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Commentary

Tilzer, Rule 1.8(g), & The End Of Mass Tort Settlement As We Know It

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Introduction

Global settlements have become a vital tool for resolving mass tort litigation. Some might argue that, in the context of product liability litigation, mass settlement is the primary goal, not merely an alternative end. Mass settlements are often preferred by all parties because they reduce the delay in providing relief to injured plaintiffs, minimize litigation costs, and provide defendants with efficient resolution of litigation and all its adverse business consequences. Consider, for example, the recent Vioxx® settlement, which resolved more than 50,000 claims in one global settlement for $4.85 billion.[1] Without that global settlement, Vioxx® litigation likely would have spanned a decade, preventing many plaintiffs from receiving compensation during their lifetimes.

While settlements are often preferred by parties on both sides, attorneys have long viewed *aggregate* settlements as too risky or impractical for use in mass tort cases. Once Rule of Professional Conduct 1.8(g) applies, counsel must deal with added hurdles. The rule requires an attorney to disclose to each client "the existence and nature" of all claims and the "participation" of each client in the settlement.[2] The scope of these requirements has become a source of confusion, and even attorneys who comply with the broadest interpretation of the rule risk violating their confidentiality obligations by disclosing too much information.[3] As a result, parties have preferred to structure "non-aggregate" settlements to avoid the rule altogether.

The Kansas Supreme Court recently struck a serious blow to the traditional use of non-class mass action settlements. While becoming the first state supreme court to formally define "aggregate settlement" for purposes of Rule 1.8(g), the court in Tilzer v. Davis, Bethune, & Jones, LLC,[4] adopted a definition that is so broad it engulfs virtually all non-class mass-action settlement structures, thus subjecting such settlements to Rule 1.8(g).

More significantly, the Tilzer court appears to have held the informed consent contemplated by Rule 1.8(g) requires prior determination and disclosure of the

specific amount each plaintiff will receive under the settlement — a requirement that is inconsistent with a plain reading of the rule and devastatingly impractical in mass litigation today. If Tilzer carries the day, global settlements may cease to be an option for resolving mass tort actions.

Rule 1.8(g) — The Ins And Outs Of The Aggregate Settlement Rule

Every state has adopted some form of Rule 1.8(g) for avoiding conflicts of interest in settlement of cases where counsel represents more than one client. The rule seeks to minimize the potential risk that an attorney will benefit one client, or herself, at the expense of another. It states that "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims . . . unless each client gives informed consent."[5] The rule also states that informed consent requires disclosure of "the existence and nature of all the claims" and the "participation of each person in the settlement."[6] While the rule appears simple on its face, there are several important implications.

First, the rule does not forbid aggregate settlements. The simple fact that there is an "aggregate settlement rule" does not mean such settlements are in any way inappropriate or disfavored. Rather, the rule merely establishes that certain disclosures must be made before attorneys may properly enter into such settlements on behalf of the multiple clients they represent in a single action.

Next, the aggregate settlement rule governs attorney conduct only. It does not expressly govern the validity or enforceability of settlement agreements. Even the Tilzer court recognized that Rule 1.8(g) "is a rule of professional conduct defining an unethical conflict of interest for an attorney representing two or more clients in a particular action. It is not a statutory provision governing the validity of settlement agreements . . . "[7]

Finally, the rule applies only to attorneys who enter into a settlement while representing "two or more clients" in the same action. The rule would not apply where an individual plaintiff had his or her own attorney — even if multiple plaintiffs were part of the same settlement agreement. Nor would it apply in a mass action where one attorney represents a single client only, even though it would apply to other attorneys in the same action representing multiple clients. Conduct surrounding a single settlement agreement, therefore, could subject one attorney to the strictures of Rule 1.8(g), while having no application to another.

Why Should Defense Counsel Care?

Given that the rule's obligations fall mainly on plaintiffs' counsel and that the rule does not expressly govern the validity or enforceability of the underlying settlement agreement in the event of a violation, it seems obvious that this is an issue defense counsel can "sit out." *Not so*. Some courts have invalidated settlement agreements as against public policy based on plaintiffs' counsel's failure to comply.

For example, in Hayes v. Eagle-Picher Industries, Inc.,[8] the Tenth Circuit Court of Appeals held an aggregate settlement was unenforceable because the attorney failed to comply with Rule 1.8(g) when he required all of his clients to agree beforehand to a majority-vote provision regarding settlement. Similarly, the New Jersey Supreme Court has held majority-vote settlement provisions violate Rule 1.8(g) and would render any resulting aggregate settlements unenforceable.[9] In both cases, the clients challenging the settlement voted against it, and therefore, never consented at all.

