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## Consent v. Closure

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# CONSENT VERSUS CLOSURE

Howard M. Erichson† & Benjamin C. Zipursky††

*The difficulty of resolving mass tort cases has frustrated claimants, defendants, courts, and counsel alike. Defendants demand closure, but class certification has proved elusive, and nonclass settlements require individual consent. Lawyers and scholars have been drawn to strategies that solve the problem of mass tort cases by empowering plaintiffs' counsel to negotiate package deals that effectively sidestep individual consent. In the massive Vioxx settlement, the parties achieved closure by including terms that made it unrealistic for any claimant to decline. The American Law Institute's Principles of the Law of Aggregate Litigation offers another solution: it proposes to permit clients to consent in advance to be bound by a settlement with a supermajority vote. This Article argues that, despite their appeal, both of these strategies are deficient. Lawyer-empowerment strategies like these render settlements illegitimate when they rely on inauthentic consent or place lawyers in the untenable position of allocating funds among bound clients. Consent, not closure, is the touchstone of legitimacy in mass tort settlements.*

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#### INTRODUCTION

On November 9, 2007, representatives of the pharmaceutical company Merck signed a \$4.85 billion agreement with law firms that represented individuals suing Merck for heart attacks and strokes allegedly caused by Merck's blockbuster painkiller, Vioxx.<sup>1</sup> Despite the headlines proclaiming the settlement<sup>2</sup>—not to mention the fact that the document was titled "SETTLEMENT AGREEMENT"—the November 2007 deal could not have been a settlement of claims. That deal was struck between Merck and law firms, not between Merck and the plaintiffs. The law firms did not have claims against Merck; their clients did.

How could Merck know that its deal with the law firms would result in an actual settlement of the plaintiffs' claims? The deal contained two controversial terms that made it practically impossible for a claimant to decline the offer. First, under the terms of the agreement, for a lawyer to participate in the deal—that is, for *any* of the lawyer's clients to avail themselves of the settlement offer—the lawyer was required to recommend the settlement to *all* of the lawyer's eligible clients. Second, if any clients decided not to participate in the settlement, the lawyer was required to withdraw from representing the nonsettling clients. A client wishing to decline the settlement, in other words, faced the prospect of losing her lawyer and finding that every other lawyer handling Vioxx claims was similarly unavailable. Under these circumstances, Merck had every reason to believe that its deal with law firms would succeed in bringing about a settlement of claims. And it did. One year later, the Claims Administrator reported that over 99.79% of the eligible claimants had enrolled.<sup>3</sup>

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<sup>1</sup> See Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto (Nov. 9, 2007) [hereinafter Vioxx Settlement Agreement], available at [www.merck.com/newsroom/vioxx/pdf/Settlement\\_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Settlement_Agreement.pdf).

<sup>2</sup> E.g., Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. TIMES, Nov. 10, 2007, at A1; Carrie Johnson, *Merck Agrees to Blanket Settlement on Vioxx*, WASH. POST, Nov. 10, 2007, at D1; Heather Won Tesoriero et al., *Merck's Tactics Largely Vindicated as It Reaches Big Vioxx Settlement*, WALL ST. J., Nov. 10, 2007, at A1; Wailin Wong, *Settlement Frees Merck of Vioxx Suits*, CHI. TRIB., Nov. 10, 2007.

<sup>3</sup> BROWNGREER PLC, CLAIMS ADMINISTRATOR COURT REPORT NO. 13, at 2 (Dec. 19, 2008), available at [www.browngreer.com/vioxxsettlement/images/pdfs/mdlreport\\_121908.pdf](http://www.browngreer.com/vioxxsettlement/images/pdfs/mdlreport_121908.pdf). By September 16, 2009, 48,507 claims had been submitted, including 30,480 claims for myocardial infarctions and 18,027 claims for ischemic strokes. BROWNGREER PLC,

Are lawyers allowed to do that? May a litigator sign a contract with her client's adversary promising to recommend the adversary's settlement offer and drop any client who says no? The lawyers who negotiated the deal found ways to hedge the language of the settlement agreement in gentler and more qualified terms, but on nearly anyone's reading, the settlement agreement pushed the envelope in legal ethics.

Yet, the settlement of the Vioxx litigation represented, in many ways, a highly satisfactory resolution of the dispute. One can understand why the parties struck the deal and why all sides seemed rather pleased with it. From Merck's perspective, a settlement of under \$5 billion seemed a reasonable price to pay; financial analysts initially predicted that Merck's liability could run as high as \$25 billion.<sup>4</sup> The settlement removed the distraction and expense of massive litigation and allowed the company to get back to business. For the tens of thousands of claimants whose heart attacks and strokes Vioxx may have caused, the settlement provided substantial compensation and a measure of satisfaction. Plaintiffs had faced a vigorous defense and had seen only mixed success. From the perspective of plaintiffs and their lawyers, a settlement of nearly \$5 billion seemed a pretty good payday. For the courts (and the taxpayers who pay for them), the settlement removed a potentially enormous drain on judicial resources. Measured by the closure it brought, the deal might be called one of the great success stories of mass tort resolution.

Achieving closure in mass tort settlements has not been easy. The standard answer for creating binding resolutions of mass disputes—the class action—rarely succeeds in mass torts. At least in mass torts involving personal-injury or wrongful-death claims, individual issues and intraclass conflicts render such classes uncertifiable. Ever since the Supreme Court rejected a pair of asbestos settlement class actions in the late 1990s,<sup>5</sup> and particularly since the fen-phen settlement class action a few years later resulted in a disastrous ballooning of costs for the defendant,<sup>6</sup> mass tort lawyers largely abandoned any hope that settlement class actions would be the key to finding closure.

Nonclass aggregate settlements have filled this void, but in this setting, closure collides with consent. Outside of class actions and bankruptcy cases, a settlement binds only those claimants who choose to accept the deal. If too many claimants decide not to participate,

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CLAIMS ADMINISTRATOR COURT REPORT NO. 21, at 4 (Sept. 17, 2009), *available at* [www.brown-greer.com/vioxxsettlement/images/pdfs/mdlreport\\_091709.pdf](http://www.brown-greer.com/vioxxsettlement/images/pdfs/mdlreport_091709.pdf).

<sup>4</sup> Alex Berenson, *Merck Is Said to Agree to Pay \$4.85 Billion for Vioxx Claims*, N.Y. TIMES, Nov. 9, 2007, at A1.

<sup>5</sup> See *infra* text accompanying notes 15–21.

<sup>6</sup> See *infra* text accompanying notes 22–32.

the defendant faces substantial ongoing liability exposure and litigation expenses. Defendants worry that the claimants with the most serious claims may be the least inclined to settle. The last thing a defendant wants to do is put serious money on the table only to find that the settlement eliminated junk claims while leaving high-value plaintiffs in the litigation pipeline. Aggregate settlements can and often do resolve large bundles of mass tort claims, but when numerous law firms each represent numerous plaintiffs, true closure is hard to find. Yet, closure is what defendants demand, and it is what plaintiffs need to offer if they are to maximize settlement value.

The Vioxx Settlement Agreement stands as the most prominent real-life solution to the intractable problem of achieving closure in a mass tort settlement without using the class action rule and without resorting to bankruptcy. It is also the most striking single illustration of what has become the standard answer to the mass tort closure problem—*lawyer empowerment*. Class action settlements, of course, are a form of lawyer empowerment: class counsel negotiates a settlement, and with the court's approval, the settlement binds all of the class members whether they like it or not. In its newer incarnation, the lawyer-empowerment idea is to empower plaintiffs' lawyers to make deals on behalf of large categories of claimants but within a privately negotiated framework rather than a class action framework. While the Vioxx settlement is currently the most striking illustration of this idea, it is hardly the only one. In a variety of mass tort cases,<sup>7</sup> and in work by leading academics,<sup>8</sup> the idea of empowering plaintiffs' lawyers to strike deals with defendants has taken hold. In the most fully developed academic treatment of the problem, Richard Nagareda urges a rethinking of mass torts as a problem of governance in which plaintiffs' lawyers negotiate peace arrangements that replace claimants' individual rights of action with compensation rights under an administrative grid.<sup>9</sup>

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<sup>7</sup> See, e.g., *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606, 613 (E.D. La. 2008); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708, 2008 WL 682174, at \*8 (D. Minn. Mar. 7, 2008); *In re Zyprexa Prods. Liab. Litig.*, 433 F. Supp. 2d 268, 271 (E.D.N.Y. 2006).

<sup>8</sup> See, e.g., Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUP. CT. REV. 183, 214–20; Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1182–90 (2009); David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1970–73 (2008); Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809, 1810–15 (2006); Richard A. Nagareda, *Embedded Aggregation in Civil Litigation*, 95 CORNELL L. REV. 1105, 1110–15 (2010); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205, 2213–16 (2008); Charles Silver, *Merging Roles: Mass Tort Lawyers as Agents and Trustees*, 31 PEPP. L. REV. 301, 304–13 (2004); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 115–18 (2010).

<sup>9</sup> RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 219–21 (2007).

In 2010, support for the lawyer-empowerment idea culminated in the release of American Law Institute's (ALI) *Principles of the Law of Aggregate Litigation*.<sup>10</sup> In an impressive document bringing together small and large principles regarding aggregate litigation, one provision has stood out as a centerpiece of the Reporters' efforts and a lightning rod for debate. Section 3.17(b) presents a legal device designed to allow plaintiffs' lawyers to bind clients to a group settlement. Although the proposal would require that clients as a group ratify the settlement by supermajority vote, it would bypass the requirement of individual consent. The bottom line is that the ALI proposal contemplates a world in which a personal-injury claimant in the mass tort setting gives up her right to decide on what settlement to accept or whether to accept a settlement at all. In this world, plaintiffs' lawyers will be able to settle massive cases, plaintiffs will receive compensation, defendants will get peace, and courts will clear their dockets. One can see why the proposal garnered enough support among plaintiffs' lawyers, defense lawyers, judges, and academics to win approval within the ALI. Lawyer empowerment in mass tort litigation looks like a win-win-win proposal.

This Article is a critique of the lawyer-empowerment idea in mass torts. Mechanisms that empower plaintiffs' lawyers to deliver closure downplay the importance of client consent. Although defendants, plaintiffs' lawyers, and judges desire a high level of closure, it is a mistake to assume that such closure is necessary. By contrast, the preservation of certain basic aspects of client consent is essential to settlement in nonclass aggregate litigation. Consent—not closure—determines legitimacy.

Part I explains the search for closure in mass tort settlements and the history that has led lawyers and academics to embrace increasingly aggressive lawyer-empowerment strategies. Part II closely studies the Vioxx litigation and the settlement agreement that emerged from it. Part II.A details the strengths and the vulnerabilities of the plaintiffs' claims, illuminating why settlement was so desirable for both sides and why it once seemed elusive. Part II.B explains how the Vioxx Settlement Agreement solved the problem posed by mass torts by giving plaintiffs' lawyers a central role in achieving closure and lays bare the features of the agreement that raise ethical concerns. Part III shows how the advance-consent proposal of the *Principles of the Law of Aggregate Litigation* aims to solve the very same predicament that the Vioxx Settlement Agreement did; however, the proposal manages only to shift the problems of lawyer overempowerment, not solve them. Part IV considers consent and closure in mass tort settlements, drawing a

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<sup>10</sup> AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010) [hereinafter PRINCIPLES].

distinction between the necessity of the former and the mere desirability of the latter.

Rather than presenting an alternative strategy for achieving comprehensive closure in mass torts, this Article questions the idealization of closure in its strongest form. Instead of buying into the insistence of plaintiffs' lawyers and defendants that near-absolute closure is the only way to resolve mass torts, this Article demands that our system evaluate more candidly what degree of closure is truly necessary. It demands that our system take seriously the notions that claims belong to claimants, that inauthentic consent accomplishes nothing, and that nonclass litigation differs from class actions despite powerful functional similarities. Before we compromise even the most minimal conceptions of client consent and attorney loyalty to achieve closure, we ought to make sure we understand what closure means and how much of it is really necessary.

## I

### SEEKING CLOSURE IN MASS TORT SETTLEMENTS

Mass litigation emerges quickly after some event triggers a defendant's vulnerability to widespread potential liability. The trigger might be a product recall, scientific study, whistleblower disclosure, sudden stock drop, mass disaster, or other liability-suggesting event. In the early stages, defendants tend to litigate vigorously, pursuing legal and factual defenses and nearly always opposing class certification or large-scale joint trials. If defendants succeed in their early cases, they may nip the problem in the bud before it expands into mass litigation. If early plaintiffs succeed, however, litigation grows exponentially as their success encourages new plaintiffs and lawyers to file lawsuits. While defendants routinely oppose class certification and trial consolidation, they frequently support pretrial coordination by multidistrict-litigation (MDL) transfer. It creates the perfect conditions for an aggregate settlement: vigorous litigation that generates information about anticipated claim values,<sup>11</sup> the prospect of countless individual trials with their attendant expense and unpredictability, and just enough coordination to provide a setting with counsel leadership and judicial encouragement for a global settlement when the defendant decides to put money on the table.

In what has become a predictable pattern, defendants fighting mass litigation reach a point when they seek to settle claims en masse. Up to that moment, the defendant may have insisted that it had no interest in settling and that it would fight each case individually at

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<sup>11</sup> See Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, 80 TEMP. L. REV. 1013, 1056–66 (2007) (describing the usefulness of multiple individual cases and jury verdicts for achieving accurate claim valuation in mass tort settlements).

trial,<sup>12</sup> but in hindsight, the early trials and procedural battles may be seen as fights over bargaining position for the all-but-inevitable mass settlement. The timing of this settlement moment varies. In some cases, such as those involving asbestos, breast implants, and fen-phen, the settlement moment occurs after defendants suffer numerous defeats at trial. In others, such as Vioxx and OxyContin, it occurs after defendants have had notable trial success. Still in others, such as Zyprexa and the state-attorney-general tobacco litigation, it occurs before any actions have reached verdicts. In each case, however, the defendant sees a risk of liability and faces the burden of lengthy and widespread litigation.

When defendants settle mass litigation, they prefer to settle wholesale. Not only do individual negotiations require greater resource expenditures, but piecemeal settlements simply do not provide sufficient peace to allow a defendant to put a dispute behind it. Worse, piecemeal settlements may draw more claimants into the litigation, as prospective plaintiffs and attorneys smell blood in the water. From the defendant's perspective, the more comprehensive the deal, the better.

During the 1990s, the preferred device for global peace in mass litigation was the settlement class action.<sup>13</sup> A defendant facing mass litigation would negotiate with plaintiffs' lawyers to design a settlement of the entire dispute on a classwide basis, and both sides would jointly seek class certification and approval of the settlement. Parties continue to use settlement class actions in securities, business, and consumer cases.<sup>14</sup> However, the Supreme Court dealt a blow to the

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<sup>12</sup> See, e.g., Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Suits*, N.Y. TIMES, Aug. 21, 2007, at A1 ("Promising to contest every case, Merck has spent more than \$1 billion over the last three years in legal fees. It has refused, at least publicly, to consider even the possibility of an overall settlement to resolve all the lawsuits at once."); Julie Fishman, *Company Fends Off OxyContin Lawsuits*, STAMFORD ADVOC., Feb. 9, 2002, at A3 (quoting Howard Udell, general counsel for Purdue Pharma, on the company's refusal to settle OxyContin cases: "They file their lawsuits in the hope that they'll get a quick settlement. If someone files a baseless claim against our company, however, they don't get a quick settlement. They get a vigorous defense at every turn."); Alison Frankel, *The Torch Is Dimming on Tort Cases*, FULTON COUNTY DAILY REP., Jan. 10, 2007 (quoting plaintiffs' lawyer W. Mark Lanier: "If Vioxx predated [fen-phen], you would see Merck more willing to settle instead of trying every case. Instead, they're following the tobacco model: Try every case, take no prisoners." (alteration in original)); *Litigation Update*, DRUG INDUSTRY DAILY, Dec. 8, 2003, at 1 ("[Purdue Pharma] said it has not settled or suffered an adverse judgment in any OxyContin case. Purdue still faces 325 pending lawsuits but has no intention of paying anything to settle any of them, company spokesman Tim Bannon told [Drug Industry Daily]." (citation omitted)).

<sup>13</sup> See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 1995-2001 (1999).

<sup>14</sup> See, e.g., *Thomas v. Blue Cross & Blue Shield Ass'n*, 594 F.3d 823, 832 (11th Cir. 2010) (class action against health insurance company); *In re Ins. Brokerage Antitrust Litig.*,



use of settlement class actions in mass tort litigation with its decisions in *Amchem Products, Inc. v. Windsor*<sup>15</sup> and *Ortiz v. Fibreboard Corp.*<sup>16</sup>

*Amchem* involved a proposed global settlement of asbestos liability for the Center for Claims Resolution, a consortium of defendants. The parties negotiated a massive settlement with a detailed administrative mechanism for compensating asbestos victims who contracted asbestosis, pleural thickening, mesothelioma, lung cancer, and certain other cancers. After an extensive fairness hearing, the district court approved the settlement. The Supreme Court held that approval under Federal Rule of Civil Procedure 23(e)—that is, a determination that a settlement is fair, reasonable, and adequate—cannot, in itself, justify the approval of a settlement class action. Rather, a settlement class action also must meet the requirements of Rule 23(a) and (b) for class certification.<sup>17</sup> The asbestos claims in the *Amchem* settlement, the Court said, involved too many conflicts of interest and individualized issues to meet the requirements of adequate representation and common-issue predominance.<sup>18</sup> Because most mass tort personal-injury and wrongful-death claims present too many individual issues for class certification, the Court's holding in *Amchem* impedes parties' efforts to use Rule 23 to accomplish global peace in mass torts. Without "structural assurance of fair and adequate representation,"<sup>19</sup> the Court held, the class action device could not be used to bind claimants to a mass settlement.

