument depends in part on the overall expected frequency of all-or-nothing aggregate settlements.

V. APPLICATION OF THE TYPOLOGY TO CLASS SETTLEMENTS

While the typology lends itself to defining the reach of the aggregate settlement rule in the non-class context, it may help describe class action settlements as well. For class actions, the typology is not needed for defining which settlements are aggregate. Every class settlement is by definition aggregate, but it is far from clear that the aggregate settlement rule itself applies to class actions. The typology adds little to deciding whether the constraints of Rule 1.8(g) apply in the class action context. The typology is useful, however, for understanding the various shapes that class settlements take and for seeing the potential conflicts of interest in those settlements.

A. *Class Actions and the Aggregate Settlement Rule*

Class actions ordinarily end in settlement. As Richard Nagareda puts it, "class actions today serve as the procedural vehicle not ultimately for adversarial litigation but for dealmaking on a mass basis."¹⁴³ Because a class settlement necessarily involves numerous class members,¹⁴⁴ and because class litigation and settlement by definition proceed on a representative rather than individual basis, the settlement of a class action represents the quintessential aggregate settlement.

The unsurprising assertion that class settlements are aggregate settlements, however, does not answer whether they are or should be governed by the disclosure and informed consent requirements of the aggregate settlement rule. Model Rule 1.8(g) and most of the state versions of the aggregate settlement rule do not expressly exclude class actions,¹⁴⁵ and occasionally the rule has been applied to class

142 See Rheingold, *supra* note 67, at 478 ("Knowledgeable counsels will not paint themselves into a corner whereby all of their clients must agree to the plan.")

143 Nagareda, *supra* note 97, at 151.

144 See FED. R. CIV. P. 23(a)(1) (requiring numerosity for class certification).

145 See MODEL CODE OF PROF'L RESPONSIBILITY DR 5-106(A) (1980); MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2002); Laws. Man. on Prof. Conduct (ABA/BNA) 51:382 (June 24, 1998) ("The ABA's ethics rules on aggregate settlements and the

action settlements.¹⁴⁶ The aggregate settlement rule, however, is better suited to addressing settlements involving multiple named parties rather than representative litigation. In a class action, settlement protections are better accorded through the mechanisms of the class action rule, including the constraints on class certification,¹⁴⁷ the requirement of court approval of settlement,¹⁴⁸ and in most money damages class actions, the right to opt out.¹⁴⁹

Some state variations sensibly exclude class actions from the operation of the rule. North Dakota's Rule 1.8(g) specifies that the rule applies "other than in class actions."¹⁵⁰ Similarly, the notes to California's aggregate settlement rule state that the rule "is not intended to apply to class action settlements subject to court approval."¹⁵¹ The revised 2003 comment to the Model Rule, as well, implies that class actions are not subject to the rule:

Lawyers representing a class of plaintiffs or defendants, or those proceeding derivatively, may not have a full client-lawyer relationship with each member of the class; nevertheless, such lawyers must comply with applicable rules regulating notification of class mem-

rules of most states contain no express exclusion that makes the rules inapplicable to complex, multiparty actions such as class actions.")

146 See *In re Green*, 354 S.E.2d 557, 558 (S.C. 1987) (finding that an attorney violated DR 5-106 by settling a case designated as a class action without giving notice to all class members); Ala. Ethics Comm. Op. 89-68 (1989) (finding that a lawyer appointed to represent a class of unknown heirs should use reasonable means to give the class adequate notice of any aggregate settlement, citing, inter alia, DR 5-106(A)); see also Carrie Menkel-Meadow, *Ethics and the Settlements of Mass Torts: When the Rules Meet the Road*, 80 CORNELL L. REV. 1159, 1189-95 (1995) (discussing the difficulty of applying conflict of interest rules, particularly the requirement of consent, to class actions).

147 See FED. R. CIV. P. 23(a)-(b).

148 See FED. R. CIV. P. 23(e). Rule 23 has long required court approval of settlement, but until recently, the rule itself gave no procedural or substantive content to how that requirement should be followed. The 2003 amendments to Rule 23(e) added a requirement that the court hold a fairness hearing to evaluate any class settlement. FED. R. CIV. P. 23(e)(1)(C). The revised rule also requires a finding that the settlement is "fair, reasonable, and adequate." *Id.*

149 See FED. R. CIV. P. 23(c)(2)(B).

150 N.D. R. PROF'L CONDUCT R. 1.8(g) (2003).

A lawyer who represents two or more clients, other than in class actions, 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 pleas, unless, after consultation, including disclosure of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement, each client consents.