One case, however, may support the contention a settlement is invalid where the client consented to settle, but where the attorney failed to make the required disclosures under Rule 1.8(g). In Quintero v. Jim Walter Homes, Inc.,[10] nearly 350 plaintiffs were represented by the same attorney (Lawyer 1). Lawyer 1 arranged to have another attorney (Lawyer 2) try the Quinteros' lawsuit, while he worked toward settlement of his entire inventory. Lawyer 2 successfully tried the Quinteros' case, and the plaintiffs were awarded approximately $78,000.00. Without knowledge of the judgment, Lawyer 1 and the Quinteros agreed to settle the same claim for approximately $13,000.00. After the district court upheld the settlement, the Texas Court of Appeals reversed, holding the settlement agreement between the Quinteros and the defendant was void and unenforceable as a matter of public policy because the manner by which Lawyer 1 obtained the Quinteros' consent to settle violated the Rule 1.8(g) disclosure obligations.[11]

Quintero's unique facts likely preclude an interpretation that it establishes a general rule for invalidating settlements for Rule 1.8(g) violations. The Texas

appeals court specifically noted in its holding the defendant in the original settlement agreement was not a "totally innocent party" given its knowledge of the favorable jury verdict when it agreed to settle the Quinteros' claim for one-sixth the amount.[12] Indeed, the particular facts of Quintero arguably made invalidating the settlement in that case a singularly appropriate remedy.

The more practical recourse for a Rule 1.8(g) violation is a malpractice action against the attorney by the former client. Some courts have also held fee forfeiture is appropriate. In Arce v. Burrow,[13] the Texas Court of Appeals held fee forfeiture is a viable remedy for a violation of Rule 1.8(g) because of the fiduciary nature of the attorney-client relationship. But as long as the effect of a rule violation on the validity and enforceability of the settlement remains unsettled, attorneys *on both sides* should be aware that some courts may be inclined to invalidate settlement agreements under appropriate circumstances.

The Tilzer Decision

In Tilzer, a disgruntled former client sued his lawyer for malpractice alleging, among other matters, the settlement reached in the underlying action was "aggregate" and his lawyer failed to comply with Rule 1.8(g). The Tilzers and others hired attorney Davis and his firm to represent them in a negligence action in Missouri against two drug companies and Robert Courtney — the infamous pharmacist who criminally diluted chemotherapy medication of allegedly hundreds of cancer patients to turn a profit.

A global settlement was reached with the pharmaceutical companies, and the Tilzers elected to opt in. According to the Kansas Supreme Court, under the terms of the agreement, a fund would be created and court-appointed special masters would evaluate each individual claim using a court-sanctioned matrix to award individual amounts from the fund. Unhappy with their award, the Tilzers challenged the settlement in the Missouri court on grounds it violated Rule 1.8(g). After the Missouri court upheld the settlement, the Tilzers filed a malpractice suit against Davis and his firm in Kansas state court.

In the malpractice action, the trial court granted partial summary judgment in favor of the defendants on the issue of whether the settlement was "aggregate." It held "because the amount that each of Davis' clients would receive under the settlement was not and could not have been known by the lawyers prior to the announcement to all of the opted in claimants . . . this could not be an aggregate settlement contemplated by the rules of professional conduct."[14] The Tilzers appealed the ruling, and the Kansas Supreme Court reversed, finding it was the very "unavailability" of this information that made the settlement aggregate and thus subject to the disclosure requirements of Rule 1.8(g).

Defining 'Aggregate Settlement'

Because state courts (until now) have neglected to define what makes a settlement "aggregate," attorneys have had little guidance in the their efforts to avoid the rule by structuring "non-aggregate" settlements. In Tilzer, the Kansas Supreme Court adopted the American Law Institute's definition of aggregate settlement, holding that a settlement of the claims of two or more clients is aggregate if the "resolution of the claims is interdependent."[15]

Resolution of the claims is interdependent if "the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of claimants," *or* "the value of each claim is not based solely on individualized case-by-case facts and negotiations."[16] This is conceptually similar to the definition proposed by Professor Howard Erichson,[17] cited by the Tilzer court and summarized in the ABA Manual on Professional Conduct, which states a settlement of two or more claims is an aggregate settlement "unless (1) a particular amount is negotiated on behalf of each individual plaintiff, and (2) each plaintiff is free to accept or reject the offer without affecting anyone else's settlement."