Two years later, in *Ortiz*, the Court rejected another asbestos settlement class action. Instead of using Rule 23(b)(3) as the parties did in *Amchem*, the parties in *Ortiz* had negotiated a settlement class action under Rule 23(b)(1)(B) on a limited-fund theory. They contended that the settlement class action was warranted because Fibreboard Corporation's assets were insufficient to meet the claims of asbestos plaintiffs.<sup>20</sup> The Court, taking a narrow view of permissible limited-fund class actions under Rule 23, reiterated its insistence on structural assurance of fairness.<sup>21</sup>

After *Amchem* and *Ortiz*, lawyers understood that Rule 23 was not an easy avenue for global settlements, but they did not give up on the possibility of mass tort settlement class actions. With more careful attention to intraclass conflicts and greater structural assurance of fair-

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579 F.3d 241, 264–70 (3d Cir. 2009) (class action against insurance brokers); *In re SFBC Int'l Inc.*, 310 F. App'x 556, 558 (3d Cir. 2009) (class action for securities fraud).

<sup>15</sup> 521 U.S. 591 (1997).

<sup>16</sup> 527 U.S. 815 (1999).

<sup>17</sup> *Amchem*, 521 U.S. at 621–22.

<sup>18</sup> *Id.* at 622–28.

<sup>19</sup> *Id.* at 627.

<sup>20</sup> *Ortiz*, 527 U.S. at 824–28.

<sup>21</sup> *See id.* at 856.

ness, nothing in those decisions suggested that a court could not certify an appropriate mass tort settlement class action.

Therefore, when in 1999 American Home Products (later Wyeth) sought a global settlement of the fen-phen litigation, it negotiated a nationwide settlement class action. To assure fairness, particularly with regard to the future claims that played so prominent a role in both *Amchem* and *Ortiz*, the fen-phen settlement steered clear of onerous requirements on claimants. It also included a series of intermediate and back-end opt-out rights for those who were diagnosed later with relevant injuries.<sup>22</sup> At the time, the fen-phen settlement class action—particularly its multiple opt-out phases dealing with future injuries—appeared to be a brilliant solution to the *Amchem* problem, a sophisticated way for a mass tort defendant to move toward global peace while providing sufficient assurance of fairness to claimants.<sup>23</sup> The district court painstakingly distinguished *Amchem* and *Ortiz*<sup>24</sup> and found that the fen-phen settlement “provides for structural protections which make it fair to bind absent class members here.”<sup>25</sup> If claimants’ injuries became worse, “they [would be] protected by the settlement in that they may ‘step up’ to higher amounts of compensation on the matrices as their level of disease progresses.”<sup>26</sup> In addition, “unlike *Amchem*, there are no case flow maximums designed to limit defendants’ payments.”<sup>27</sup> Above all, the court emphasized that claimants would have plenty of chances to opt out: “Most importantly, unlike *Amchem*, where only a small number of class members per year had the opportunity to reject the settlement and pursue their claims in court, the instant class has several meaningful opt out rights accompanied by protections against statute of limitations and claims splitting defenses.”<sup>28</sup>

If the test for success was the ability to secure judicial approval notwithstanding the precedents of *Amchem* and *Ortiz*, the nationwide fen-phen settlement succeeded admirably. The district court certified the class and approved the settlement,<sup>29</sup> and the United States Court of Appeals for the Third Circuit enforced it by enjoining a competing

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<sup>22</sup> See *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, Nos. 1203, 99-20593, 2000 WL 1222042, at \*49 (E.D. Pa. Aug. 28, 2000).

<sup>23</sup> See Lawrence T. Hoyle, Jr. & Edward W. Madeira, Jr., “*The Philadelphia Story*”: *Mass Torts in the City of Brotherly Love*, 2 *SEDONA CONF. J.* 119, 146–50 (2001); Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 *HARV. L. REV.* 747, 800–04 (2002).

<sup>24</sup> See *In re Diet Drugs*, 2000 WL 1222042, at \*45–50.

<sup>25</sup> *Id.* at \*45.

<sup>26</sup> *Id.* at \*49.

<sup>27</sup> *Id.*

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

<sup>29</sup> *Id.* at \*69–72.

state court proceeding.<sup>30</sup> If the point of the settlement was peace and predictability, however, the nationwide fen-phen settlement class action was a failure. The number of claimants far exceeded original expectations, as did the number of opt-outs.<sup>31</sup> Rather than bringing the fen-phen litigation to a conclusion, the settlement class action was the opening salvo in a long-running resolution process. The settlement class action was amended multiple times as Wyeth sought to draw additional claimants into the class. Meanwhile, Wyeth pursued expensive firm-by-firm settlements with law firms that represented plaintiffs who had opted out of the class settlement. By most accounts, the nationwide fen-phen settlement class action turned out to be a disaster for Wyeth.<sup>32</sup>

*Amchem* imposed constraints that made it impossible for parties to settle mass torts on a classwide basis unless they bent over backward to ensure that all claimants were treated fairly in light of intraclass conflicts. Fen-phen showed that when a settlement class action provided sufficient assurances of fairness to garner post-*Amchem* approval, it exposed the defendant to the risk of being overwhelmed by class claims as well as by opt-outs pursuing individual claims.

This background explains the state of affairs as lawyers considered ways to resolve the burgeoning Vioxx litigation and as the ALI weighed ideas for legal reform. Merck, looking to settle Vioxx claims, desired above all to avoid getting “fen-phened,”<sup>33</sup> and the Reporters for the *Principles of the Law of Aggregate Litigation* were looking for a way to allow plaintiffs’ lawyers to offer comprehensive peace in mass tort settlement negotiations without relying on elusive class certification.

## II THE VIOXX SETTLEMENT

For the past twenty years, mass tort defendants have searched doggedly for ways to obtain closure. Outside of bankruptcy, most of these attempts failed in one way or another—until Vioxx.

The difference between the end results of the fen-phen and Vioxx national settlements is striking. The Rule 23(b)(3) settlement class action in the fen-phen litigation turned out to be far *less* comprehensive than the nonclass settlement in Vioxx. In light of the considerable efforts to use Rule 23 as the means to accomplish global

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<sup>30</sup> *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 282 F.3d 220, 242 (3d Cir. 2002).

<sup>31</sup> See Alison Frankel, *Still Ticking*, AM. LAW., Mar. 2005, at 92, 96.

<sup>32</sup> See McGovern, *supra* note 8, at 1813–15.

<sup>33</sup> See Howard Erichson, *Public and Private Law Perspectives: Transcript of Professor Howard Erichson*, 37 SW. U. L. REV. 665, 668 (2008) (describing the arc from asbestos to fen-phen to Vioxx as a series of overreactions); Issacharoff, *supra* note 8, at 217 (describing the pressing circumstances that drove the unusual features of the Vioxx settlement).

resolutions,<sup>34</sup> how ironic that settling without class certification should prove a surer road to peace? Obtaining closure without Rule 23 or bankruptcy depends on two things: knowing who the claimants are and making sure the settlement binds them. The driving strategy of settlement class actions such as *Amchem*, *Ortiz*, and *In re Diet Drugs* is to get comprehensive peace by using class certification and settlement approval to bind unknown claimants. But settlement class actions are incomplete because of opt-outs, and if the class action includes back-end opt-outs to provide assurances of fairness after *Amchem*—the approach taken in the fen-phen settlement class action—then long-term opt-out numbers may be substantial.

The lawyers in *Vioxx* understood that once the identity of the claimants was known, a nonclass aggregate settlement could provide as comprehensive a resolution as a class action, but only if those claimants consented to be bound by the settlement. In the absence of *Vioxx*-like terms, however, most nonclass aggregate settlements have not accomplished truly comprehensive resolutions. In the *OxyContin* litigation, despite a wholesale settlement of tort claims<sup>35</sup> and a plea deal with federal prosecutors,<sup>36</sup> Purdue Pharma continued to face individual plaintiffs' claims.<sup>37</sup> In the *Zyprexa* litigation, Eli Lilly reached a deal in 2006 to pay hundreds of millions of dollars to settle about 8,000 claims in the federal multidistrict litigation<sup>38</sup> and several months later paid hundreds of millions more to settle 18,000 claims that were not included in the first deal.<sup>39</sup> Johnson & Johnson settled

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<sup>34</sup> See, e.g., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate, Civil, and Criminal Procedure, 167 F.R.D. 523, 554 (1996) (proposing to amend Rule 23 to create a new category for settlement class actions that would permit class certification where "the parties to a settlement request certification under subdivision (b)(3) for purposes of settlement, even though the requirements of subdivision (b)(3) might not be met for purposes of trial"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 821 (1999) (attempting to resolve asbestos liability by a Rule 23(b)(1)(B) settlement class action); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1997) (attempting to resolve asbestos liability by a Rule 23(b)(3) settlement class action); PRINCIPLES, *supra* note 10, § 3.06 (proposing that settlement class actions be certifiable even if they could not be certified for litigation); JAY TIDMARSH, FED. JUDICIAL CTR., MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES (1998) (describing five large-scale attempts to use Rule 23 to achieve negotiated global resolutions of mass torts).

<sup>35</sup> See Frank Donnelly, *Oxycontin Maker Settles Suit for \$75M*, STATEN ISLAND ADVANCE, Jan. 27, 2007, at A1; Jim Zebora, *Purdue Settles 90% of Pending OxyContin Cases*, STAMFORD ADVOC., Jan. 27, 2007.

<sup>36</sup> See Barry Meier, *Narcotic Maker Guilty of Deceit over Marketing*, N.Y. TIMES, May 11, 2007, at A1.

<sup>37</sup> See *id.*

<sup>38</sup> See Jeff Swiatek, *Judge Approves \$700 Million Zyprexa Deal*, INDIANAPOLIS STAR, Sept. 28, 2006.

<sup>39</sup> See Joe Schneider & Margaret Cronin Fisk, *Eli Lilly Settles Zyprexa Suits with 18,000 Patients (Update12)*, BLOOMBERG (Jan. 4, 2007, 5:55 PM), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aaePGELtBkx4>.

Ortho Evra claims on a piecemeal basis.<sup>40</sup> By striking a deal for a nonclass settlement but including clauses for mandatory recommendation and mandatory withdrawal, Merck avoided class certification hurdles while achieving a high degree of finality.

#### A. Products Liability and the Vioxx Litigation

To understand the Vioxx settlement, we need an understanding of the dispute that brought the parties to court.<sup>41</sup> In 2000, Merck obtained data from a study called VIGOR, which indicated that the risk of heart attack in people taking the painkiller Vioxx was almost five times greater than those taking another drug, Naproxen.<sup>42</sup> Years before receiving the VIGOR data, Merck scientists had wondered, with real concern, whether the very features of Vioxx that made it such an effective painkiller might also lead it to cause more blood clotting.<sup>43</sup> The VIGOR data came from a study that also indicated how effective and relatively safe Vioxx was for people needing pain relievers that did not cause gastrointestinal bleeding. *The New England Journal of Medicine* published both the good and bad aspects of the study.<sup>44</sup> To be sure, this disclosure—and its disclosure to the FDA—is appropriately important to Merck's defense of its conduct. However, the remainder of Merck's conduct looks less impressive. Instead of undertaking more studies of this risk, alerting prescribing physicians, or undertaking to give stern warnings, Merck fought the FDA's efforts to get a warning for years and marketed the drug with increasing aggressiveness to a wide range of doctors and patients, deliberately un-

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<sup>40</sup> See David Voreacos, *J&J Paid \$68 Million to Settle Birth-Control Cases (Update3)*, BLOOMBERG (Oct. 10, 2008, 4:24 PM), [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a9\]OdhmcZq9.g](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=a9]OdhmcZq9.g).

<sup>41</sup> In sketching out the facts, we will rely principally on the recitation of the facts in *McDarby v. Merck & Co.*, 949 A.2d 223 (N.J. Super. Ct. App. Div. 2008). That appellate court, of course, was not reciting the facts as it found them but rather was reciting the "facts that could reasonably have been considered by the jury in support of its verdict." *Id.* at 229. Documents and journal publications amply demonstrate many of the primary facts that the court recites in its opinion, and the *primary facts* that the court describes as the basis of the jury determination are consistent with the facts as found by the REPORT OF THE HONORABLE JOHN S. MARTIN, JR. TO THE SPECIAL COMMITTEE OF THE BOARD OF DIRECTORS OF MERCK & CO., INC. CONCERNING THE CONDUCT OF SENIOR MANAGEMENT IN THE DEVELOPMENT AND MARKETING OF VIOXX (2006), available at [www.merck.com/newsroom/vioxx/martin\\_report.html](http://www.merck.com/newsroom/vioxx/martin_report.html). For another helpful summary, see Margaret Gilhooley, *Vioxx's History and the Need for Better Procedures and Better Testing*, 37 SETON HALL L. REV. 941, 944–54 (2007) (providing the factual history of Vioxx testing and regulation).

<sup>42</sup> *FDA, Merck, and Vioxx: Putting Patient Safety First?: Hearing Before the S. Comm. on Fin.*, 108th Cong. 18 (2004) [hereinafter *Hearing*] (statement of Bruce M. Psaty, M.D., Professor, Medicine and Epidemiology, University of Washington, Cardiovascular Health Research Unit).

<sup>43</sup> See *McDarby*, 949 A.2d at 230–32 (noting that as early as 1998, Merck scientists began to collect data systematically on all cardiovascular events in all clinical trials for Vioxx).

<sup>44</sup> Claire Bombardier et al., *Comparison of Upper Gastrointestinal Toxicity of Rofecoxib and Naproxen in Patients with Rheumatoid Arthritis*, 343 NEW ENG. J. MED. 1520 (2000).

derplaying the grounds for concern about the drug's safety.<sup>45</sup> It took this position as long as it could until, in September of 2004, another study that aimed to show the benefits of Vioxx for digestive diseases (APPROVe) produced data that Vioxx multiplied the risk of heart disease as against those taking a placebo. Following that study, Merck pulled Vioxx from the market and abandoned its earlier position.<sup>46</sup>

An onslaught of scientists, physicians, public-health advocates, and politicians criticized Merck for holding its position for four years rather than searching for the truth about these drug risks.<sup>47</sup> Critics argued that millions of people who had no need for this drug nevertheless took it; one FDA official—Dr. David Graham—made statements before Congress asserting that tens of thousands of people probably died because of taking Vioxx.<sup>48</sup> Moreover, unlike many complicated toxic-tort cases, some of the data on causation in these particular cases are strong enough to pass tort law's peculiarly high standards.<sup>49</sup>

The evidence and trial outcomes in the Vioxx litigation suggest that at least some of the claims had significant merit. A body of evidence suggests that Merck knew or should have known of a substantial cardiovascular risk; that it failed to disclose this risk to prescribing physicians; that some patients would not have taken Vioxx had Merck communicated that information to them or their physicians; and that some of these plaintiffs died or were seriously injured because of taking Vioxx. Conversely, the drug did not injure millions of people who took it, and many of the plaintiffs who suffered heart attacks or strokes would have suffered them apart from taking Vioxx.

Large federal multidistrict litigation took place in the Eastern District of Louisiana before District Judge Eldon Fallon.<sup>50</sup> Even larger

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<sup>45</sup> See *McDarby*, 949 A.2d at 239–45 (noting that Merck fought to have the VIGOR results posted in the label's "precautions" section rather than the more prominent "warnings" section and instructed sales representatives to "dodge" obstacles regarding Vioxx's medical risks).

<sup>46</sup> See Gilhooley, *supra* note 41, at 950 (explaining that Merck removed Vioxx from the market after the APPROVe study because it believed that the study definitively proved that Vioxx posed a higher risk of cardiovascular events).

<sup>47</sup> See, e.g., Peter Jüni et al., *Risk of Cardiovascular Events and Rofecoxib: Cumulative Meta-analysis*, 364 LANCET 2021 (2004) (exploring the availability of evidence on the adverse effects of rofecoxib prior to September 2004).

<sup>48</sup> *Hearing*, *supra* note 42, at 14 (statement of David J. Graham, M.D., M.P.H., Associate Director for Science, Office of Drug Safety, Food and Drug Administration) (estimating that between 88,000 and 139,000 excess cases of heart attack or sudden cardiac death were caused by Vioxx, and that 30%–40% of these patients probably died).

<sup>49</sup> For example, Jüni et al., *supra* note 47, at 2021, indicate a relative risk of 2.3 for some groups. Tort law sometimes deems a relative risk of greater than 2.0 essential. See *In re Hanford Nuclear Reservation Litig.*, 292 F.3d 1124, 1137 (9th Cir. 2002). But see *Response to Article by Jüni et al. Published in The Lancet on Nov. 5, MERCK*, [www.merckfrosst.ca/assets/en/pdf/products/vioxx\\_withdrawal/lancet.pdf](http://www.merckfrosst.ca/assets/en/pdf/products/vioxx_withdrawal/lancet.pdf) (last visited Nov. 13, 2010).

<sup>50</sup> *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450 (E.D. La. 2006).

statewide consolidated litigation took place before Judge Carol Higbee in New Jersey,<sup>51</sup> and sizable coordinated proceedings took place before Judge Victoria Chaney in California<sup>52</sup> and Judge Randy Wilson in Texas.<sup>53</sup> Litigation of many claims also occurred elsewhere.