Id.

151 CAL. R. PROF'L CONDUCT R. 3-310(D) drafter's notes (1992).

bers and other procedural requirements designed to ensure adequate protection of the entire class.¹⁵²

In a recent article on conflicts of interest in class actions, Geoffrey Miller shows the difficulty of applying standard conflict of interest rules, including the aggregate settlement rule, to class actions.¹⁵³ He proposes a “hypothetical consent standard” for conflicts of interest, by which a court evaluates whether “a reasonable plaintiff under a veil of ignorance as to his or her position in the class would refuse consent to the arrangement.”¹⁵⁴ The aggregate settlement rule and other conflict rules cannot simply be applied to class actions because consent operates differently in class actions. “The difficulty, from the standpoint of class action law, is that the safety valve of client consent is missing, either to authorize the representation of multiple plaintiffs or to justify the settlement. The problem is general: class action litigation is incompatible with client consent.”¹⁵⁵ In mandatory class actions, such as those under Federal Rule 23(b)(1) or (b)(2), consent is entirely absent. Even in Rule 23(b)(3) class actions, consent takes the passive form of a right to opt out, which in practice differs dramatically from opt-in or individual informed consent.¹⁵⁶ Finally, the notice and consent process for class settlements differs from the dictates of the aggregate settlement rule.¹⁵⁷

The relationship between class counsel and absent class members differs from the standard lawyer-client relationship. Because of the nature of the lawyer-client relationship in class actions, settlement no-

152 MODEL RULES OF PROF'L CONDUCT R. 1.8(g) cmt. 13 (2003).

153 See Miller, *supra* note 106, at 586–87.

154 *Id.* at 590.

155 *Id.* at 586.

156 See *id.*; see also Erichson, *supra* note 1, at 553–75 (exploring the connections between opt-out, opt-in, and informed consent).

157 See Miller, *supra* note 106, at 586–87. Miller distinguishes class settlements in terms of both notice and consent:

Similarly, once the class action has been provisionally settled, the notice of settlement (which in a settlement class may coincide with the class action notice), will rarely contain the disclosures required by the aggregate settlement rule. And even if the notice did contain the necessary disclosures, the class member's option is, again, only to reject or accept the settlement, which is not tantamount to an affirmative manifestation of consent to the settlement's terms.

Id. I disagree with the assumption that the aggregate settlement rule nearly always requires more than class settlement notice. The disclosure required for aggregate settlements, especially in mass collective representation, need not be dramatically different in content from class settlement notice. See Erichson, *supra* note 1, at 574–75. Nonetheless, Professor Miller is correct that the difference between opt-out and informed consent distinguishes class actions from the aggregate settlement rule.

tice and consent in class actions should be governed by the law of class actions rather than by the aggregate settlement rule, even if the state's version of the aggregate settlement rule does not expressly exclude class actions.

B. Class Settlement Allocation

The typology of aggregate settlements, even if it does not help define the scope of the aggregate settlement rule for class actions, may offer a helpful way to understand class settlements themselves. Class settlements, like non-class aggregate settlements, allocate settlement amounts to individual claimants in various ways. The typology, as shown on Table 3, can be used to describe class settlements in terms of allocation method. Although problematic, some class settlement allocations can best be described as lump sum.¹⁵⁸ The Agent Orange class action settled for a lump sum of \$180 million, paid into a fund administered by the court.¹⁵⁹ Other class settlements provide a fixed per capita amount for each class member. A class action over tainted blood products, for example, provided a \$100,000 payment to each class member who contracted HIV.¹⁶⁰ Consumer antitrust class actions against Microsoft in a number of states settled on a basis that provided vouchers of fixed amounts for each of certain Microsoft products that class members had purchased.¹⁶¹ Many class settlements establish a matrix,¹⁶² formula,¹⁶³ or claims mechanism¹⁶⁴ for allocating settlement payouts to class members.

158 See Matthew L. Garretson, *A Fine Line We Walk*, in 2 ATLA ANNUAL CONVENTION REFERENCE MATERIALS 1891, 1908 (2003) (describing a lawsuit brought by asbestos class members against their former lawyers, alleging that the lawyers entered into aggregate settlements of the claims and that "the attorneys exercised complete and unsupervised *discretion* with regard to settlement funds, including the amount and timing of the disbursement of the funds to their clients"); see also *In re Combustion, Inc.*, 978 F. Supp. 673 (W.D. La. 1997) (adopting a special master's report on criteria for allocating and distributing a class settlement after preliminary approval had been granted based on a lump sum amount of over twenty million dollars to settle the claims of over 10,000 class members).