Those familiar with mass litigation will immediately recognize the broad reach of the Tilzer definition. In the typical mass action, one attorney or firm represents hundreds or even thousands of plaintiffs. There are many advantages to doing so, including economic efficiencies as well as enhanced negotiating power. A defendant will usually offer an amount it is willing to pay to rid itself of all or substantially all of the claims at once, or at least the inventory of those plaintiffs' attorneys with the highest volume of cases.

Obviously, the amount a defendant is willing to pay to resolve *all*, or *virtually all*, claims would not be the same as it would be to settle only some. Thus, the global

settlement offer often includes a walk-away provision for the defendant if a specified number of plaintiffs do not agree to participate. Under the Tilzer definition, any settlement that involves a lump-sum offer for resolution of all claims, or a walk-away provision for the defendant if too few plaintiffs agree, would be classified as an "aggregate settlement" and subject to Rule 1.8(g). The fact that this definition has been adopted by the ALI, ABA, legal scholars, and now one state supreme court, indicates its growing general acceptance.

Tilzer's Heightened Disclosure Requirements And The Mischief They Could Do

The Kansas Supreme Court did not stop at merely defining aggregate settlement. It went on — possibly unintentionally — to hold Rule 1.8(g) requires determination and disclosure of the amount of each client's individual settlement award before obtaining consent. The Tilzer court's primary criticism of the trial court's ruling was it concluded the settlement could not be an "aggregate settlement" because the settlement structure made it impossible for the plaintiffs' attorney to know and communicate the amount each client was to receive when he sought consent.

According to the Kansas Supreme Court, "Rather than establishing a non-aggregate settlement, the unavailability of the information . . . simply corroborated that it was an aggregate settlement and *rendered it impossible for Davis to obtain informed consent under the rule*."[18] While not expressly holding Rule 1.8(g) requires disclosure of individual settlement amounts, the court found for settlements in which individual awards will be determined at a later date, it is "impossible [for the attorney] to obtain informed consent" under Rule 1.8(g).

In other words, to avoid potential conflicts under Rule 1.8(g), plaintiffs' counsel arguably must disclose to each plaintiff the individual settlement amount before consent can be obtained — an obligation that, as a practical matter, would make global settlement of mass litigation difficult, if not impossible.

Under the Tilzer court interpretation, for example, the structure of the recent Vioxx Settlement would make compliance with Rule 1.8(g) impossible. Because the Vioxx Settlement was a $4.85 billion lump-sum offer, it would meet the interdependency requirement under Tilzer and be deemed an "aggregate settlement." In the Vioxx Settlement, each claimant had to "enroll" to be "eligible."[19] Enrollment required signing an irrevocable release of that individual's claim. Only after the enrollment process was completed could the claimant have his or her claim valued under the settlement's "Points Award Process." Thus, while claimants could likely estimate their ultimate award based on the point scale, none knew the exact amount of their award or the awards of any other plaintiffs when they consented to settle. Under Tilzer, Vioxx plaintiffs' attorneys representing multiple clients could not comply with the disclosure requirements of Rule 1.8(g).

The Better View: Sufficient Information To Make An Intelligent Decision

To the extent Tilzer holds Rule 1.8(g) requires disclosure of individual amounts to each plaintiff in a mass action before informed consent can be obtained, the Tilzer court has gone too far. The practical effect of that holding would be that global settlements in which the issue of individual awards is referred to non-interested third parties for later determination — a method attorneys often use to avoid the potential conflicts addressed under the rule — are now the *sine qua non* of its violation.

Because the individual damages each plaintiff alleges can vary greatly, many mass tort settlement agreements provide a detailed process by which a third party evaluates each case under defined and typically agreed-upon criteria to determine allocation of each client's award. Under Tilzer, this expensive and time-consuming process arguably would have to be conducted on the front end, before any client could consent to settle, and thus, before a final deal is struck. Given the defendants' dual goal of certainty and finality, Tilzer's heightened disclosure requirements would make settlement under such circumstances virtually impossible.

Even in the simplest cases where a defendant makes a lump-sum offer to settle all or virtually all cases, each client's ultimate award necessarily would be affected by the number of clients who agree to settle. This would make it impossible for each client to know her exact share until all clients have decided whether to participate and at what amount. Certain plaintiffs may also feel their claims are worth more or they have suffered a greater loss than others. Requiring disclosure of the exact award of every other plaintiff before a settlement is reached with the defendant would undoubtedly lead

to an endless cycle of offers and counter-offers that would sink any chance of obtaining a final agreement.

Indeed, the complete absence of any assurance of certainty or finality in a process that requires each plaintiff in a mass tort to agree to an individual amount before settlement can be reached takes the "global" out of resolution, interfering with both sides' settlement objectives and thwarting the settlement process.