The results in the cases that went to trial set the stage for the mass settlement. Consider how those results informed the lawyers' thinking about the risks of the litigation. Merck prevailed at trial against the tort claims of eleven out of eighteen plaintiffs, and in two additional cases (which were consolidated before the court), Merck was granted a mistrial.<sup>54</sup> Of the five remaining cases where courts initially granted verdicts for the plaintiffs, in two of these cases, the appellate courts completely vacated the plaintiffs' verdicts, and in one case, the appellate court reversed the trial court's punitive damages award.<sup>55</sup> In yet another case, the court drastically reduced the compensatory damages award.<sup>56</sup> In only one case (where the plaintiff went through a second trial) did a plaintiff not have his verdict vacated or trimmed on appeal.<sup>57</sup> Looking toward the possibility of settlement, both Merck and the plaintiffs' lawyers undoubtedly knew what the win-loss record suggested: a plaintiff's chance of winning a verdict at trial was less than one in three, and the chances after appeal were closer to one in six. On the other hand, both sides also knew that juries awarded punitive damages in all five of Merck's losses.<sup>58</sup> Moreover, the compensatory damages for pain and suffering were high in all five cases.<sup>59</sup> In other words, five juries found enthusiastically for plaintiffs.

Two legal developments rendered the parties particularly open to settlement. First, on the day before the announcement of the settlement agreement, Judge Fallon published a decision ruling that the statute of limitations had run on unfiled Vioxx claims, except those claims that might have been filed in a few relatively unpopulated jurisdictions.<sup>60</sup> This, along with threats to start trying more cases, rendered Merck more willing to relax its antisettlement stance because the ruling reduced the probability that settlement would prompt new

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<sup>51</sup> See *In re Vioxx Litig.*, 2006 WL 2950622, at \*1 (N.J. Super. Ct. Oct. 2, 2006).

<sup>52</sup> See *In re Vioxx Consol. Class Action*, No. JCCP 4247, 2009 WL 1283129 (Cal. Super. Ct. Apr. 30, 2009).

<sup>53</sup> See *Ledbetter v. Merck & Co.*, Nos. 2005-59499, 2005-58543, 2007 WL 1181991 (Dist. Ct. Tex. Apr. 19, 2007).

<sup>54</sup> See Alexandra D. Lahav, *Rediscovering the Social Value of Jurisdictional Redundancy*, 82 TUL. L. REV. 2369, 2394 nn.106-07 (2008) (collecting Vioxx trial outcomes); *Mistrial Granted in Vioxx Case*, L.A. TIMES, Jan. 19, 2007 (noting a mistrial of the consolidated case).

<sup>55</sup> See Lahav, *supra* note 54, at 2394 n.106.

<sup>56</sup> See *id.*

<sup>57</sup> See *id.*

<sup>58</sup> See *id.*

<sup>59</sup> See *id.*

<sup>60</sup> See *In re Vioxx Prods. Liab. Litig.*, 522 F. Supp. 2d 799, 801-02 (E.D. La. 2007).

filings. Second, the Supreme Court was about to grant certiorari on whether FDA approval preempted state products-liability claims for failure to warn,<sup>61</sup> and both the FDA and the Bush administration supported preemption.<sup>62</sup> Many plaintiffs' lawyers worried—incorrectly, as it turned out<sup>63</sup>—that the Court was on the verge of adopting a strong preemption position that would leave Vioxx plaintiffs empty handed if they failed to achieve a settlement.<sup>64</sup>

## B. Legal Ethics and the Vioxx Settlement

### 1. *The Settlement Agreement*

Unlike many mass tort settlement agreements, the Vioxx agreement was made public,<sup>65</sup> so the full details of its terms are available. Merck agreed to put \$4.85 billion into a compensation fund—\$4 billion for heart attack victims and \$850 million for stroke victims. The deal included a walkaway clause that conditioned the settlement on the participation of 85% of the eligible claimants in each of several categories. To be eligible for the fund, Vioxx plaintiffs had to enroll in the program, which required putting a release in escrow. Each claimant had to demonstrate that he or she (or the victim in a wrongful-death suit) had a heart attack or an ischemic stroke and ingested a certain amount of Vioxx over a certain period. Additionally, a claimant had to establish a temporal nexus between ingestion and injury. A “gate committee” composed of three Merck representatives and three plaintiff representatives determined eligibility.

Once claimants were eligible, a claims administrator would score them. The more serious the heart attack or stroke was, the more points the claimant received. The longer the claimants or victims took Vioxx, the more points they received. Finally, claimants or victims who were older and had greater risk factors, such as weight, family history, and diabetes, received fewer points. The total points of all claimants for heart disease and stroke, divided into the total settlement pot, would determine the dollar value per point. Each eligible claimant would receive an award equal to the number of the claimant's points multiplied by the value of each point. This calculation

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<sup>61</sup> See *Wyeth v. Levine*, 552 U.S. 1161 (2008) (granting certiorari on the issue of preemption).

<sup>62</sup> See Brief for the United States as Amicus Curiae Supporting Petitioner, *Wyeth v. Levine*, 129 S. Ct. 1187 (2009) (No. 06-1249), 2008 WL 2308908.

<sup>63</sup> See *Wyeth*, 129 S. Ct. at 1204.

<sup>64</sup> See, e.g., Ed Silverman, *Mark Lanier Defends the Vioxx Settlement*, PHARMALOT (Jan. 7, 2008, 7:05 PM), [www.pharmalot.com/2008/01/mark-lanier-defends-the-vioxx-settlement](http://www.pharmalot.com/2008/01/mark-lanier-defends-the-vioxx-settlement).

<sup>65</sup> Merck, the Plaintiffs' Steering Committee, and the Claims Administrator posted the settlement agreement. See Vioxx Settlement Agreement, *supra* note 1; *Vioxx Settlement Documents*, OFFICIAL VIOXX SETTLEMENT, [www.officialvioxxsettlement.com/documents](http://www.officialvioxxsettlement.com/documents) (last visited Nov. 13, 2010).



structure meant that claimants had to decide whether to enroll before knowing what their payments would be. Thus, the settlement payments were doubly contingent: they were contingent on how many points the claims administrator granted *and* on how many dollars each point was worth.<sup>66</sup>

The indeterminacy that each plaintiff faced was exacerbated (or made easier, depending on one's view) by the role that each lawyer would play. All lawyers who signed the agreement or who enrolled anyone in the program were obligated to recommend enrollment to each and every client. Moreover, if the client did not find the recommendation persuasive, the lawyer had something else to make the decision easier: if the client did not accept the offer, the lawyer would no longer represent the client. The option of not settling was remarkably unattractive.

These provisions—the mandatory-recommendation provision and the mandatory-withdrawal provision—were the two most controversial aspects of the Vioxx settlement. The mandatory-recommendation provision took the form of an affirmation by participating lawyers:

By submitting an Enrollment Form, the Enrolling Counsel affirms that he has recommended, or . . . will recommend by no later than [the deadline], to 100% of the Eligible Claimants represented by such Enrolling Counsel that such Eligible Claimants enroll in the Program.<sup>67</sup>

The mandatory-withdrawal provision, notwithstanding several ethical caveats, clearly indicated that Merck expected participating lawyers to cease representing any nonsettling clients. More importantly, when deciding whether to take part in the settlement, clients would be aware that saying “no” meant losing their lawyer:

If any such Eligible Claimant disregards such recommendation, or for any other reason fails (or has failed) to submit a non-deficient and non-defective Enrollment Form on or before [the deadline], such Enrolling Counsel shall . . . [by the required date], to the extent permitted by the equivalents to Rules 1.16 and 5.6 of the ABA Model Rules of Professional Conduct in the relevant jurisdiction(s), (i) take (or have taken, as the case may be) all necessary steps to disengage and withdraw from the representation of such Eligible Claimant and to forego any Interest in such Eligible Claimant and (ii) cause (or have caused, as the case may be) each other Enrolling Counsel, and each other counsel with an Interest in any Enrolled

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<sup>66</sup> The Plaintiffs' Steering Committee placed a Vioxx points “calculator” on the Internet to help claimants estimate their settlement payment. See *Vioxx Settlement Calculator*, OFFICIAL VIOXX SETTLEMENT, [www.officialvioxxsettlement.com/calculator](http://www.officialvioxxsettlement.com/calculator) (last visited Nov. 13, 2010).

<sup>67</sup> Vioxx Settlement Agreement, *supra* note 1, § 1.2.8.1.

Program Claimant, which has an Interest in such Eligible Claimant to do the same.<sup>68</sup>

Other language reinforced the expectation that all of each participating law firm's eligible Vioxx clients would take part in the settlement: "The parties agree that a key objective of the Program is that, with respect to any counsel with an Interest in the claims of any Enrolled Program Claimant, all other Eligible Claimants in which such counsel has an Interest shall be enrolled in the Program."<sup>69</sup>

Some Vioxx plaintiffs' lawyers, troubled by the mandatory-recommendation and mandatory-withdrawal provisions, sought a declaratory judgment that these terms were unenforceable.<sup>70</sup> In response, Merck and the negotiating plaintiffs' lawyers added explanatory language to the agreement: "Each Enrolling Counsel is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program."<sup>71</sup> Although this amendment apparently satisfied the objecting lawyers, it was put forth as a "clarification" rather than as a substantive change; neither of the controversial provisions was removed.<sup>72</sup>

## 2. Legal Ethics Problems

The mandatory-recommendation and mandatory-withdrawal provisions of the Vioxx settlement run afoul of several legal ethics rules,<sup>73</sup> as a number of commentators, including ourselves, pointed out.<sup>74</sup>

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<sup>68</sup> *Id.* § 1.2.8.2.

<sup>69</sup> *Id.* § 1.2.7; *see also id.* Recital G ("A key objective of the Program is that, with respect to any counsel with an Interest in the claims of any Enrolled Program Claimant, all other Eligible Claimants in which such counsel has an Interest shall be enrolled in the Program.").

<sup>70</sup> *See, e.g.*, Memorandum in Support of Certain Plaintiffs' and Their Counsels' Motion for Declaratory Judgment that Certain Provisions of the Settlement Agreement are Unenforceable at 1, *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d 606 (E.D. La. 2008) (MDL No. 1657), 2008 WL 83836, at \*1; *see also* Alex Berenson, *Lawyers Seek to Alter Settlement over Vioxx*, N.Y. TIMES, Dec. 21, 2007, at C4.

<sup>71</sup> *See* Amendment to Settlement Agreement § 1.2.2 (Jan. 17, 2008), available at [www.merck.com/newsroom/vioxx/pdf/Amendment\\_to\\_Settlement\\_Agreement.pdf](http://www.merck.com/newsroom/vioxx/pdf/Amendment_to_Settlement_Agreement.pdf).

<sup>72</sup> *See id.* Recital C; *see also* Heather Won Tesoriero, *Merck's Prospects Brighten for Vioxx Settlement*, WALL ST. J., Jan. 19, 2008, at A3 ("Lawyers for both sides said this is a point of clarification but not a substantive change.").

<sup>73</sup> We are aware of one state ethics opinion addressing the Vioxx settlement. It concluded that the mandatory-recommendation and mandatory-withdrawal provisions violated the Connecticut Rules of Professional Conduct. *See* Conn. Bar Ass'n, Informal Op. 08-01 (2008) (discussing obligations of plaintiffs' counsel under a particular aggregate settlement agreement).

<sup>74</sup> *See, e.g.*, Daniel Costello, *Vioxx Deal May Cause Pain*, L.A. TIMES, Nov. 15, 2007, at C1; Nathan Koppel, *Vioxx Plaintiffs' Choice: Settle or Lose Their Lawyer*, WALL ST. J., Nov. 16, 2007, at B1; Adam Liptak, *In Vioxx Settlement, Testing a Legal Ideal: A Lawyer's Loyalty*, N.Y. TIMES, Jan. 22, 2008, at A12; Howard M. Erichson, *The Vioxx Settlement*, MASS TORT LITIG. BLOG (Nov. 10, 2007) [hereinafter Erichson, *The Vioxx Settlement*], <http://lawprofessors.typepad.com>.

Given the attractiveness of the Vioxx deal both as a resolution of the litigation and as a model for future mass tort settlements, its deficits warrant detailed examination.

Before explaining the problems with the Vioxx settlement, a word is necessary about conflicts of interest in mass litigation. The problem with the Vioxx settlement is *not* that Vioxx plaintiffs' interests diverged because of differences in their cases' strengths and weaknesses, their litigation objectives, their risk tolerances, or other plaintiff-to-plaintiff dissimilarities. Nor is the problem that the settlement contemplated dividing a fixed sum of money among a group of claimants, creating a zero-sum game in the allocation of settlement funds. Of course the interests of Vioxx plaintiffs conflicted with each other, but the same is true, in various ways, in all mass litigation. And of course they were competing, as a practical matter, for a finite pool of resources. We take these conflicts as given. The interests of plaintiffs in mass litigation do not line up perfectly, but nonetheless, most plaintiffs in mass litigation rationally prefer representation by a lawyer who represents numerous claimants.<sup>75</sup> Therefore, although concurrent client-client conflicts of interest exist in any mass plaintiff representation, such conflicts ordinarily should not prevent mass representation as long as the clients are aware of the conflicts and give their informed consent.<sup>76</sup> Nor should such conflicts ordinarily prevent mass aggregate settlements as long as clients give informed consent after the appropriate disclosure under the aggregate settlement rule.<sup>77</sup> The conflict-of-interest rules and the aggregate settlement rule leave substantial room for multiple-client representation in litigation and settlement with informed consent. Thus, the problem is not mass collective representation itself, nor the fact of a mass aggregate settle-

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com/mass\_tort\_litigation/2007/11/the-vioxx-settl.html; Anthony Sebok & Benjamin Zipursky, *Getting with the Program: The Vioxx Settlement*, FINDLAW (Nov. 20, 2007), <http://writ.lp.findlaw.com/sebok/20071120.html>; Ed Silverman, *Vioxx Deal and Legal Ethics: Are They Compatible?*, PHARMALOT (Nov. 16, 2007, 8:03 AM), <http://www.pharmalot.com/2007/11/vioxx-deal-and-legal-ethics-debate-continues>; see also Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1000-04 (2010) [hereinafter Erichson, *The Trouble*].

<sup>75</sup> See Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 543-50.

<sup>76</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2010) (permitting informed consent to conflicts of interest if a lawyer reasonably concludes that the lawyer can give each client competent and diligent representation).

<sup>77</sup> See *id.* at R. 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.

ment. Rather, the problem with the Vioxx settlement was that participating lawyers were obligated to recommend the settlement to all of their clients and obligated to withdraw from representing clients who refused the settlement. We turn now to the various aspects of legal ethics that shed light on the problem.

The most fundamental point is that the decision to settle belongs to the client, not to the client's lawyer. The Model Rules of Professional Conduct, while leaving significant gray areas as to other types of decisions, leave no doubt about who owns the decision to accept or reject a settlement: "A lawyer shall abide by a client's decision whether to settle a matter."<sup>78</sup> In class actions, lawyers may seek court approval of settlements over the objections of class representatives,<sup>79</sup> but the Vioxx personal-injury and wrongful-death litigation was not a certified class action.<sup>80</sup> In the Vioxx litigation, the claims belonged to the individual claimants, as did the decision of whether to release those claims in settlement. The lawyer's job is not to make the decision but rather to advise the client about the pros and cons of the settlement offer and, in the language of Rule 1.2(a), to "abide by" the client's decision. A lawyer who tells the client, "Settle or you're fired!" is hardly abiding by the client's decision.

The mandatory-recommendation provision runs afoul of the lawyer's obligation to give a client independent and loyal advice. A lawyer must base her advice on what she thinks is right for the client, not what she has promised another party (particularly the adversary!) that she will tell her client. Several ethics rules come into play. Rule 1.4, on communication with clients, requires lawyers to explain matters as reasonably necessary so that clients can make informed decisions.<sup>81</sup>

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<sup>78</sup> *Id.* at R. 1.2(a):

Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

*See also* *Moores v. Greenberg*, 834 F.2d 1105, 1108 (1st Cir. 1987) (permitting malpractice claim where lawyer, who considered settlement offer inadequate, failed to transmit settlement offer to client); *In re Harshey*, 740 N.E.2d 851, 853 (Ind. 2001) (disciplining lawyer for accepting settlement offer contrary to client's instructions); *In re Panel File No. 99-5*, 607 N.W.2d 429, 431-32 (Minn. 2000) (disciplining lawyer for failure to transmit client's settlement offer to opposing party).

<sup>79</sup> *See* *Parker v. Anderson*, 667 F.2d 1204, 1211 (5th Cir. 1982).

<sup>80</sup> *In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 463 (E.D. La. 2006).

<sup>81</sup> MODEL RULES OF PROF'L CONDUCT R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.").

Rule 2.1, on the lawyer's role as advisor, requires lawyers to "exercise independent professional judgment and render candid advice."<sup>82</sup> Finally, the conflict-of-interest rules prohibit representation absent consent if there is a significant risk that the lawyer's duty to a third person will materially limit the advice that the lawyer gives to her client.<sup>83</sup> It is difficult to see how a lawyer could comply with these obligations while agreeing to recommend the settlement to every one of her Vioxx clients. In theory, a lawyer could determine that the overall settlement and its allocation process are satisfactory for all Vioxx claimants and, on that basis, sincerely recommend the settlement to each of her clients. In practice, however, one wonders how a lawyer would handle clients whose claims may be undervalued by the point-allocation system, or whose claims would provoke unusually strong jury sympathy, or who would make uncommonly strong witnesses, or who have high risk tolerance, or who place significant value on the right to go to trial, or who for any other reason might be well advised to decline the settlement.

The mandatory-withdrawal provision presents several ethical problems. In addition to undermining the client's decision whether to settle,<sup>84</sup> mandatory withdrawal violates the prohibition on settlement provisions that restrict a lawyer's right to practice,<sup>85</sup> as well as the constraints on termination of the lawyer-client relationship.<sup>86</sup>

Rule 5.6(b) prohibits settlement provisions that restrict a lawyer's right to practice: "A lawyer shall not participate in offering or making . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."<sup>87</sup> An American Bar Association formal ethics opinion addressed the rule's applicability to mass torts in light of the "pressure to find creative solutions

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<sup>82</sup> *Id.* at R. 2.1 ("In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.")