159 *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 858, 863 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

160 See *Walker v. Bayer Corp.*, No. 96-C5024, 1999 U.S. Dist. LEXIS 10060, at *4 (N.D. Ill. June 23, 1999) (mem.) (referring to a \$100,000 per-plaintiff settlement for class members with HIV in litigation over contaminated blood products).

161 See *Microsoft to Settle Suit with Vouchers*, N.Y. TIMES, Nov. 25, 2003, at C6 (describing voucher settlement in the Tennessee class action); *Microsoft California Class Action Settlement*, available at <http://www.microsoftcalsettlement.com> (last visited Mar. 29, 2005) (detailing the voucher settlement in the California class action).

162 Jay Tidmarsh describes the matrix used in the 1994 *Lindsey v. Dow Corning Corp.* settlement class action in the breast implant litigation:

Just as non-class aggregate settlements do not always fit neatly into a particular box in the typology, neither do class settlements. Many settlements are best understood as hybrids. In the breast implant litigation, a 1995 settlement class action provided for a per capita payment of \$5000 to each class member, plus a matrix allocation of additional payments for certain categories of claims, plus a more complex matrix or formula for higher amounts based on particular medical criteria.¹⁶⁵ In a class action involving claims of defective heart valves, the settlement established a consultation fund with a per capita payment of \$4000, potentially adjusted downward based on the number of claimants, plus compensation for injuries based on an alternative of either a matrix payout or an arbitration mechanism.¹⁶⁶ The *Manual for Complex Litigation (Fourth)* describes a claims valuation process that can be understood as a settlement matrix administered through a claims mechanism:

Where the value of the personal injury claims varies, courts have approved settlements that establish fixed amounts for injuries that meet defined criteria and create claims facilities to administer the

The first step was to fit the claimant onto a compensation grid. The grid had two axes: a disease axis and an age axis. The disease axis contained the four disease processes for which compensation was allowed, as well as subcategories based on severity. The age axis broke age into 35 and under, 36–40, 41–45, 46–50, 51–55, and over 56. Once a person's disease and age were known, the grid provided the exact dollar amount of compensation. For instance, an under-35 woman with lupus in the highest severity category received the highest possible award: \$2 million. The same-aged woman with the least severe form of lupus received \$200,000. A 60-year-old woman with severe lupus received \$1.5 million. A 60-year-old woman with mild lupus received the lowest award in the grid: \$150,000. Decisions about classification of a claim were subject to appeal to the claims administrator, and ultimately to the district court.

JAY TIDMARSH, *MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES* 80 (1998).

163 Securities and antitrust class actions epitomize situations in which settlement amounts can be allocated by formula, based on the amount and timing of each class member's purchases and sales.

164 See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (rejecting, for other reasons, an asbestos settlement class action that established a complex claims mechanism for resolving asbestos claims against a group of defendants); see also Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2019–21 (1997) (discussing Judge Weinstein's role in creating administrative compensation schemes in class settlements).

165 See TIDMARSH, *supra* note 162, at 81–82 (describing the terms of the revised 1995 settlement by Bristol-Myers, Baxter, 3M, McGhan, and Union Carbide).

166 See *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992) (certifying the class and approving the settlement); TIDMARSH, *supra* note 162, at 36–39 (describing the settlement terms).

claims process. The parties may establish an administrative appeal process, an auditing process, or both, to review the claims of those dissatisfied with the application of the criteria.¹⁶⁷

The settlement class action addressed in *Amchem*, although rejected by the Supreme Court based on adequacy and predominance problems, among other things, represents a class settlement with a matrix for allocating amounts and a claims mechanism for making the determinations required by the matrix.¹⁶⁸

Finally, a limited fund class action settlement,¹⁶⁹ to the extent it remains viable after *Ortiz v. Fibreboard Corp.*,¹⁷⁰ can be understood as a form of lump sum settlement or a settlement with a total cap. Given the command of *Ortiz* that essentially all of the assets of the defendant be used to satisfy the plaintiffs' claims in any limited fund class action,¹⁷¹ any limited fund class settlement incorporates the sort of zero-sum interdependence represented by the "Lump Sum" and "Total Cap" rows of the typology.