To maintain viability of settlements as a means of resolving mass litigation, Rule 1.8(g) should be interpreted to require only the disclosure of sufficient information to permit each client to make an intelligent decision whether to settle. This view does not require even the slightest stretch of the rule's language.

Rule 1.8(g) merely requires disclosure of the "the existence and nature of all claims" and "the participation of each person in the settlement."[20] "Existence and nature of all claims" should be interpreted to mean just that: the number of total claimants eligible for the settlement, a breakdown of the nature of the various causes of action and injuries alleged and, if available, information regarding where the client's claims may fit into the overall picture and/or possible range of settlement amounts.

Similarly, the requirement to disclose the "participation of each person in the settlement," in and of itself, should place no serious burden on mass litigation settlement. Consider, for example, the Tilzer settlement. While the plaintiffs did not know each participant's exact award, each plaintiff had a clear understanding of the other plaintiffs' "participation" in the settlement. As the Kansas Supreme Court acknowledged, each client knew that every other client's "participation" would affect the overall distribution of funds; that if not enough people agreed to participate, the defendants could walk away; the minimum award each plaintiff would receive; the maximum amount the defendants would pay into the settlement fund; and how individual allocations would be decided. Surely this information is sufficient to permit a person to make an "intelligent decision" whether to settle his or her individual claim or proceed to trial.

The view that Rule 1.8(g) does not require disclosure of individual amounts before obtaining informed consent is not novel. The Maryland Court of Special Appeals has held that Rule 1.8(g) need not be applied "with such harsh force" as long as the "information provided [is] adequate to make an intelligent decision."[21] Similarly the ABA Manual on Professional Conduct notes that "[c]ommentators generally agree that in mass actions where the plaintiffs do not know each other, Rule 1.8(g) should not be construed to require disclosure of client's names as long as clients are given enough information about the settlement to make an informed decision whether to accept it."[22]

Conclusion

The Kansas Supreme Court's holding in Tilzer may have a profound effect on the future of settlements in non-class mass litigation. While becoming the first state supreme court to provide a clear definition of "aggregate settlement," the breadth of its definition encompasses virtually all mass litigation settlement structures and thus imposes disclosure requirements that are often avoided today. Furthermore, the court's apparent conclusion that Rule 1.8(g) requires the determination and disclosure of the specific settlement amount of each claimant before obtaining informed consent would make settlement in mass actions impractical, if not impossible. As applied to mass litigation, Rule 1.8(g) should be narrowly read by the courts as requiring only the disclosure of sufficient information for clients to make an informed decision whether to settle their claims.

Endnotes

1. *See* Settlement Agreement (Nov. 9, 2007), available at http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf [Vioxx Settlement].

2. ABA Model Rule 1.8(g).

3. *See In re Anonymous Member of the South Carolina Bar*, 377 S.E.2d 567, 568 (S.C. 1989) (where plaintiff did not disclose names and settlement amounts because of his "concern that this level of disclosure might violate the confidences and secrets of his clients.").

4. 204 P.3d 617 (Kan. 2009).

5. ABA Model Rule 1.8(g).

6. *Id*.

7. *Tilzer*, at 627. Specifically referring to Rule 1.8(g), the Mississippi Supreme Court recently reiterated that "[v]iolation of a Rule [of Professional Conduct] should not give rise to a cause of action" and the "fact that a Rule is a just basis for a lawyer's self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule." *See Waggoner v. Williamson*, 8 So.3d 147 n.8 (Miss. 2009).

8. 513 F.2d 892 (10th Cir. 1975).

9. *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512 (N.J. 2006).

10. 709 S.W.2d 225 (Tex. Ct. App. 1985).

11. *Id*.

12. *Id.* at 233.3.

13. 958 S.W.2d 239 (Tex. Ct. App. 1998).

14. *Tilzer*, 204 P.3d at 622 (internal quotations omitted).

15. *Id.* at Syl. ¶ 3.4.

16. *Id.* at 627 (quoting *Principles of the Law of Aggregation* § 3.16, p. 322).

17. *See* Howard M. Erichson, *A Typology of Aggregate Settlements,* NOTRE DAME L. REV. 1769, (2005).

18. *Tilzer*, 204 P.3d at 629 (emphasis added).

19. Vioxx Settlement at 4, 14-15.

20. ABA Model Rule 1.8(g).

21. *Scamardella v. Illiano*, 727 A.2d 421, 426–27 (Md. Ct. Spec. App. 1999).

22. ABA/BNA Lawyer's Manual on Professional Conduct p. 51:382 (2006). ■