<sup>83</sup> *Id.* at R. 1.7(a):

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

<sup>84</sup> *See id.* at R. 1.2(a).

<sup>85</sup> *See id.* at R. 5.6(b).

<sup>86</sup> *See id.* at R. 1.16.

<sup>87</sup> *Id.* at R. 5.6(b); *see also* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-108(B) (1980) ("In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts his right to practice law."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 13(2) (2000) ("In settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice law, including the right to represent or take particular action on behalf of other clients.").

to mass tort litigation.”<sup>88</sup> It concluded that “a lawyer cannot agree to refrain from representing present or future clients against a defendant pursuant to a settlement agreement on behalf of current clients even in the mass tort, global settlement context.”<sup>89</sup> In another case, a federal court held that plaintiffs’ lawyers violated Rule 5.6 because they negotiated a settlement for fifty-six plaintiffs and “coerced at least one plaintiff (if not many more) to accept the settlement by threatening to withdraw representation if the settlement were not accepted.”<sup>90</sup>

To be sure, Rule 5.6(b) is itself controversial. Some commentators believe that lawyers ought to be able to agree to limit their future representations,<sup>91</sup> but the Vioxx settlement did not restrict taking on new clients; much more troublingly, it restricted what a lawyer may do for current clients.<sup>92</sup> The Vioxx scenario is not on the periphery but is at the core of plausible justifications for Rule 5.6(b). Mandatory withdrawal does not hurt hypothetical clients; it hurts actual clients. Mandatory withdrawal compromises not only loyalty to clients but also the public policy of preventing malefactors from buying off lawyers qua private attorneys general.

We turn now to the ethical constraints on terminating a lawyer–client relationship. This concern is intuitively quite strong and legally quite subtle: it is the question of whether a lawyer may withdraw from representing a client who rejects the lawyer’s recommendation to accept a settlement. The first—and easier—question concerns whether, when an individual client declines to participate in an aggregate settlement that other clients would accept, the lawyer ethically *must* withdraw from representing that client. Rule 1.16 governs termi-

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<sup>88</sup> ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 93-371 (1993).

<sup>89</sup> *Id.*

<sup>90</sup> *Adams v. BellSouth Telecomms., Inc.*, No. 96-2473, 2001 WL 34032759, at \*1 (S.D. Fla. Jan. 29, 2001).

<sup>91</sup> See, e.g., *Feldman v. Minars*, 658 N.Y.S.2d 614, 617 (App. Div. 1997); Stephen Gillers & Richard W. Painter, *Free the Lawyers: A Proposal to Permit No-Sue Promises in Settlement Agreements*, 18 GEO. J. LEGAL ETHICS 291, 294 (2005); Stephen Gillers, *A Rule Without a Reason: Let the Market, Not the Bar, Regulate Settlements That Restrict Practice*, A.B.A. J., Oct. 1993, at 118.

<sup>92</sup> Vioxx Settlement Agreement, *supra* note 1, §§ 1.2.8.1, 1.2.8.2. Although Rule 5.6(b) usually arises in the context of a settlement provision that restricts a lawyer’s ability to take on future clients with claims against the defendant, there is no doubt about its applicability to restrictions on representing current nonsettling clients. See Ass’n of the Bar of the City of N.Y., Formal Op. 1999-03 (1999) (“We believe that this rule is unambiguous in its application to agreements not to represent present or future clients in litigation against a settling defendant.”); Ethics Comm. of the Colo. Bar Ass’n, Formal Op. 92 (1993) (“Practice restrictions of the kind prohibited in Rule 5.6(b) are clearly overbroad and antithetical to a lawyer’s ability to practice. Where the lawyer is representing contemporaneously settling and non-settling claimants, such restrictions could create an irreconcilable conflict of interest.”); State Bar of Mich., Op. CI-1165 (1986) (stating that a lawyer behaves unethically when she proposes or accepts settlement in which she agrees to withdraw from representing other clients with pending cases against same defendant).

nation of the lawyer–client relationship; it addresses both mandatory and permissive withdrawal. Rule 1.16(a) requires a lawyer to withdraw if continued representation of a client would “result in violation of the Rules of Professional Conduct.”<sup>93</sup> Thus, when a representation presents an impermissible conflict of interest, a lawyer generally must withdraw.

Under some circumstances, settlement offers may create conflicts that require withdrawal.<sup>94</sup> If withdrawal were mandatory, the lawyer ordinarily would have to withdraw from representing all of the clients, absent consent.<sup>95</sup> A lawyer may not drop one client like a “hot potato” to take on a more lucrative client.<sup>96</sup> In other words, to whatever extent rejection of the Vioxx settlement might present a conflict of interest justifying withdrawal under Rule 1.16(a), the conflict could require withdrawal from representing *all* the clients—settling as well as nonsettling—which is obviously not what the settling lawyers had in

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<sup>93</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(a)(1) (2010).

<sup>94</sup> See N.C. State Bar, Op. 251 (1997) (discussing that if a lawyer represents four personal-injury claimants and the insurance coverage cannot compensate all four clients fully, the lawyer may have to withdraw from representing all of the clients if they do not agree on a settlement: “The lawyer must withdraw from the representation of all of the claimants if the lawyer is placed in the role of advocate for one or more of the claimants against the other claimants. The lawyer must also withdraw from the representation if one or more of the claimants do not agree to accept the settlement offer. If the lawyer must withdraw, the lawyer may continue to represent one or more of the claimants only with the consent of the claimants whose cases the lawyer relinquishes.”); Bd. of Prof'l Responsibility of the Supreme Court of Tenn., Formal Op. 95-F-136 (1995) (stating that when an attorney represents both a personal-injury claimant and the client's health insurer with a subrogation interest, “[a]t the time of the initial contact by the health insurance provider, the attorney should advise the health insurance provider both orally and in writing that if both clients do not agree on the proposed settlement, then the lawyer may not continue his multiple employment and must withdraw from representing the health insurer.”); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 128 cmt. d(i), illus. 2 (2000) (stating that in a two-client aggregate settlement with insufficient coverage for both claimants, “[i]f one client wishes to accept and the other wishes to reject the proposed settlement, Lawyer may continue to represent both A and B only after a renewal of informed consent by each.”).

<sup>95</sup> See N.C. State Bar, Op. 251.

<sup>96</sup> See, e.g., *Picker Int'l, Inc. v. Varian Assocs., Inc.*, 869 F.2d 578, 584 (Fed. Cir. 1989) (stating that a law firm may not “force [plaintiff] to accept a second-class level of clienthood . . . in order that [the law firm] may continue to represent a more preferred client in all pending cases”); *ValuePart, Inc. v. Clements*, No. 06 C 2709, 2006 WL 2252541, at \*2 (N.D. Ill. Aug. 2, 2006) (“When a lawyer or law firm suddenly finds itself in a situation of simultaneously representing clients who either are presently adverse or are on the verge of becoming adverse, it may not simply to [sic] drop one client ‘like a hot potato’ in order to treat it as though it were a former client for the purpose of resolving a conflict of interest dispute.”); *Santacroce v. Neff*, 134 F. Supp. 2d 366, 367 (D.N.J. 2001) (“The ‘Hot Potato Doctrine’ has evolved to prevent attorneys from dropping one client like a ‘hot potato’ to avoid conflict with another, more remunerative client.”); *In re Kittrels*, No. EDU 99-06S, 2007 WL 92400, at \*3 (N.J. Super. Ct. App. Div. Dec. 29, 2006) (“One of the most basic responsibilities incumbent on a lawyer is the duty of loyalty to his or her clients.’ This duty of loyalty precludes an attorney from dropping a client like a ‘hot potato’ in order to avoid a conflict with ‘another, more remunerative’ client.” (citations omitted) (quoting *State ex rel. S.G.*, 814 A.2d 612, 616 (N.J. 2003), and *Santacroce*, 134 F. Supp. 2d at 367)).

mind. But we are not suggesting that the Vioxx settlement required withdrawal. In the context of mass aggregate settlements, addressing conflicts of interest through the disclosure and informed-consent provisions of Rule 1.8(g) is more sensible than requiring withdrawal whenever client choices diverge. We are simply pointing out that a conflict-of-interest argument in support of Rule 1.16(a) withdrawal would *not* establish a basis for conveniently withdrawing only from nonsettling clients.

The second and more difficult question concerns permissive withdrawal: if a lawyer wishes to withdraw from a client who declines a recommended settlement, *may* the lawyer terminate the relationship? Rule 1.16(b) permits a lawyer to withdraw from representing a client for no reason at all if the withdrawal will have no material adverse effect on the interests of the client.<sup>97</sup> In the Vioxx case, a client's search for replacement counsel would be complicated by the fact that nearly every Vioxx plaintiffs' lawyer participated in the settlement and thus agreed to get out of the business of Vioxx litigation. It is hard to imagine, under these circumstances, a straight-faced argument that withdrawal would not adversely affect the clients.

Even if termination would have a material adverse effect, Rule 1.16(b) permits withdrawal for a number of reasons. These include where "(4) the client insists upon taking action . . . with which the lawyer has a fundamental disagreement," "(6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client," and "(7) other good cause for withdrawal exists."<sup>98</sup> A lawyer withdrawing from a nonsettling Vioxx client might seek to justify the withdrawal under Rule 1.16(b)(4) on the grounds that the lawyer fundamentally disagrees with the client's decision to reject the settlement. In a similar vein, the lawyer might contend that the client, by refusing to cooperate in the settlement, has rendered the representation unreasonably difficult within the meaning of Rule 1.16(b)(6). The problem with both of these arguments is that they assume the settlement decision belongs to the lawyer despite Rule 1.2(a)'s clear instruction that the lawyer shall abide by the client's decision whether to accept or reject a settlement.

Cases overwhelmingly reject the idea that a lawyer may fire a client for declining a settlement against the lawyer's advice. In one case,<sup>99</sup> a law firm negotiated an aggregate settlement. When one client, DeFlumer, refused to sign the release, the firm sought to termi-

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<sup>97</sup> MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(1).

<sup>98</sup> *Id.* at R. 1.16(b).

<sup>99</sup> *DeFlumer v. LeSchack & Grodensky P.C.*, No. 99-CV-1650, 2000 WL 654608 (N.D.N.Y. May 19, 2000).



nate its representation of DeFlumer. The court denied the withdrawal application:

The only possible ground for good cause here which can be found in the law firm's motion is DeFlumer's refusal to enter into the settlement agreement negotiated by the law firm. There is no indication that DeFlumer ever approved or consented to the settlement. The mere fact that an attorney and client may disagree over a proposed settlement will not establish good cause for withdrawal of representation.<sup>100</sup>

In another case, a client refused to execute documents needed to effect a settlement that the lawyer had negotiated; the lawyer sought to withdraw on the grounds that the client was not cooperating.<sup>101</sup> The court rejected the application, stating that although the rule permits withdrawal when a client renders it unreasonably difficult for a lawyer to carry out his work, "a client's refusal to accept a settlement generally does not constitute the kind of uncooperative behavior which is sufficient to authorize an attorney to withdraw."<sup>102</sup>

In *Nehad v. Mukasey*,<sup>103</sup> a lawyer represented an immigrant from Afghanistan in a removal proceeding. The client wished to pursue a claim for asylum based on fear of persecution by the Taliban. The lawyer counseled the client that the asylum claim was weak and recommended that the client accept voluntary departure.<sup>104</sup> On the facts as accepted for purposes of the appeal, the lawyer threatened to withdraw if the client proceeded with the asylum claim.<sup>105</sup> The Ninth Circuit held that such a threat constituted ineffective assistance of counsel that denied the client due process in the immigration pro-

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<sup>100</sup> *Id.* at \*1 (citing *Marrero v. Christiano*, 575 F. Supp. 837, 839 (S.D.N.Y. 1983); *Borup v. Nat'l Airlines, Inc.*, 159 F. Supp. 808, 810 (S.D.N.Y. 1958); *In re Busby*, 616 N.Y.S.2d 755, 756 (App. Div. 1994)).

<sup>101</sup> *Busby*, 616 N.Y.S.2d at 756. At the time of the *DeFlumer* and *Busby* cases, New York relied upon the Code of Professional Responsibility—a predecessor to the Rules of Professional Conduct—and thus the courts looked to the Code's Disciplinary Rules. New York adopted new Rules of Professional Conduct that went into effect on April 1, 2009, including a rule based in significant part on the Model Rule 1.16. See N.Y. RULES OF PROF'L CONDUCT R. 1.16 (2009).

<sup>102</sup> *Busby*, 616 N.Y.S.2d at 756; see *Sec. & Exch. Comm'n v. Intracom Corp.*, No. CV 02-4367, 2007 WL 1593208, at \*2 (E.D.N.Y. June 1, 2007) ("Certainly, a refusal to accept a settlement, even though favored by an attorney, is not just cause for withdrawal by an attorney." (emphases omitted) (quoting *Marrero*, 575 F. Supp. at 839)); *Welch v. Niagara Falls Gazette*, No. 98-CV-0685E(M), 2000 WL 1737947, at \*2 (W.D.N.Y. Nov. 17, 2000) ("[A] client's refusal to accept a settlement offer is not good cause for an attorney to withdraw. The client decides whether or not to accept a settlement offer, and this decision is binding on [the] attorney even if it is against the attorney's advice."); ABA/BNA LAWYERS' MANUAL ON PROFESSIONAL CONDUCT 31:1106-07 (2004) (citing *Estate of Falco v. Decker*, 233 Cal. Rptr. 807 (Ct. App. 1987); *Tsavaris v. Tsavaris*, 244 So. 2d 450 (Fla. Dist. Ct. App. 1971); *Michael D. Tully Co. v. Dollney*, 537 N.E.2d 242 (Ohio Ct. App. 1987)).

<sup>103</sup> 535 F.3d 962 (9th Cir. 2008).

<sup>104</sup> *Id.* at 965.

<sup>105</sup> *Id.* at 967-68.

ceeding. The court noted the general rule that “the lawyer may not burden the client’s ability to make settlement decisions by structuring the representation agreement so as to allow the lawyer to withdraw, or to ratchet up the cost of representation, if the client refuses an offer of settlement,”<sup>106</sup> as well as the general rule that “a lawyer may not withdraw merely because a client refuses to settle.”<sup>107</sup> Based on these principles, the court held that “a lawyer may not burden a client’s decisionmaking by threatening to withdraw if the client refuses to settle.”<sup>108</sup> Whether the stakes are immigration status or tort compensation, the settlement decision belongs to the client; a lawyer may not use the threat of withdrawal to hijack that decision.<sup>109</sup>

Lawyers might contend that representation of nonsettling Vioxx claimants would result in “an unreasonable financial burden” justifying withdrawal under Rule 1.16(b)(6). Compared with the certainty of payout under Merck’s settlement program, plaintiffs’ lawyers might regard bringing a case to trial as a highly questionable investment. The problem with this argument is that when the lawyer agreed to represent each Vioxx claimant, the lawyer could not assume that Merck would offer a settlement, and even if it did, the lawyer could not assume that the client would accept the offer. The lawyers did not limit the scope of their representation to pursuing settlement.<sup>110</sup>

Finally, lawyers might look to the catch-all provision of Rule 1.16(b)(7), which permits a lawyer to terminate the relationship if “other good cause for withdrawal exists.”<sup>111</sup> As discussed above, the client’s rejection of a settlement does not in itself constitute good

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<sup>106</sup> *Id.* at 971 (citing *Compton v. Kittleson*, 171 P.3d 172, 173 (Alaska 2007); *Jones v. Feiger, Collison & Killmer*, 903 P.2d 27, 34 (Colo. App. 1995), *rev’d on other grounds*, 926 P.2d 1244 (Colo. 1996); *Conn. Bar Ass’n, Informal Op.* 99-18 (1999); *Conn. Bar Ass’n, Informal Op.* 95-24 (1995); *State Bar of Mich., Op.* RI-132 (1992)).

<sup>107</sup> *Nehad*, 535 F.3d at 971 (citing *Augustson v. Linea Aerea Nacional-Chile S.A.*, 76 F.3d 658, 663 (5th Cir. 1996); *Ambrose v. Detroit Edison Co.*, 237 N.W.2d 520, 523–24 (Mich. Ct. App. 1975)).

<sup>108</sup> *Id.*

<sup>109</sup> Quantum meruit cases reach the same conclusion. *See, e.g.*, *Estate of Falco v. Decker*, 233 Cal. Rptr. 807, 815–16 (Ct. App. 1987) (“A client’s right to reject settlement is absolute. . . . A client’s exercise of this right cannot constitute cause for the purpose of awarding attorneys’ fees.”); *May v. Seibert*, 264 S.E.2d 643, 646 (W. Va. 1980) (“No cases are cited and we have found none, that state that refusal by a client to accept a ‘reasonable’ settlement is good cause for withdrawal.”).

<sup>110</sup> Under Rule 1.2(c), a lawyer “may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.” MODEL RULES OF PROF’L CONDUCT R. 1.2(c) (2010). We doubt whether, under the circumstances of the Vioxx litigation, a lawyer could properly limit the scope of representation so that clients understood that the lawyer represented them solely for purposes of a possible settlement. Without the leverage of adjudication, a lawyer could not adequately pursue the interests of tort claimants. In any event, such limited representation is not the scenario that the actual Vioxx case presents.