C. Class Settlement Conditionality

The typology described in this Article and shown on Table 3 also helps describe collective conditions in settlement class actions and in class action settlements with settlement opt-outs. Class settlements range from those in which every class member is bound by the settlement, to those in which each class member is free to decline the settlement individually without affecting others, to those in which class members' individual decisions to decline the settlement may destroy the settlement for others.

Some class settlements—particularly settlement class actions under Federal Rule 23(b)(3) or its state equivalents—permit individual class members to opt out of the deal. In terms of the typology, such settlement opt-out rights make a class settlement resemble a non-class aggregate settlement with independent conditionality, i.e., with no collective conditions. In addition to settlement class actions under Rule 23(b)(3), which necessarily include the right to opt out,¹⁷² some

167 MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.922 (2004) (citing *In re Diet Drugs Prods. Liab. Litig.*, MDL No. 1203, 2000 WL 1222042, at *23–24, *63 (E.D. Pa. Aug. 28, 2000)).

168 See *Amchem*, 521 U.S. at 603–05.

169 See FED. R. CIV. P. 23(b)(1)(B).

170 527 U.S. 815 (1999).

171 See *id.* at 849.

172 See FED. R. CIV. P. 23(c)(2)(B).

litigation class actions may settle on a basis that permits class members to opt out after learning the settlement terms.¹⁷³

Like non-class aggregate settlements with walk-away provisions, class settlements sometimes include provisions that render the settlement void or voidable if greater than a set number or percent opt out.¹⁷⁴ The *Manual for Complex Litigation (Fourth)* describes such settlement terms:

Defendants often condition a settlement in a Rule 23(b)(3) class on having the number of opt-outs remain at or below a certain percentage or number of absent class members, commonly known as a "blow-out" clause. This is particularly significant in cases with a large number of claims that might support individual litigation.¹⁷⁵

In a California class action over stock option payments, for example, a proposed settlement failed because too many employees opted out.¹⁷⁶ Similarly, the Sulzer hip implant settlement gave the defendant a right to withdraw from the class settlement if there were too many opt-outs,¹⁷⁷ and a settlement class action in litigation over defective heart valves gave the defendant the right to walk away from the

173 See FED. R. CIV. P. 23(e)(3) (permitting courts to condition approval of settlements on giving class members another opportunity to opt out of the class action suit).

174 Richard Nagareda points out the interdependence introduced by such provisions: "A right-to-withdraw clause undoubtedly introduces a degree of interdependence to class members' claims. All will lose the benefit of the class settlement if too many choose to opt out." Nagareda, *supra* note 97, at 217. He distinguishes such provisions, however, from techniques that deter opt-outs by modifying preexisting legal rights. See *id.* at 217-18.

175 MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.922 (2004) (citing *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, MDL No. 926, (N.D. Ala. Dec. 22, 1995) (Order No. 27, approving revised settlement program and injunctions), available at <http://www.fjc.gov/BREIMLIT/ORDERS/orders.htm>; see also 4 ALBA CONTE & HERBERT B. NEWBERG, NEWBERG ON CLASS ACTIONS § 12:12 (4th ed. 2002) (outlining right-to-withdraw clauses); George Rutherglen, *Better Late than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 281-82 (1996) ("[O]ffers of settlement could be made contingent upon acceptance of the offer by a sufficient number of class members.").

176 See *Burrows v. Qualcomm, Inc.*, No. D040808, 2004 Cal. App. Unpub. LEXIS 2819, at *5 (Cal. Ct. App. Mar. 29, 2004) (discussing the class action settlement in *Sprague v. Qualcomm, Inc.*, No. 730565 (San Diego County Super. Ct. 1999), which "was not consummated because a large number of employees opted out of it"); see also Mike Drummond, *Qualcomm Settlement Could Be Torpedoed*, SAN DIEGO UNION-TRIB., Mar. 22, 2000, at C1 ("Just days after Qualcomm reached a class action settlement with more than 1,000 former employees, disgruntled litigants are threatening to scuttle the deal. Qualcomm has the right to walk away from the \$8.9 million settlement if a 'certain number' refuse to accept terms of the agreement.").