<sup>111</sup> *Id.* at R. 1.16(b)(7).

cause for withdrawal, but could a contractual obligation constitute good cause? The Vioxx Settlement Agreement required lawyers to take steps to withdraw from representing any client who declined the settlement. Does the lawyers' obligation to Merck provide good cause for withdrawal? Surely it does not, at least if we are correct in our analysis that the mandatory-withdrawal provision violates the lawyers' duties under Rules 1.2, 1.7, and 5.6. Ethically prohibited cause cannot be good cause. Stepping back, the very idea that entering into a contract with a client's adversary could establish good cause to withdraw from representing a client is troubling.

The Vioxx Settlement Agreement included language aimed at protecting against some of these criticisms. Section 1.2.8 disavowed any intent to violate Rule 5.6:

[N]othing in this Agreement is intended to operate as a "restriction" on the right of any Claimant's counsel to practice law within the meaning of the equivalent to Rule 5.6(b) of the ABA Model Rules of Professional Conduct in any jurisdictions in which Claimant's Counsel practices or whose rules may otherwise apply . . . .<sup>112</sup>

More significantly, section 1.2.8.2, which articulated the duty to withdraw, qualified the duty with language indicating that the duty to withdraw exists only insofar as it is consistent with legal ethics:

[S]uch Enrolling Counsel shall, . . . to the extent permitted by the equivalents to Rules 1.16 and 5.6 of the ABA Model Rules of Professional Conduct in the relevant jurisdiction(s), (i) take (or have taken, as the case may be) all necessary steps to disengage and withdraw from the representation of such Eligible Claimant [who fails to accept the settlement] . . . .<sup>113</sup>

To a great extent, these clauses are defensive verbiage, and the work they are actually supposed to do is unclear. One cannot cure an unethical agreement by declaring it to be ethical. The announcement that "nothing in this Agreement is intended" to violate Rule 5.6(b) does not change the fact that the agreement instructs lawyers to terminate their representation of nonsettling clients. Whether or not it is *intended* to violate Rule 5.6(b), the agreement *does* restrict practice in violation of that rule.

What about the caveat in section 1.2.8.2 that lawyers should withdraw only "to the extent permitted by" Rules 1.16 and 5.6? If this language is taken seriously, especially in combination with the declaration that nothing in the agreement is intended to restrict practice in violation of Rule 5.6, then neither the intent nor the terms of the agreement required counsel to withdraw from representing clients

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<sup>112</sup> Vioxx Settlement Agreement, *supra* note 1, § 1.2.8.

<sup>113</sup> *Id.* § 1.2.8.2.

who declined the settlement. Obedience to Rules 1.16 and 5.6 would compel plaintiffs' counsel *not* to withdraw from representing their nonsettling clients. Such a reading, however, would render the clause meaningless. The defensive verbiage, at least, might provide some contractual comfort to a lawyer who refuses to withdraw from representing nonsettling claimants, but surely the intent of the clause was to put pressure on the participating lawyers to get all of their clients on board. If participating lawyers were expected to terminate their representation of any nonsettling plaintiffs—an expectation contrary to the dictates of Rules 1.16 and 5.6—then it is hard to take seriously the “to the extent permitted by” language.

A similar analysis applies to the amendment reached two months after the initial settlement agreement, inserting the following language: “Each Enrolling Counsel is expected to exercise his or her independent judgment in the best interest of each client individually before determining whether to recommend enrollment in the Program.”<sup>114</sup> Of course, every lawyer should exercise independent judgment in determining whether to recommend the settlement agreement to each client. Merely saying so, without altering either the mandatory-recommendation clause of section 1.2.8.1 or the mandatory-withdrawal clause of section 1.2.8.2, hardly eliminates the ethical concerns. Too little, too late, too boilerplate.

This defensive verbiage raises another important question: Who decides disputes about compliance? Under the Vioxx Settlement Agreement, disputes about interpretation and compliance are brought to the Chief Administrator.<sup>115</sup> This brings us to one of the most interesting and disarming features of the settlement agreement—the identity of the Chief Administrator. The Chief Administrator is Judge Eldon Fallon,<sup>116</sup> the federal district judge who presided over the Vioxx MDL and who played a major role in pushing the parties to settle. As each of us has pointed out, judges who oversee mass litigation face a powerful set of incentives to aid settlement.<sup>117</sup> The judge who pushed for the settlement, agreed to implement it, and stands to benefit from it is unlikely to resolve controversies over the settlement in ways that endanger its satisfactory conclusion.

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<sup>114</sup> Amendment to Settlement Agreement, *supra* note 71, § 1.2.2.

<sup>115</sup> Vioxx Settlement Agreement, *supra* note 1, § 8.1.2 (“Except as specifically provided in this Agreement, any dispute that arises . . . shall be submitted to the Chief Administrator who shall sit as a binding arbitration panel and whose decision shall be final, binding and Non-Appealable.”)

<sup>116</sup> *See id.* § 6.1.1.

<sup>117</sup> *See* Erichson, *The Vioxx Settlement*, *supra* note 74 (noting that settlements clear away a significant number of “docket-clogging” cases and can also reflect personal victories and professional accomplishments for judges); Sebok & Zipursky, *supra* note 74 (commenting that judges often regard settlements as accomplishments that circumvent the arduous and time-consuming task of trying individual plaintiffs in mass litigation cases).

In sum, the Vioxx settlement—in so many ways an appealing resolution of an enormous and difficult dispute—secured nearly unanimous participation in part by including two terms that violated well-established principles of legal ethics. The mandatory-recommendation provision is inconsistent with the lawyer's duty to give independent and loyal advice to clients. The mandatory-withdrawal provision violates the bar on practice restrictions, the constraints on terminating the lawyer-client relationship, and the principle that the decision to accept or reject a settlement belongs to the client.

### III

#### ADVANCE CONSENT

When the ALI undertook a major project to rethink mass litigation—the *Principles of the Law of Aggregate Litigation (Principles)*, which will be published this year—it recognized that it could not sensibly limit the project to class actions. Acknowledging the fundamental similarities between class and nonclass aggregate proceedings,<sup>118</sup> as well as the similarities between formally and informally aggregated litigation,<sup>119</sup> the project encompassed issues that arise in nonclass as well as class action settings. Similarly, the ALI recognized that it could not limit the project to *adjudication* because settlement accounts for a far greater share of mass dispute resolutions.<sup>120</sup> Thus, a significant portion of the *Principles* addresses nonclass aggregate settlements.<sup>121</sup> Indeed, Reporter Samuel Issacharoff described the proposal on nonclass aggregate settlements as “probably the single greatest contribution” of the project.<sup>122</sup>

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<sup>118</sup> See PRINCIPLES, *supra* note 10, § 1.02(a)–(b) (defining “aggregate lawsuit” and “administrative aggregation” as types of aggregate proceedings that include both class and nonclass actions); see also Erichson, *supra* note 75, at 530 (describing the functional similarity between class actions and nonclass litigation in which “numerous plaintiffs depend upon the work of counsel with whom they have no meaningful individual lawyer-client relationship, over whom they have no meaningful control, and whose loyalty is directed primarily to the interests of the group as a whole”).

<sup>119</sup> See PRINCIPLES, *supra* note 10, § 1.02(c) (defining “private aggregation” as a type of aggregate proceeding); see also Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 417–48 (2000) (exploring how lawyers handle related claims on a coordinated basis even in the absence of formal judicial aggregation).

<sup>120</sup> See PRINCIPLES, *supra* note 10, § 3.01 cmt. a. For an article in which two ALI Reporters note that both class and nonclass actions are resolved far more often by settlement than by trial, see Issacharoff & Klonoff, *supra* note 8, at 1200–01.

<sup>121</sup> See PRINCIPLES, *supra* note 10, § 3.15–18.

<sup>122</sup> *Discussion of Principles of the Law of Aggregate Litigation*, 86 A.L.I. PROC. 229 (2009) [hereinafter *2009 Discussion of Principles of the Law of Aggregate Litigation*] (remarks of Professor Samuel Issacharoff) (“My personal view is that this is probably the single greatest contribution of our project: to take this area on directly, something that has not been done before.”); see also *Discussion of Principles of the Law of Aggregate Litigation*, 85 A.L.I. PROC. 27 (2008) [hereinafter *2008 Discussion of Principles of the Law of Aggregate Litigation*] (remarks of

The ALI proposal would allow clients to consent at the outset of a representation to be bound by an aggregate settlement based on a supermajority vote. Put differently, the proposal is that lawyers may have their clients empower them, in advance, to negotiate binding settlements on their behalf as part of a collective resolution of claims. The difficulties in the Vioxx Settlement Agreement, and those like it, are not finessed but are plainly addressed by disclosure and consent at the front end of the lawyer–client relationship. Indeed, the ALI Reporters pointed to the ethical difficulties of the Vioxx settlement as a reason to support the advance-consent proposal.<sup>123</sup>

Two types of concerns bedevil the ALI proposal, however. First, there are grave reasons to doubt that our legal system can generate, in any systematic way, authentic client consent to a waiver of the right to decide individually on a settlement agreement. Second, the conflicts of interest within a pool of plaintiffs render multiple representation only partially consentable. At least in cases that present serious allocation issues, back-end individual settlement control cannot be waived without fundamentally altering the lawyer–client relationship.

#### A. The American Law Institute Proposal

The *Principles* propose a dramatic shift in the ethics rules governing nonclass aggregate settlements. Before reaching that proposal, however, the *Principles* offer several useful clarifications of the aggregate settlement rule currently in effect.<sup>124</sup> Most importantly, the *Principles* offer a coherent definition of the term *aggregate settlement* for purposes of the informed-consent requirement.<sup>125</sup> In addition, the *Principles* suggest that counsel can satisfy the disclosure requirements either by allowing each claimant to review “the settlements of all other persons subject to the aggregate settlement” or by informing each

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Professor Samuel Issacharoff) (“Let me say why we think that this is perhaps as single a contribution as the Institute will make in this area if this is approved.”).

<sup>123</sup> See *2008 Discussion of Principles of the Law of Aggregate Litigation*, *supra* note 122 (remarks of Professor Samuel Issacharoff) (commenting that the advance-consent approach “would have avoided many of the ethical difficulties in the Vioxx case”); *id.* (remarks of Professor Richard Nagareda) (noting the mandatory-withdrawal provision of the Vioxx settlement and commenting that “[w]e believe that instead of putting that kind of pressure on the lawyer–client relationship, we should invigorate disclosure and contract in advance”).

<sup>124</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2010).

<sup>125</sup> See PRINCIPLES, *supra* note 10, § 3.16. Because the aggregate settlement rule is, at bottom, a rule about informed consent to conflicts of interest, the *Principles* sensibly define aggregate settlement in terms of interdependence. Interdependence, in turn, is defined broadly in terms of features that commonly appear in group settlements—collective allocation or collective conditionality. *Id.* § 3.16 cmts. a–c; see also Howard M. Erichson, *A Typology of Aggregate Settlements*, 80 NOTRE DAME L. REV. 1769, 1784–95 (2005) (proposing that aggregate settlements be defined in terms of collective allocation and collective conditionality).

claimant of “the formula by which the settlement will be divided among all claimants.”<sup>126</sup> They usefully add that “informed consent requires that the total financial interest of claimants’ counsel be disclosed to each claimant.”<sup>127</sup>

The major ALI proposal on aggregate settlements picks up on an idea that Professors Charles Silver and Lynn Baker advanced in the 1990s.<sup>128</sup> Their idea was to permit lawyers to obtain advance settlement consent from clients. If clients agree in advance to be bound by a group settlement as long as certain conditions are met—that is, if clients waive their individual right to reject a settlement after its actual terms are known—then the lawyer can negotiate with the defendant for comprehensive peace. In the ALI version, the clients could agree at the outset of the representation to be bound by an aggregate settlement provided that a supermajority of the client group approves the settlement.<sup>129</sup> This would permit plaintiffs’ lawyers to negotiate fully comprehensive settlements (at least, fully comprehensive with regard to the clients who the particular lawyer or group of lawyers represents and who signed the advance consent).<sup>130</sup>

The proposal generated significant controversy. Professor Nancy Moore published a powerful critique of the proposal from the perspective of legal ethics.<sup>131</sup> A motion to reject the proposal at the ALI’s Annual Meeting in 2008<sup>132</sup> drew enough support to persuade the Reporters and membership to table the proposal until the following year.<sup>133</sup> After additional safeguards were added, the proposal finally passed in 2009.

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<sup>126</sup> PRINCIPLES, *supra* note 10, § 3.17(a).

<sup>127</sup> *Id.*

<sup>128</sup> See Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227, 228–40 (1999); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1500–06 (1998); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 736 (1997) [hereinafter Silver & Baker, *Mass Lawsuits*].

<sup>129</sup> PRINCIPLES, *supra* note 10, § 3.17(b)–(f) (proposing that claimants be allowed to enter into an agreement to be bound by an aggregate settlement proposal and listing the specific requirements for such an agreement).

<sup>130</sup> For a similar proposal to permit binding nonclass aggregate settlements based on supermajority vote, see Katherine Dirks, Note, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 524–30 (2008).

<sup>131</sup> See Nancy J. Moore, *The American Law Institute’s Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (or Want) Group Decision Making?*, 57 DEPAUL L. REV. 395, 402–16 (2008) (critiquing the advance-consent proposal in an earlier draft of the *Principles*).

<sup>132</sup> See Submission of Motion to Delete Sections 3.17(b) Through 3.19 of Principles of the Law of Aggregate Litigation Tentative Draft No. 1 (May 13, 2008) (available at [www.ali.org/doc/Motion-AggLit-Stewart.pdf](http://www.ali.org/doc/Motion-AggLit-Stewart.pdf)) (arguing that Sections 3.17(b)–(c), 3.18, and 3.19 are “unwise, unwarranted and/or unworkable”).

<sup>133</sup> See 2008 Discussion of Principles of the Law of Aggregate Litigation, *supra* note 122 (remarks of Director Lance Liebman and Mr. Larry S. Stewart).

The ALI proposal presents advance consent as an alternative to informed consent under the aggregate settlement rule. As under current law,<sup>134</sup> an aggregate settlement would be binding if each party gives informed consent to the settlement after learning the terms of the deal.<sup>135</sup> In a marked departure from current law, however, the proposal would permit binding aggregate settlements based on advance consent:

In lieu of [informed consent after the settlement terms are known], individual claimants may, before the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a substantial-majority vote of all claimants concerning an aggregate-settlement proposal (or, if the settlement significantly distinguishes among different categories of claimants, a separate substantial-majority vote of each category of claimants).<sup>136</sup>

The proposal emphasizes that the claimants retain the collective power to reject a settlement through the voting procedure. The claimants may not assign the settlement power to counsel, although they may delegate it to an “independent agent.”<sup>137</sup> The proposal envisions that a client can give advance consent at the time the client retains the lawyer or thereafter.<sup>138</sup>

Finally, echoing the law of class actions,<sup>139</sup> the proposal incorporates a substantive requirement that the settlement itself be “fair and reasonable,” envisioning that courts would refuse to enforce an unreasonable settlement achieved through the advance-consent and supermajority voting process:

[T]he enforceability of a settlement approved through an agreement under [the advance-consent mechanism] should depend on whether, under all the facts and circumstances, the settlement is substantively fair and reasonable. Facts and circumstances to be considered include the costs, risks, probability of success, and delays in achieving a verdict; whether the claimants are treated equitably (relative to each other) based on their facts and circumstances; and

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<sup>134</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2010).

<sup>135</sup> PRINCIPLES, *supra* note 10, § 3.17(a) (“A lawyer or group of lawyers who represent two or more claimants on a non-class basis may settle the claims of those claimants on an aggregate basis provided that each claimant gives informed consent in writing.”).

<sup>136</sup> *Id.* § 3.17(b).

<sup>137</sup> *Id.* § 3.17(b)(1) (“The power to approve a settlement offer must at all times rest with the claimants collectively and may under no circumstances be assigned to claimants’ counsel. Claimants may exercise their collective decisionmaking power to approve a settlement through the selection of an independent agent other than counsel.”).

<sup>138</sup> *Id.* § 3.17(b)(2) (“The agreement among the claimants may occur at the time the lawyer–client relationship is formed or thereafter, but only if all participating claimants give informed consent.”).

<sup>139</sup> See FED. R. CIV. P. 23(e)(2) (permitting settlement of a class action only upon a judicial finding that the settlement is “fair, reasonable, and adequate”).



whether particular claimants are disadvantaged by the settlement considered as a whole.<sup>140</sup>

It also would permit claimants to challenge the fairness of the settlement in court.<sup>141</sup> The proposal replaces the individual claimant's decision about whether to accept a settlement with a lawyer's presentation of the deal, a group vote, and the possibility of a judicial ruling on whether the settlement is fair and reasonable.

## B. Current Law on Advance Consent

The ALI proposal would require a striking reversal of current law. Every court and ethics committee that has considered the issue has concluded that advance consent cannot satisfy the aggregate settlement rule.<sup>142</sup> Outside of class actions, settlements are binding only on those claimants who consent to the settlement. When an aggregate settlement resolves the claims of multiple parties, it requires "informed consent" based on disclosure of the settlement terms.<sup>143</sup> Informed consent, within the meaning of the ethics rule, requires client consent after the terms of the settlement are known.

In *Hayes v. Eagle-Picher Industries, Inc.*,<sup>144</sup> eighteen asbestos plaintiffs represented by a single lawyer had agreed to be bound by a majority vote on settlement. Thirteen of them approved a settlement on the eve of trial; Eugene and Judy Hayes and three others objected. The United States Court of Appeals for the Tenth Circuit held that the objecting clients could not be bound: "An agreement such as the present one which allows a case to be settled contrary to the wishes of the client and without his approving the terms of the settlement is opposed to the basic fundamentals of the attorney-client relationship."<sup>145</sup> Other courts have adopted the reasoning and conclusion of *Hayes*.<sup>146</sup>

The New Jersey Supreme Court reached the same conclusion on the impermissibility of advance consent in *The Tax Authority, Inc. v.*

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<sup>140</sup> PRINCIPLES, *supra* note 10, § 3.17(e).

<sup>141</sup> *Id.* § 3.18.

<sup>142</sup> See *Hayes v. Eagle-Picher Indus., Inc.*, 513 F.2d 892, 894–95 (10th Cir. 1975); *Knisley v. City of Jacksonville*, 497 N.E.2d 883, 887–88 (Ill. App. Ct. 1986); *In re Hoffman*, 883 So. 2d 425, 433–34 (La. 2004); *The Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 522 (N.J. 2006); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006); Ass'n of the Bar of the City of N.Y., Formal Op. 2009-6 (2009); see also SECTION OF LITIC., AM. BAR ASS'N, ETHICAL GUIDELINES FOR SETTLEMENT NEGOTIATIONS § 3.2.3 (2002); Erichson, *supra* note 125, at 1809; Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 165 (1999).

<sup>143</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2010).

<sup>144</sup> 513 F.2d 892 (10th Cir. 1975).

<sup>145</sup> *Id.* at 894.

<sup>146</sup> See *Knisley*, 497 N.E.2d at 887–88; *Hoffman*, 883 So. 2d at 433–34.

*Jackson-Hewitt, Inc.*,<sup>147</sup> although that case presented a far more compelling scenario for deploying an advance-consent mechanism. In *Tax Authority*, 154 tax-preparation business owners sued their common franchisor over a dispute concerning the payment of rebates for Refund Anticipation Loans (RALs). The franchise agreement prohibited class actions, so the franchisees instead hired a single lawyer who filed a lawsuit naming all 154 clients as plaintiffs. Each of the plaintiffs signed an identical retainer agreement providing that the lawyer would represent the plaintiffs collectively, that a steering committee would make decisions on behalf of all of the plaintiffs, and that the plaintiffs would share responsibility for fees on a per-RAL basis. The retainer agreement provided that all plaintiffs would be bound by a settlement if a weighted majority approved the deal:

[T]he Client agrees that the Matter may be resolved by settlement as to any portion or all of the Matter upon a vote of a weighted majority of the Client and all of the Co-Plaintiffs. Each Plaintiff shall have one vote for each funded RAL for the 2002 Tax Season. The Client will be eligible to vote only if current in all payments required under this agreement . . . . A quorum for such vote shall be sixty percent (60%) of the votes eligible to be cast.<sup>148</sup>

The retainer agreement further specified that settlement proceeds would be allocated “according to each plaintiff’s proportionate share of the RAL reserve.”<sup>149</sup> Mediation led to a settlement agreement that received the affirmative vote of a weighted majority of the plaintiffs; eighteen plaintiffs opposed the deal. The defendant moved to enforce the settlement, and the trial court granted the motion.<sup>150</sup> The New Jersey Supreme Court, following *Hayes*, held that the advance-consent provision was impermissible under the Rules of Professional Conduct:

We conclude that *RPC* 1.8(g) forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement. Before a client may be bound by a settlement, he or she must have knowledge of the terms of the settlement and agree to them.<sup>151</sup>

Interestingly, the court chose to apply its ruling only prospectively, affirming the district court’s enforcement of the settlement.<sup>152</sup>

Ethics opinions have reached the same conclusion about the inadequacy of advance consent. In a 2006 ethics opinion, the American

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<sup>147</sup> 898 A.2d 512 (N.J. 2006).

<sup>148</sup> *Id.* at 515.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 516–17.

<sup>151</sup> *Id.* at 522–23.

<sup>152</sup> *Id.* at 523.

Bar Association spelled out the disclosures that a lawyer must make to obtain clients' informed consent under Rule 1.8(g) and noted that the rule presumes the existence of a particular settlement offer: "These detailed disclosures must be made in the context of a specific offer or demand. Accordingly, the informed consent required by the rule generally cannot be obtained in advance of the formulation of such an offer or demand."<sup>153</sup>

In 2009, the Association of the Bar of the City of New York released an ethics opinion on aggregate settlements that took up the question of advance consent.<sup>154</sup> The opinion addressed two related questions concerning advance settlement consent by jointly represented clients: First, "may the clients delegate complete authority to their lawyer to negotiate and bind them collectively to a settlement, thereby waiving any right to review and approve the settlement before it is concluded by counsel?"<sup>155</sup> Second, may the clients "agree to be bound collectively to any aggregate settlement approved by a specified number or percentage of those clients, following counsel's disclosure of the terms of the proposed settlement?"<sup>156</sup> The committee answered no to both questions, concluding that the disclosure and consent required for aggregate settlements must be made in the context of a particular settlement offer.<sup>157</sup>

In the context of appraising the ALI proposal, our recitation of these authorities might appear to be something of a non sequitur. These cases and ethics opinions articulate their criticisms in terms of the positive norms of the current law governing lawyers. The ALI proposal is not put forward as an interpretation of the current aggregate settlement rule; it is put forward as a needed change. As we explain below, however, our opposition to advance consent is not simply a call for compliance with current legal ethics rules. Rather, we ground our objection to advance consent in the principles underlying a proper conception of the lawyer-client relationship and control over claims. The ALI proposal would shift power from clients to lawyers in ways that not only raise concerns about the authenticity of consent but also put lawyers in a role that is inconsistent with loyal representation of clients.

### C. Advance Consent as Lawyer Overempowerment

The report on the *Principles of the Law of Aggregate Litigation* acknowledges that the advance-consent proposal runs contrary to cur-

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<sup>153</sup> ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006).

<sup>154</sup> Ass'n of the Bar of the City of N.Y., Formal Op. 2009-6 (2009).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

rent law on aggregate settlements<sup>158</sup> but argues that the law ought to be changed to facilitate comprehensive settlements of mass disputes.<sup>159</sup> The solution it offers is both creative and attractive, and successive drafts have toned down some of its objectionable features.<sup>160</sup> The proposal builds in certain safeguards to increase the likelihood of a fair settlement. Moreover, the advance-consent approach is transparent and noncoercive, particularly in comparison to approaches that mass tort lawyers currently employ to engineer comprehensive deals. Given our conclusion that the Vioxx settlement's mandatory-withdrawal provision was an impermissible approach to achieving an otherwise attractive resolution of the dispute,<sup>161</sup> we are tempted to embrace any solution that offers to permit similar resolutions without resorting to mandatory-withdrawal or similarly coercive devices. Ultimately, however, the ALI proposal suffers from the same problem as the Vioxx settlement: it shifts too much settlement power from the claimants to their lawyers.

Our critique of the ALI proposal has two prongs: First, we raise concerns about whether clients' advance consent to aggregate settlements could ever be sufficiently authentic to justify the imposition on

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<sup>158</sup> PRINCIPLES, *supra* note 10, § 3.17 reporters' notes (Effect on Current Law) ("Subsections (b)-(e) depart from the existing aggregate-settlement rule and would require changes to the rules of professional responsibility in all jurisdictions."); *see also id.* § 3.18 reporters' notes (Effect on Current Law) (proposing language for a new rule effectuating the proposal).

<sup>159</sup> *See id.* § 3.17 cmt. b.

<sup>160</sup> For example, the final proposal omits a troubling judicial-bypass feature that would have permitted plaintiffs' counsel to seek judicial approval to bind clients to a settlement even if those clients had not given advance consent. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.19, at 310–11 (Discussion Draft No. 2, 2007); *see also* Moore, *supra* note 131, at 399–401 (describing and critiquing the judicial-bypass proposal); 2009 *Discussion of Principles of the Law of Aggregate Litigation*, *supra* note 122 (remarks of Dean Robert H. Klonoff) (explaining the decision to scrap the bypass provision). Moreover, the final proposal reinstates a provision for limited judicial review to permit claimants to challenge unfair settlements. *See* PRINCIPLES, *supra* note 10, § 3.18; *see also* 2009 *Discussion of Principles of the Law of Aggregate Litigation*, *supra* note 122 (remarks of Dean Robert H. Klonoff) (explaining the decision to permit claimants to challenge settlements for substantive unfairness). To reduce the adhesion problem, the final proposal adds a requirement that lawyers offer traditional representation as an alternative to advance-consent representation. *See* PRINCIPLES, *supra* note 10, § 3.17(b)(4); *see also* 2009 *Discussion of Principles of the Law of Aggregate Litigation*, *supra* note 122 (remarks of Dean Robert H. Klonoff) (explaining the decision to require the alternative of traditional representation "in response to concerns that essentially the aggregate-settlement rule would simply become a nullity"). To address assorted other concerns, the final proposal offers a list of factors relevant to the enforceability of advance consent, including the sophistication of the claimants and whether a special master reviewed the settlement terms. *See* PRINCIPLES, *supra* note 10, § 3.17(d). All of these revisions make the proposal more palatable to those who, like us, are skeptical of moves that empower lawyers to impose settlements on their clients. These improvements do not, however, eliminate the two most fundamental problems with the proposal: the problem of inauthentic consent and the problem of nonconsentable conflicts.

<sup>161</sup> *See supra* text accompanying notes 41–117.

clients' rights. Second, we contend that even if the problems of inauthentic consent could be addressed, the advance-consent proposal would place lawyers in a fundamentally untenable position. In any dispute that raises serious allocation questions, the client-client conflicts of a yet-to-be-negotiated aggregate settlement are nonconsentable because they place the lawyer in the position of adjudicating clients' claims vis-à-vis each other.

Both prongs concern problems of lawyer overempowerment—giving lawyers the power to decide whether, when, and on what terms to settle and the power to allocate settlement funds among clients with conflicting interests. We should emphasize that this is our characterization, not that of the ALI. The ALI proposal strives mightily to insist that it empowers clients, not lawyers. The black letter of the advance-consent provision emphasizes that settlement approval depends on a supermajority vote of the claimants rather than on the lawyer's determination: "The power to approve a settlement offer must at all times rest with the claimants collectively and may under no circumstances be assigned to claimants' counsel."<sup>162</sup> Claimants in mass litigation, however, infrequently reject settlements negotiated by their lawyers. Accordingly, mass settlements negotiated by plaintiffs' counsel will nearly always garner the approval of a sufficient supermajority. If the dynamics of lawyer-client relationships in mass litigation virtually guarantee supermajority approval, the notion that the power to accept lies with the collective clients rather than with counsel is illusory. More fundamentally, it is a mistake to equate a minority veto-power over the collective settlement with the authority of individual clients over their own claims.

The drafters of the ALI proposal acknowledged concerns that the proposal "would give too much authority to lawyers representing multiple clients."<sup>163</sup> They considered, but ultimately did not adopt, an alternative approach involving the creation of an entity to pursue settlement on behalf of multiple claimants.<sup>164</sup> As the draft advanced, the Reporter recognized the objection that the proposal "allowed too

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<sup>162</sup> PRINCIPLES, *supra* note 10 § 3.17(b)(1); see also Kerrie M. Brophy, *Consent Waivers in Non-Class Aggregate Settlements: Respecting Risk Preference in a Transactional Adjudication Model*, 22 GEO. J. LEGAL ETHICS 677, 682 (2009) (accepting the ALI's assertion that its proposal, by allowing claimants to vote on settlements, preserves claimants' power over the settlement rather than handing that power to attorneys).

<sup>163</sup> Samuel Issacharoff, *Reporter's Memorandum*, in PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION xiii, xiv (Preliminary Draft No. 5, 2008).

<sup>164</sup> *Id.*:

One concept that has been suggested and that is attractive to us is to authorize the creation of an entity to which claims could be assigned and that would have the authority to approve a settlement. Such an approach would create an intermediary entity that would serve to protect private interests without overly concentrating authority in the hands of plaintiffs' counsel.

much authority to lawyers in both creating the ex ante agreement and structuring the distribution of benefits from the settlement”<sup>165</sup> and observed that the revised proposal “should accommodate some, but certainly not all, of the objections.”<sup>166</sup> While the proposal became more protective of client interests, its fundamental problems still remain.

### 1. *The Problem of Inauthentic Consent*

Some of the problems with the ALI proposal echo the most basic concerns about the Vioxx settlement. The ethical concerns about the Vioxx settlement largely boil down to this: when claimants consented to the settlement, their consent was inauthentic because they could not rely on independent advice from counsel and because the prospect of losing their lawyer left them with no real choice. For informed consent to be authentic, the client must understand the choice and it must be noncoercive. The ALI advance-consent proposal raises similar concerns about the authenticity of client consent. Rather than eliminating the problem of informed consent, the proposal frontloads the problem. It raises questions about whether clients, at the time they sign retainer agreements, can understand the implications of waiving their control over the settlement.<sup>167</sup> There is reason to suspect that, if the ALI proposal became law, virtually every mass tort lawyer would include boilerplate advance-consent language in the retainer agreement and virtually every client would sign it. Would clients understand what they are signing? Even if they did, would they have any realistic alternative?

On the question of comprehension, much depends on the level of client sophistication.<sup>168</sup> Clients who are not experienced users of legal services are unlikely to base their advance consent on genuine understanding of the trade-offs. Clients often sign whatever retainer agreement the lawyer gives them; the fact that a client signed the lawyer’s standard retainer agreement would offer little reason to be confident that the client knowingly gave up the right to decide whether to accept a settlement offer.

The ALI proposal tries to address the sophistication concern. It requires that the advance-consent agreement be “fair and reasonable

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<sup>165</sup> Samuel Issacharoff, *Reporter’s Memorandum*, in PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION xiii, xiv (Council Draft No. 2, 2008).

<sup>166</sup> *Id.* at xv.

<sup>167</sup> See Moore, *supra* note 131, at 419–20.

<sup>168</sup> Client sophistication figures prominently in analysis of consent to conflicts of interest. See, e.g., Ass’n of the Bar of the City of N.Y., Formal Op. 2001-2 (2001) (“To be sure, sophisticated corporate and institutional clients can consent to conflicts which might be non-consentable in cases involving unsophisticated lay clients who are not represented by independent counsel in connection with the consent.”).

from a procedural standpoint” and offers a list of factors including the “timing of the agreement, the sophistication of the claimants, the information disclosed to the claimants, whether the terms of the settlement were reviewed by a neutral or special master[,] . . . whether the claimants have some prior common relationship, and whether the claims of the claimants are similar.”<sup>169</sup> If the proposal were limited to cases involving sophisticated claimants and virtually identical claims, most of our objections would disappear. In the mass tort context, however, the ALI’s suggested factors play out differently. Mass tort plaintiffs, on the whole, are probably not any more sophisticated than the general population. Mass tort claimants rarely have a prior common relationship, at least in the products-liability context. Their claims involve individual issues that present serious allocation problems in an aggregate settlement. A mass tort lawyer seeking to use the ALI advance-consent approach, however, could easily satisfy the remaining factors by disclosing the advance-consent agreement and by having the settlement reviewed by a special master. Unless courts would be willing to strike down such agreements despite the powerful inertia of mass settlements presented as *faits accomplis*, the ALI proposal, if adopted, would likely result in the enforcement of settlements despite the inauthentic consent of unsophisticated clients.

Certainly, as the ALI Aggregate Litigation Reporters emphasize,<sup>170</sup> we permit people to waive all kinds of rights in our legal system. For example, the right to a lawyer and the right to trial by jury are waivable rights. Individuals may not, however, waive other rights, such as the right to recover in a medical malpractice claim against a physician or the right to sue for products liability.<sup>171</sup> Part of what differentiates these two types of rights is that once the permissibility of waiver is established in the latter, the market will uniformly require such waivers, thereby rendering their voluntariness artificial. Similarly, if lawyers could obtain advance settlement consent in mass torts, the market for plaintiffs’ lawyers in such cases might end up providing only one option. The question is not whether a plaintiff could intelligently waive such a right. Rather, the question is whether such waivers would result in a legal system that *de facto* eliminated the possibility of legal representation in mass tort cases that permitted a person to hold

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<sup>169</sup> PRINCIPLES, *supra* note 10, § 3.17(d).

<sup>170</sup> *Id.* § 3.17 cmt. b (“Waivers of important rights are valid in a variety of areas, including the most cherished of constitutional rights. Subsection (b) rejects the view that individual decisionmaking over the settlement of a claim is so critical that it cannot be subject to a contractual waiver in favor of decisionmaking governed by substantial-majority vote.”); *see also id.* § 3.17 reporters’ notes (naming fundamental rights that claimants can waive).

<sup>171</sup> Responding to the argument that clients should be permitted to waive their right to reject a settlement because other important rights may be waived, Nancy Moore points to numerous ways in which the law governing lawyers appropriately refuses to honor client preferences. Moore, *supra* note 131, at 416–18.

onto her right to determine whether to settle. Given the advantages, from the perspective of mass plaintiffs' lawyers, of being able to negotiate binding comprehensive settlements, would any talented lawyers continue to offer their services without expecting advance consent to settlement? If not, then clients who gave advance consent would be doing so as an alternative to having no lawyer at all; it would be a contract of adhesion.<sup>172</sup> To the extent that legal representation is more like medical care than like hang gliding, the compromise of voluntariness built into such a waiver (in a uniformly waiver-requiring market) is troubling as a matter of policy and principle.

The ALI proposal addresses the adhesion concern by requiring that lawyers offer to represent claimants regardless of whether the clients agree to give advance settlement consent:

Before claimants enter into the agreement, their lawyer or group of lawyers must explain to all claimants that the mechanism [of informed consent under the traditional aggregate settlement rule] is available as an alternative means of settling an aggregate lawsuit under this Section. A lawyer or group of lawyers may not terminate an existing relationship solely because the claimant declines to enter into an [advance-consent agreement], and the lawyer must so inform the client.<sup>173</sup>

This requirement goes some distance toward solving the problem of lack of alternatives. In the end, however, the concern about market alternatives is inseparable from the concern about client sophistication. If lawyers who represent mass tort plaintiffs recommend that their clients sign the retainer agreement with the advance-consent provision, expecting any clients to refuse is probably unrealistic. What client would choose to hire a lawyer on terms that the lawyer says, from the outset, are disadvantageous?