177 See Nagareda, *supra* note 97, at 217 & n.291.

settlement if there were over a certain number of front-end opt-outs from the settlement.¹⁷⁸

Some class settlements include a variation on the walk-away clause: if greater than a certain number or percent opt out in a given year, then class members are placed on a queue to opt out the following year or later. Such a provision was included in the massive asbestos settlement class action that ultimately was rejected by the Supreme Court in *Amchem*.¹⁷⁹ Each plaintiff class member was entitled to accept or reject the Rule 23(b)(3) opt-out settlement class action, but the number of opt-outs was limited to a certain percent per year, tiered by disease category. Only two percent of the mesothelioma plaintiffs, two percent of the lung cancer plaintiffs, one percent of other cancer plaintiffs, and one-half percent of plaintiffs with non-malignant conditions could opt out in a given year. If too many class members in a category chose to opt out, they would be put in a queue to opt out at a later date.¹⁸⁰ Such opt-out limits function as a Rule 23(b)(3) variant on walk-away provisions. Rather than voiding a settlement, they restrict the flow of individual lawsuits by controlling the timing of opt-outs.

Both walk-away and restricted-flow provisions address the problem of excessive opt-outs. Some class settlements, however, address what may seem like the opposite problem: too many claimants under the class settlement. These settlements include a provision that might be called *downward ratchet conditionality*. In these deals, individual class members' settlement amounts are reduced if greater than a set number of class members file claims for compensation under the settle-

178 *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992); TIDMARSH, *supra* note 162, at 37 ("Pfizer also reserved the right to withdraw from the settlement in the event that an excessive number of claimants excluded themselves from the class during the initial 'front-end' opt-out period."); *see also id.* at 95 (describing the *Walker v. Bayer Corp.* settlement class action involving HIV-tainted blood products, in which "[e]ach defendant also reserved the right to withdraw in the event that too many class members opted out").

The settlement agreement in the Agent Orange class action provided: "Any defendant shall have the right to withdraw from this Agreement if it believes in its discretion that the number of persons who have elected to be excluded from the Class is substantial." *In re Agent Orange Prod. Liab. Litig.*, 597 F. Supp. 740, 865 (E.D.N.Y. 1984), *aff'd*, 818 F.2d 145 (2d Cir. 1987). The agreement specified that if any defendant withdrew, the settlement would remain in force for the remaining defendants in accordance with their proportionate share of the settlement amount. *Id.*

179 *See, e.g., Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 605 (1997) ("A small of number class members—only a few per year—may reject the settlement . . . Those permitted to exercise this option, however, may not assert any punitive damages or any claim for increased risk of cancer.")

180 *See* TIDMARSH, *supra* note 162, at 53.

ment. The breast implant settlement class action, both in its original form in 1994 and as revised in 1995, included such a downward ratchet.¹⁸¹

Other class action settlements provide no opportunity for plaintiffs to exclude themselves from the deal. These mandatory aggregate settlements do not fit neatly along the conditionality axis of the typology, which implicitly assumes that clients decide whether to accept or reject a settlement. From one perspective, a mandatory class settlement can be understood as a type of all-or-nothing deal. If the court approves the settlement, then the deal applies to every class member; if the court does not approve the settlement, then it applies to none. This description of all-or-nothing settlements reveals that class settlements may be mandatory even if the underlying class action was not. *Mandatory aggregate settlements*, as I use the term here, include not only Rule 23(b)(1) and 23(b)(2) class settlements, but also many Rule 23(b)(3) settlements and perhaps bankruptcy reorganization packages as well. Class action settlements under Rules 23(b)(1)(A), 23(b)(1)(B), and 23(b)(2) are the most obvious mandatory aggregate settlements because such actions, collectively known as "mandatory class actions," ordinarily do not include a right to opt out.¹⁸² But mandatory aggregate settlements occur frequently under Rule 23(b)(3) as well. Whenever a Rule 23(b)(3) class action results in a settlement that is not a settlement class action, and without a settlement opt-out,¹⁸³ the settlement functions as an all-or-nothing deal in the sense described above. If the court approves the settlement, every class member is bound by it. Those who opted out at the outset of the class action would no longer be considered part of the class, but among those remaining as class members after the conclusion of the

181 Jay Tidmarsh describes the downward ratchet provision in the 1994 settlement: Since the defendants provided only so much money, it was possible that there would not be enough money to pay everyone's claims at the scheduled rate. In that event, the agreement required that the payments to eligible claimants be "ratcheted down" by reducing compensation levels according to a predetermined formula. As a general matter, the less severe diseases were ratcheted down first and most severely. Significantly, ongoing claimants were entitled to compensation only at the "ratcheted down" rate actually paid to current claimants, not at the scheduled rate.