Because most mass tort plaintiffs are unsophisticated consumers of legal services and because the nature of mass tort practice makes it likely that lawyers overwhelmingly would prefer to obtain their clients' advance consent to settlement, there are serious concerns about whether client consent under the ALI proposal could ever be reliably authentic.

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<sup>172</sup> See generally Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1222-38 (1983) (explaining that the enforceability of contracts of adhesion hinges on the allocation of power between commercial organizations and individuals and that enforcing boilerplate terms infringes on the freedom of the adhering party).

<sup>173</sup> PRINCIPLES, *supra* note 10, § 3.17(b)(4).



## 2. *The Problem of Nonconsentable Conflicts*

Doubtful as we are about the prospects of authentic client consent under the ALI proposal, the proposal is subject to an even more fundamental problem. Even if the problems of sophistication and adhesion could be overcome, advance consent should not be permitted because the conflicts inherent in most aggregate settlements are nonconsentable in advance. In other words, assuming a sophisticated client who fully understands the advance-consent mechanism, whose lawyer provides full disclosure of its advantages and disadvantages, and who has realistic alternatives, the client should not be permitted to waive in advance the right to accept or reject a settlement.

To explain why the conflicts inherent in most aggregate settlements should be nonconsentable in advance, we will consider the problem in four steps: first, consentability of conflicts of interest in general; second, consentability of conflicts in aggregate settlements; third, advance consent to conflicts of interest in general; and fourth, advance consent to conflicts in aggregate settlements. Looking at the question of advance consent to the conflicts in aggregate settlements, we will show that cases in which such advance consent should be permissible are likely to be quite rare.

Most conflicts of interest may be waived. Rule 1.7(b) of the Model Rules of Professional Conduct provides that notwithstanding a conflict of interest, a lawyer generally may represent a client if the client gives informed consent in writing. Some conflicts, however, are nonconsentable.<sup>174</sup> Client consent to a concurrent conflict of interest is permissible only if “the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client.”<sup>175</sup> Significantly, consent is not permitted if the representation involves “the assertion of a claim by one client against another client represented by the lawyer in the same litigation.”<sup>176</sup>

Like most other conflicts of interest, the conflicts involved in aggregate settlements ordinarily may be waived. Indeed, the disclosure and consent requirements of Rule 1.8(g)—the aggregate settlement rule—are best understood as a specialized application of informed consent to conflicts of interest.<sup>177</sup> Although aggregate settlements raise a host of client–client and lawyer–client conflicts of interest, in most cases, the interests of clients are well served by a lawyer who rep-

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<sup>174</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 14 (2010) (“Ordinarily, clients may consent to representation notwithstanding a conflict. However, . . . some conflicts are nonconsentable, meaning that the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent.”).

<sup>175</sup> *Id.* at R. 1.7(b)(1).

<sup>176</sup> *Id.* at R. 1.7(b)(3).

<sup>177</sup> See Erichson, *supra* note 125, at 1795–96.

resents their interests collectively in the negotiation of an aggregate settlement. By offering clients the benefits of leverage and economies of scale, collective representation offers the only practical way for plaintiffs in mass litigation to litigate on a level field against a defendant who invests in the litigation based on the aggregate stakes. Not only does collective representation improve the quality of plaintiffs' litigation position, but in negotiating a settlement, a lawyer who represents a significant inventory of claimants generally has greater leverage than a lawyer who does not. Because of the benefits of collective representation and settlement, the conflicts involved in aggregate settlements generally should be consentable. The nature of the client-client and lawyer-client conflicts depends on the particular litigation and the terms of the proposed settlement, but those conflicts may be explained to clients in accordance with the disclosure requirements of the aggregate settlement rule. Thus, clients may give their informed consent to the lawyer's multiple representation in making an aggregate settlement, notwithstanding the conflicts of interest.

When we turn to advance consent, things get trickier. It is one thing to ask a client to consent to a known conflict of interest; it is quite another to ask a client to consent to an unknown conflict that may arise in the future. Advance-consent problems often arise in the corporate setting.<sup>178</sup> When a corporate client seeks to retain a law firm for a new matter, the law firm may worry that representing the client would render the firm incapable of taking on other matters in the future because of conflicts of interest. If the law firm is large and the prospective client is large, the risk of future conflicts of interest is substantial. Understandably, some law firms in this situation seek assurances that the representation will not prohibit them from taking on new work in the future. By asking the new client to consent in advance to potential conflicts of interest, these firms hope to protect future opportunities.

Whether such advance consent is permissible depends largely on two things: the clarity of the anticipated conflict and the sophistication of the client. Comment 22 to Rule 1.7 explains the general standard for evaluating "[w]hether a lawyer may properly request a client to waive conflicts that might arise in the future":

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<sup>178</sup> Cf. ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-436 (2005); Richard W. Painter, *Advance Waiver of Conflicts*, 13 GEO. J. LEGAL ETHICS 289, 308-11 (2000) (suggesting that the ABA's rules on advance consent are unclear); see also Alice E. Brown, *Advance Waivers of Conflicts of Interest: Are the ABA Formal Ethics Opinions Advanced Enough Themselves?*, 19 GEO. J. LEGAL ETHICS 567, 575-76 (2006); Michael J. DiLernia, *Advance Waivers of Conflicts of Interest in Large Law Firm Practice*, 22 GEO. J. LEGAL ETHICS 97, 122-26 (2009).

The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation.<sup>179</sup>

Authorities take various approaches when considering the enforceability of advance-conflict waivers, but they uniformly call for caution when dealing with unsophisticated clients and difficult-to-foresee future conflicts.

Applying these ideas to the context of the ALI proposal, aggregate settlements appear poorly suited for advance consent to conflicts. Not only are plaintiffs in mass litigation less sophisticated on the whole than the typical corporate client, but the conflicts in aggregate settlements are devilishly hard to describe before the settlement terms exist. The terms and conditions of mass settlements vary widely and raise too many different sorts of conflicts, both client–client and lawyer–client. In other words, even if all clients had the sophistication to understand the idea of advance consent to aggregate settlement, whether such consent can ever suffice is questionable given that the conflicts inherent in an aggregate settlement cannot be accurately perceived until the contours of the settlement are known. A recent New York City Bar ethics opinion emphasizes the near impossibility of meaningful advance consent to an aggregate settlement:

[B]ecause of the dynamics of litigation and the settlement process, “informed consent” to an advance waiver is virtually a contradiction in terms. Comment 22 to Rule 1.7 states that “[t]he effectiveness of advance waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails.” In most cases, at the outset of an engagement, and indeed at

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<sup>179</sup> MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 22; *see also* D.C. Bar, Op. 309 (2001) (“[T]he less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid.”).

any point prior to an actual settlement negotiation, it may be difficult, if not impossible, for a lawyer to possess, and therefore disclose, enough information to enable the client to understand the risks of waiving the right to approve a settlement following disclosure of all material facts and terms.<sup>180</sup>

Whether client consent can be “informed” at a point in the process when so much remains to be seen is questionable.

Advance consent may be appropriate for some cases, but those cases will be rare. *Tax Authority*<sup>181</sup> provides a nice illustration of a scenario where advance settlement consent could be permissible without undue encroachment on client prerogatives.<sup>182</sup> Recall that in *Tax Authority*, the plaintiffs were owners of tax-preparation businesses, presumably relatively sophisticated legal consumers who could understand the implications of waiving individual control over the settlement decision. The retainer agreement they signed was apparently designed for them, as it established voting rights and fee responsibilities structured in accordance with the claims that they had under the franchise agreement. It appears that the franchisees asserted identical claims against their franchisor. Most important, the case did not appear to raise any serious allocation issues—the relative value of the franchisees’ claims was in proportion to their share of the “RAL reserve.”<sup>183</sup> Under the circumstances of the *Tax Authority* case, a lawyer could explain at the outset the conflicts of interest that could arise in the context of a future settlement offer, and the clients would probably have understood the nature of those conflicts. Because the claims did not raise serious allocation problems, the lawyer would not be in the position of judging the relative worth of his clients’ claims.

This contrasts starkly with mass tort litigation. First, unlike the franchisees in *Tax Authority*, the typical mass tort plaintiff is not a particularly sophisticated consumer of legal services, is unlikely to obtain independent legal advice about whether to waive settlement control, and is unlikely to understand the implications of the choice. The more fundamental problem, however, concerns allocation. Mass tort cases involving personal injury or wrongful death (or, for that matter, any litigation in which the claims vary in strength or in which damages

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<sup>180</sup> Ass’n of the Bar of the City of N.Y., Formal Op. 2009-6 (2009).

<sup>181</sup> 898 A.2d 512 (N.J. 2006). For a discussion of *Tax Authority*, see *supra* text accompanying notes 147–52.

<sup>182</sup> The Reporters for the ALI project highlighted *Tax Authority* in support of their proposal. See, e.g., 2008 *Discussion of Principles of the Law of Aggregate Litigation*, *supra* note 122 (remarks of Professor Samuel Issacharoff) (laying out the facts of *Tax Authority* to introduce the advance-consent proposal and calling it “the case that for us sets the stage most clearly”). The terms of the ALI proposal, however, are not limited to cases like *Tax Authority* in which the claimants are businesses and the settlement involves no serious allocation problems.

<sup>183</sup> *Tax Authority*, 898 A.2d at 515.

are subjective or contingent) do not lend themselves to simple formulas for dividing settlement proceeds. Take, for example, a mass tort involving personal-injury claims based on product liability. The value of an individual claim depends in part on the amount of damages the plaintiff would be entitled to if the plaintiff were to prevail at trial. Items such as medical expenses, lost income, and pain and suffering thus figure into the settlement value of a particular plaintiff's claim. The value also depends on the likelihood that the particular plaintiff would prevail at trial. Thus, items such as proof of exposure, length of exposure, and alternative risk factors affect the settlement value. In addition to all of these details that relate to the merits of the claim, certain details not related to the merits also figure into the plaintiff's prospects at trial, such as whether the plaintiff is a sympathetic victim and whether the jurisdiction is known for large verdicts on damages. A defendant deciding how much to pay to obtain the particular plaintiff's release would be interested in all of these factors. Similarly, a rational plaintiff would consider these factors in weighing whether to give up the right to go to trial in exchange for a particular amount of compensation.

When an aggregate settlement resolves mass tort claims on a wholesale basis, the negotiations rarely account for all of the factors that might come into play when evaluating individual claims. Nonetheless, lawyers often establish a matrix of settlement values to take into account the most salient factors that can be efficiently compared across claimants. Depending on the nature of the claims, the matrix may include disease category, severity of injury, age, risk factors, length of exposure, proof, and other items relevant to determining how much of the settlement each claimant will receive. Whatever the approach used, in any aggregate settlement that includes monetary compensation, the settlement funds must somehow be allocated among the claimants.

Several approaches to allocation are possible. Plaintiffs' lawyers may negotiate the allocation with the defendants. Plaintiffs' lawyers may determine the allocation themselves. Plaintiffs' lawyers may delegate the allocation process to a special master. What plaintiffs' lawyers cannot do is avoid the necessity of allocation. Even the decision to give each plaintiff an identical settlement amount is an allocative decision (and a questionable one except in cases where the claims are either uniform or very small).<sup>184</sup>

When a lawyer for multiple claimants negotiates an aggregate settlement, the conflicts of interest involved in allocating settlement

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<sup>184</sup> See Erichson, *supra* note 125, at 1800.

funds can be severe.<sup>185</sup> Indeed, in settlements where the allocation occurs after a total fund has been negotiated, the conflicts are those of a zero-sum game. But this situation does not necessarily make the conflicts nonconsentable. As long as the client has the right to accept or reject the settlement after learning of the allocation and the conflicts it entailed, the situation falls within the scope of consentable conflicts that the conflict rules in general and the aggregate settlement rule in particular permit. The lawyer represented the clients in the negotiation of the settlement. Each client may choose whether to accept the settlement and, in so doing, to consent to the conflicts of interest in the deal.

If the lawyer obtained the clients' advance consent to be bound by an aggregate settlement, however, the story changes. Even if the lawyer is able to represent all of her clients together when negotiating with the defendant over the size of the overall settlement, an entirely different sort of problem arises when the lawyer turns to the question of how much each client is entitled to receive relative to her other clients. On this issue, the lawyer finds herself in the untenable position of adjudicating claims between her clients.

Arguably, this is simply a kind of arbitration agreement. On this theory, clients who give advance consent to be bound by an aggregate settlement are appointing their lawyer to arbitrate the conflicting interests among the client group in the context of negotiating and consummating the aggregate settlement. The law enforces arbitration agreements in a wide variety of settings, so why not this one? The problem is that, at least as envisioned by the ALI proposal (and in every one of the cases that has taken up the issue), the clients do not think they are hiring an arbitrator. They think they are hiring a lawyer to represent them in a lawsuit against the defendant. Advance settlement consent, in the ALI proposal, does not presuppose that the lawyer will be functioning in an adjudicative rather than a representative relationship. Rather, the lawyer is understood to be putting herself forward for the purposes of an otherwise standard lawyer-client relationship in which she is retained to advance the client's interest whether by litigation or negotiation.

We have argued that the advance-consent proposal presents a client-client conflict of interest that is nonconsentable. At one level, our criticism might appear too nuanced. We recognize that the aggregate settlement rule permits a lawyer to represent multiple clients in a settlement so long as clients retain the power of back-end consent to the settlement terms. In other words, we accept that a lawyer may negotiate a settlement for multiple clients, notwithstanding the inher-

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<sup>185</sup> See Moore, *supra* note 131, at 408-09 (explaining that financial incentives and special relationships with certain clients may bias a lawyer's decision regarding allocation).

ent conflicts of interest, if clients individually agree to the terms. But the inability of clients to reject the settlement agreement, in our view, creates a nonconsentable client–client conflict. How can the client’s approval make such a difference?

The answer is that there is a world of difference between a lawyer *creating an option* for each of multiple clients to release his or her claim as part of an aggregate settlement and a lawyer *consummating the release* of these claims. To simplify, imagine a settlement fund of \$200 million for three hundred clients suing an asbestos defendant—one hundred mesothelioma claimants and two hundred exposure-only claimants. Simplify further and imagine a \$2 million fund for three clients of lawyer L—client X with mesothelioma and clients Y and Z who are exposure-only claimants. Although the fixed size of the fund entails an obvious conflict of interest in the allocation of the settlement, the conflict is consentable under the aggregate settlement rule as long as X, Y, and Z each retain the right to decide whether to settle. If the lawyer negotiates a deal of \$1.8 million for X, \$100,000 for Y, and \$100,000 for Z, then X, Y, and Z each can decide whether to accept the settlement after learning its terms.

By contrast, suppose L’s retainer agreement with each of X, Y, and Z states that L may execute a settlement agreement for the client on whatever terms L deems acceptable, and suppose L executes the settlement agreements on such terms. The problem here is not that the result is bad or that L is untrustworthy. The problem is that it is incoherent to suppose that L, when she executes these releases, is acting as an agent of X *and* acting as an agent of Y *and* acting as an agent of Z. Because L is one lawyer and because she is dealing with a fixed settlement sum, it is not cogent to understand this as X’s act of release, Y’s act of release, and Z’s act of release, each through the agent L. It is simply L’s act of allocation among them.

Does a vote of the client group change anything? It adds a safeguard against egregiously inadequate settlements, but fundamentally, voting does not alter the fact that the lawyer cannot coherently be representing each of the clients in the allocation process if those clients may be bound over their objection. In the XYZ client group, ratification by a two-thirds majority would not make it the case that the dissenting client accepted the settlement through his lawyer. Indeed, the example shows how easily a lawyer can manipulate supermajority votes in the mass tort context. By overvaluing Y’s and Z’s claims and undervaluing X’s claim, L can virtually assure a positive vote. The same, of course, can be done in settlements of hundreds or thousands of claimants.

The client–client conflict is nonconsentable without back-end approval not because (or at least, not only because) the lawyer’s divided

loyalties make her untrustworthy. The client–client conflict is non-consentable because the divided loyalties undermine the possibility that her putative release of a client’s claim in aggregate settlement should count as the client’s release. What the back-end approval does is not simply to cleanse an otherwise suspicious deal. It preemptively avoids the agency problem that divided loyalties present. The client who gives back-end informed consent to an aggregate settlement is releasing the claim herself, not through her lawyer. Without back-end consent, the client is merely losing her claim (and gaining some money), not releasing it.

We can envision two ways that an advance settlement consent mechanism might avoid running afoul of fundamental principles. Unfortunately, neither way holds much appeal as a broad-based solution to the problem of finding closure in mass tort litigation. First, the mechanism could be limited to sophisticated clients with claims that present no serious allocation problems—the *Tax Authority* scenario.<sup>186</sup> In cases that fit this description, advance consent is not particularly problematic. Such a limitation, however, would render the mechanism useless in the vast majority of mass litigation. Second, the mechanism could explicitly place the lawyer in the role of arbitrator, avoiding any pretense of creating a lawyer–client relationship. But this mechanism would accomplish little. Claimants in mass tort litigation seek out lawyers to represent them in pursuing their claims. At the outset, neither claimants nor lawyers know what will happen in any claimant’s case. From the perspective of the initial moment when the lawyer is hired, the case could go to trial, it could be dismissed, it could settle individually, it could settle as part of a nonclass aggregate settlement, or it could get swept up into a class action. The lawyer has leverage to negotiate a settlement only because she can take cases to trial if necessary. The lawyer may wish to have the client’s advance consent in the event the lawyer negotiates a nonclass aggregate settlement, but in the end, the lawyer’s leverage to obtain a favorable settlement depends upon the lawyer’s access to the full range of litigation options.