Id. at 80; *see also id.* at 82 (describing the 1995 downward ratchet provision). Both versions of the settlement provided class members a second opt-out right in the event of a ratcheting down of settlement amounts, although these opt-out rights came with certain restrictions. *See id.* at 80-82.

182 *See* FED. R. CIV. P. 23(c)(2)(B) (limiting the opt-out requirement to class actions under Rule 23(b)(3)).

183 *See* FED. R. CIV. P. 23(e)(3).

opt-out period, an approved settlement binds everyone unless the settlement provides an additional opportunity to exit. One interesting implication of this is that it highlights the importance of the new provision in Rule 23 that permits courts to impose settlement opt-outs.¹⁸⁴ Describing Rule 23(b)(3) class settlements as a form of mandatory aggregate settlement, especially in light of the policies underlying the aggregate settlement rule, underlines the importance of such settlement opt-outs to protect client interests.

Mandatory aggregate settlements, despite their apparent similarity to all-or-nothing deals, fit poorly on the conditionality axis of the typology as shown on Table 3. From one perspective, they belong in the “All-or-nothing” column, but from another, they belong in the “Independent” column. Because of this poor fit, class actions give reason to rethink the typology’s notion of conditionality. Is conditionality about claims or releases? The answer depends on the purpose of the question. For purposes of describing settlements that defendants crave—settlements that resolve all claims—mandatory settlements are all-or-nothing. The defendant’s payment eliminates all of the claims. In this regard, the defendant obtains the same core benefit whether the mechanism for preventing further claims is *res judicata* (by class action), release (by aggregate settlement agreements), or discharge (by bankruptcy). But for purposes of understanding the lawyer-client conflict of interest created by collective conditions—specifically, the risk that lawyers will pressure clients to accept a settlement to prevent the overall deal from falling apart—mandatory settlements should be understood as independent. In a mandatory aggregate settlement, unless the deal contains a walk-away provision, no plaintiff’s compensation is jeopardized by other plaintiffs’ refusal to accept the deal.

The relevance of the lawyer-client conflict, as discussed above in the context of non-class aggregate settlements,¹⁸⁵ is to determine what disclosure should be made to clients to enable them to make reasonably informed decisions on whether to accept the settlement and thereby release their claims. That inquiry matters in non-class aggregate settlements as well as in opt-out class settlements because each plaintiff has an opportunity to decide whether to accept or reject the settlement. However, in mandatory aggregate settlements, each plaintiff is not given a choice whether to release claims in exchange for

184 Rule 23(e)(3), adopted in 2003, provides: “In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.” *Id.*

185 See *supra* text accompanying notes 111–15 *supra*.

compensation under the settlement. Thus, while the disclosure and informed consent requirements of the aggregate settlement rule apply to non-class aggregate settlements, and similar concerns bear on settlement class actions and class actions with settlement opt-outs, they do not apply the same way to the mandatory aggregate settlements that may occur in bankruptcy, in limited fund class settlements, or in post-certification Rule 23(b)(3) class action settlements without settlement opt-outs.

CONCLUSION

When plaintiffs' lawyers and defense lawyers are faced with large numbers of related claims, they handle them on an aggregate basis, regardless of class certification. Often, they settle them on an aggregate basis as well. But saying that mass litigation settles in blocks may obscure as much as it reveals. Understanding group settlements in terms of their key attributes—allocation and conditionality—gets to the heart of the distinction between individual and collective settlements. A typology drawn from these attributes permits a more rational application of ethical protections, as well as a clearer picture of the variety of settlement structures currently in use.

I do not expect that the typology is complete. Undoubtedly, there are types of aggregate settlements that have been used but of which I am unaware, and surely there are many others yet to be devised. What seems likely, however, is that the essential collective attributes of those settlements can be described in terms of allocation and conditionality. If a settlement agreement involves neither collective allocation nor collective conditions, then the strong presumption should be that it is not an aggregate settlement. If, on the contrary, the settlement terms contain either some form of collective allocation or collective conditions, then the settlement gives rise to the types of conflicts of interest that implicate the aggregate settlement rule. The typology can grow and change by the addition of new forms of collective allocation between the two poles of lump sum and individual amounts, and by the addition of new collective conditions between the two poles of all-or-nothing and independent settlements. But even in its present form, the typology should suffice to demonstrate that a wide range of settlement types implicates the concerns of collective representation, and perhaps it will prevent the mischief that comes from the misconception that "aggregate settlement" means nothing more than a lump sum package deal.