#### IV

#### CONSENT AND CLOSURE

Part I set out the problem of obtaining closure in mass tort settlements, Part II argued that the leading real-world example for solving that problem is unacceptable as a model, and Part III argued that the best-conceived legal-reform solution to those problems is similarly unacceptable. Our critics will object that we are letting an obsessive con-

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<sup>186</sup> See *supra* text accompanying notes 147–52.



cern with consent stand in the way of win-win solutions, that we are letting the perfect be the enemy of the good.<sup>187</sup>

This understandable line of objection merges together two related challenges: (a) Is a rigorous focus on client consent really justifiable? (b) Given that the ALI's advance-consent proposal would secure closure and offers a solution that is, in most respects, satisfactory, is it not the right normative decision to embrace that proposal and simply tolerate whatever concerns remain regarding consent? Both of these challenges merit responses.

### A. The Importance of Consent

First, it may well be true that most plaintiffs would choose a substantial economic recovery in a reasonable period of time over strict compliance with informed-consent requirements, and in this sense, focusing on consent may seem impractical and paternalistic.<sup>188</sup> But tort law is not simply a device for transferring wealth, and good lawyers are not simply maximizers of average payout. As one of us has argued in prior work, tort law provides individuals with an avenue of civil recourse against those who have committed legal wrongs against them.<sup>189</sup> It does so by empowering individuals with a right of action against tortfeasors. When the tort system is functioning well, compensation for injured parties can be an extremely important byproduct, but the claim tort law provides against the tortfeasor is not precisely a means to that end. The claim is something that a plaintiff has if and only if she was tortiously injured, and its point is the empowerment to

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<sup>187</sup> Cf. FRANÇOIS VOLTAIRE, *LA BÉGUEULE, CONTE MORAL* (Geneva 1772) (“[L]e mieux est l’ennemi du bien.”).

<sup>188</sup> See NAGAREDA, *supra* note 9, at xx:

Rather than attempt to legitimize the peace by reference to claimant autonomy, the law instead should look to how other regimes of administration have garnered legitimacy: by using institutional structure to align the interests of the administrators with those of the people whom they are supposed to serve, not by empowering affected persons to opt out.

<sup>189</sup> See Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 738–41 (2003) [hereinafter Zipursky, *Civil Recourse*] (developing the civil recourse theory of tort law and arguing for its superiority over the corrective justice theory); Benjamin C. Zipursky, *The Philosophy of Private Law*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 623, 627–36 (Jules Coleman & Scott Shapiro eds., 2002) (analyzing the concept of right of action within tort law in terms of civil recourse theory); Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 70–88 (1998) [hereinafter Zipursky, *Rights, Wrongs, and Recourse*] (introducing the civil recourse theory of tort law); see also John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 559–611 (2005) (explaining the historical roots of the civil recourse theory of tort law and indicating its constitutional status). John Goldberg and Benjamin Zipursky have jointly elaborated the civil recourse theory in several subsequent works, most recently JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS* 47–62 (2010); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *Torts as Wrongs*, 88 TEX. L. REV. 917 (2010).

seek redress. Whether to develop or use that claim at all is, of course, the individual's choice; most people who are the victims of tortious wrongdoing simply choose not to sue. When a client has chosen to sue, the fact that she has employed a lawyer to do so on her behalf does not mean that the claim is no longer hers. To lose the right to decide whether to settle one's claim, and on what terms, is to lose control of that claim in a very real sense. The right to make such decisions generally does include the right to empower someone acting as a fiduciary to make that decision on one's behalf, and in this sense, advance consent might seem to be part of the client's right rather than antithetical to it. But unless and until we have reason to believe that client will actually understand what the delegation of that decision-making power means, and will have a realistic opportunity of declining to delegate it, checking the advance-consent box is not a delegation of the right as much as an unwitting forfeiture of it.

Perhaps class actions have habituated some legal thinkers into abandoning the paradigm of individual client rights within aggregate litigation. But cases involving nonclass aggregate litigation, like *Vioxx* or those contemplated by the ALI proposal, differ fundamentally from class actions. Despite strong functional similarities in the ways lawyers handle class actions and mass nonclass litigation, the formal difference still matters. Above all, it affects whether individual claims are subsumed into the collective.<sup>190</sup> Injunctive class actions, limited-fund class actions, and money-damages class actions for negative-value claims represent the most significant examples of when the collective claim overpowers individual claims.<sup>191</sup> To take one example, an injunction-seeking class action of working-age members of a racial minority against the local factory for a silent policy of employment discrimination involves individual civil rights, to be sure, but the claim of any one member of the class does not stand alone, and the aggregate quality of the legal action pushes strongly in the direction of collective litigation and collective settlement. Similarly, a true limited-fund class action deprives claimants of the right to control their individual claims because, like bankruptcy, the situation demands collective treatment. Even in class actions that theoretically permit opt-outs, economic imperatives may deprive claimants of control over their individual claims. Five million Con Edison customers with \$4.00 claims against the utility for fraudulent rate-setting have plausible assertions that their individual rights were violated, but the individual claimants

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<sup>190</sup> For an analysis of claimants' varying relationships to the claimant group, distinguishing between "group-oriented individuals" and "individuals-within-the-collective," see Elizabeth Chamblee Burch, *Procedural Justice in Nonclass Aggregation*, 44 WAKE FOREST L. REV. 1, 11-24 (2009).

<sup>191</sup> *Id.*

are unlikely to control the conditions under which their claims are compromised.

All of these cases carry with them reasons why the individual's claim is, in an important sense, subordinate to the group claim. In the civil rights injunctive-class-action context, the class members are, by virtue of being members of that class, the designated beneficiaries of the conduct the court is being asked to compel of the defendant. The class is not merely put together for power or convenience: just as one state might seek an injunction against another state's pollution, so a racial group may seek an injunction against a large employer's discrimination. The Con Edison example is quite different; the individual claim stands apart from other claims as a conceptual and legal matter, but as a practical matter, it is notional as an individual claim because no one would bother to go to the trouble of bringing a \$4.00 claim, apart from a class. Apart from class actions, our legal system treats these claims as nonexistent by virtue of being *de minimis*.

Claims like those asserted in the Vioxx litigation are quite different from each of these paradigms. The relief sought is individual. The obligation foisted upon the defendant pertains only to *ex post* compensation to the individual plaintiff. The parties did not claim and could not realistically claim a limited fund was at stake. Individual stakes were far from *de minimis*. The most important reasons for thinking of individual claims as fundamentally dependent on their relation to the group claim are inapposite. A package deal may make claims more attractive to settle, and collective representation may be the only way plaintiffs in mass litigation can litigate on an even field with defendants. But the fact that membership in a group may enhance litigation prospects and settlement leverage does not alter the fact that the plaintiff has a free-standing right of action against the defendant.

A facially impressive argument for the advance-consent proposal is that many clients would choose to delegate the power to settle if they fully understood what that meant because it would increase the likely value of their claim.<sup>192</sup> As discussed above, when we effectively categorize some form of lawyer-client transaction as nonconsentable even with full informed consent, we are effectively frustrating a client's wishes. In an article that has pushed the value of client choice and client autonomy as a central theme, the insistence on nonconsentability has the air of paradox.

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<sup>192</sup> See, e.g., Brophy, *supra* note 162, at 688 ("Arguably, individual autonomy can be enhanced by the implementation of ex-ante consent waivers. Allowing people to choose a form of adjudication based on their preferences for risk enhances rather than diminishes their control over the pursuit of legal recourse.").

This argument merits closer examination. In essence, a mass tort plaintiff's lawyer working under the ALI proposal is creating the legal infrastructure for an entity—the aggregate of his clients—that owns all the claims insofar as it has the power to settle all the claims simultaneously. He is trying to represent that entity as a unit while also representing each member in it. A client is essentially transferring his right to a group (of which he is a part) in return for the right to vote as part of the group and the right to a payout under a settlement reached by the group. More precisely, he is signing up for an arrangement that gives the lawyer an option to bring the group into existence for a vote because the right to decide upon the claim stays with the client individually unless the lawyer negotiates a settlement and brings the group into existence for the vote, which the lawyer is legally entitled to do (under this system). A rational, wealth-maximizing client might want to become part of such a client group because doing so might be a rational strategy for maximizing settlement payoff. It therefore may seem that we are contradicting ourselves by insisting that the ALI proposal undercuts clients' rights.

Despite appearances, there is no contradiction or paradox here. Our insistence on attending closely to the individual's claim—his right of redress—against the tortfeasor is hardly equivalent to a generic focus on individual choice or the value of individual wealth maximization. A right of action in tort is not an asset with respect to which the individual is simply entitled to maximize its value. It is a legal power to exact a certain remedy from a defendant through the court system.<sup>193</sup> Transferring the power to one's attorney or to a group of the attorney's clients might be the most conducive to a valuable settlement, even if the transfer occurs under circumstances where the attorney could no longer act as one's agent; but rights of action in tort are personal and exist only because the person herself was legally wronged.<sup>194</sup> Just because clients have the right to settle, discontinue, assert, or simply not assert their right as they choose does not entail the power to transfer the control connected with this right to someone who will not be acting as their agent. Similarly, the right to delegate the power to make important decisions regarding their claims to a lawyer acting as their agent does not entail the right to alienate the claim in a transaction with a lawyer not acting as their agent. Individuals with private rights of action in tort have a right to control their claims and may have a desire for a system that will maximize the value of their claims, but rights and desires are not the same. These individuals have no right to a system that will maximize the value of their claims. Insofar as tort law aims to secure an egalitarian framework, it

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<sup>193</sup> See Zipursky, *Civil Recourse*, *supra* note 189.

<sup>194</sup> See Zipursky, *Rights, Wrongs, and Recourse*, *supra* note 189, at 4–5.

does not do so by pushing for the highest payouts for tort victims. Rather, it does so by telling each person that their duties not to mistreat others are general and extend to all and by telling all that the right to redress a wrong done to them is theirs to use or not use as they wish. Above all, it equalizes protection and power, not resources.<sup>195</sup>

Although we are putting these points forward as general comments about rights within tort law, three aspects of the mass tort context deserve special attention. First, in circumstances like those giving rise to the Vioxx litigation, considerations of plaintiff empowerment are hardly mere theoretical abstractions. The problems giving rise to the litigation in the first place felt to many of those who became plaintiffs like a quintessential erasure of the significance of individuals in the face of a corporate megalith (Merck)<sup>196</sup> and a government agency (FDA) that failed to protect them,<sup>197</sup> turning instead into a bureaucratic megalith of its own. With staggering enthusiasm and resources poured into marketing, Merck aggressively sold its product to young and old, sick and healthy alike, regardless of whether they fit the profile of those who really needed a COX-2 inhibitor.<sup>198</sup> It did so by providing its sales force with a “Dodge Ball” memorandum explaining how to dodge questions from physicians about the cardiovascular risks of the drug.<sup>199</sup> By creating a market of 20 million U.S. users,<sup>200</sup> Merck earned billions of dollars and, according to some experts’ estimates, ended up killing tens of thousands of people.<sup>201</sup> Significant persons within the FDA later told Congress that the FDA acquiesced to Merck’s hard stance against changing the “Warnings” section of the drug’s label,<sup>202</sup> even when both the FDA and Merck were fully aware of data that suggested a possible fourfold increase in the risk of heart attack or stroke for those taking the drug.<sup>203</sup>

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<sup>195</sup> See, e.g., John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919 (2010) (explaining claimant empowerment as critical to the egalitarian aspect of products-liability law).

<sup>196</sup> Cf. Burch, *supra* note 190, at 47–48 (describing the need of claimants in cases like Vioxx to be recognized as individuals).

<sup>197</sup> See *Hearing, supra* note 42 (statement of Bruce M. Psaty, M.D., Professor, Medicine and Epidemiology, University of Washington, Cardiovascular Health Research Unit); Eric J. Topol, *Failing the Public Health—Rofecoxib, Merck, and the FDA*, 351 NEW ENG. J. MED. 1707, 1708 (2004).

<sup>198</sup> Cf. *McDarby v. Merck & Co.*, 949 A.2d 223, 232–33 (N.J. Super. Ct. App. Div. 2008) (describing the aggressive marketing campaign by Merck).

<sup>199</sup> Anna Wilde Mathews & Barbara Martinez, *Warning Signs: E-Mails Suggest Merck Knew Vioxx’s Dangers at Early Stage*, WALL ST. J., Nov. 1, 2004, at A1.

<sup>200</sup> *Id.*

<sup>201</sup> See *Hearing, supra* note 42 (statement of Bruce M. Psaty, M.D., Professor, Medicine and Epidemiology, University of Washington, Cardiovascular Health Research Unit).

<sup>202</sup> See *id.*

<sup>203</sup> See Jüni et al., *supra* note 47, at 2027.

Our political system uses tort law in part to allow those who have been victimized by the large and powerful to respond.<sup>204</sup> It empowers the individual with a right.<sup>205</sup> It is one thing for long waits and cumbersome litigation to frustrate this empowerment. It is another thing for the individual to learn one day in the newspaper that his lawyer has signed an agreement requiring the client to accept an unknown amount or else lose the lawyer. Mass tort litigation is not the best place to think that maximizing collective monetary recovery justifies departing from the norm of treating clients as having rights.

Second, the disempowerment of individual clients is not simply a channeling of client rights into higher financial payouts for clients themselves. There is another part of the story. Someone other than the client acquires an enormous amount of power—the lawyer. Client disempowerment is also lawyer empowerment, and the empowerment of the lawyer is not purely in service of a better deal for clients. In this setting, the lawyer acquires more money than any of her clients.<sup>206</sup> Given that members of the legal profession overwhelmingly are the individuals proposing changes to the law of mass torts, we ought to be especially distrustful of a plan of client disempowerment allegedly put forward for welfarist reasons.

Third, we recognize that, ironically, concern about the misallocation of power is part of what has motivated advocates of the advance-consent proposal. Scholars and lawyers worry that holdouts within the plaintiff pool (and sometimes their lawyers) can be an obstacle to comprehensive settlement.<sup>207</sup> If a defendant demands that a settlement be all-or-nothing, each individual claimant holds veto power.<sup>208</sup> Why should individuals have the power to spoil a fair outcome for thousands of others, for a large drug company that serves many, and for an already overburdened court system? From this vantage point, concerns about the fair allocation of power seem to cut in favor of an advance-consent proposal like that offered by the ALI.<sup>209</sup>

Responding to this objection is difficult because it conflates two quite different versions of the “holdout” story. If it simply reiterates the point that social welfare would be enhanced if the putative right to consent to one’s settlement were not treated as categorical, and cate-

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<sup>204</sup> See Goldberg, *supra* note 189, at 607.

<sup>205</sup> Cf. THOMAS H. KOENIG & MICHAEL L. RUSTAD, IN DEFENSE OF TORT LAW 9, 67, 207 (2001) (characterizing the role of tort law in permitting individuals to hold corporate malefactors accountable).

<sup>206</sup> Cf. Berenson, *supra* note 2 (“Besides Merck, the biggest winner in the case may be the plaintiffs’ lawyers.”).

<sup>207</sup> See Silver & Baker, *Mass Lawsuits*, *supra* note 128, at 762.

<sup>208</sup> See Erichson, *The Trouble*, *supra* note 74, at 1012–13.

<sup>209</sup> Indeed, this is the position taken by the project’s Reporter and Associate Reporter in Issacharoff & Klonoff, *supra* note 8, at 1185.

gorically within the claimant's discretion, we have already responded. Taking rights seriously means giving them staying power even when the general social welfare appears to point in the other direction.<sup>210</sup> We shall have more to say about the alleged dilemma below.

However, another suggestion here requires careful examination: the charge of extortion—the suggestion that those refusing to settle their claims are obviously merely manipulative hold-outs, that these claimants *must* recognize proposed settlements as perfectly acceptable and desirable and, by holding out, are simply trying to squeeze more out of the defendant at the cost of everyone around them. If all claimants rejecting a settlement offer fell into this category, then permitting them to act on their purely manipulative intentions would be preposterous. The argument might go that good faith exercises of the right matter, not abusive or manipulative exercises. It would be naïve to deny that some allegedly reluctant claimants are like this, but we find no reason to suppose that only a manipulative claimant would reject the settlement agreement. Claimants have different risk tolerances, different litigation objectives, different satisficing levels, and different evaluations of the strength of their own claims. Moreover, settlements treat claimants differently, leaving some better compensated than others. Claimants may place different values on certainty and may differ in their evaluation of the certainty that settlement provides. On the facts of *Vioxx*, the claimants had very little sense of how much money they would obtain from a settlement. There is good reason to think that some of them genuinely wanted to take Merck to trial rather than accept an utterly indefinite settlement.

#### B. The Putative Value of Closure

The second challenge our critics may raise is this: given that the ALI advance-consent proposal would secure closure and offers a solution that is, in most respects, satisfactory, is it not the right normative decision to embrace that proposal and simply tolerate concerns regarding consent?

The most important response to this challenge is that it begins with an undefended and indefensible premise: virtual comprehensiveness is necessary in a mass tort settlement because closure is necessary. It is true that the *Vioxx* settlement secured closure and that it was not likely to have done so without rigid restrictions on plaintiffs' lawyers. It is also true that the ALI advance-consent proposal is well designed to achieve closure and that equally high levels of closure are unlikely without the proposal (or something comparable). Additionally, clo-

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<sup>210</sup> See generally RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 184–205 (1978) (analyzing the concept of rights as trumping over considerations of social welfare).

sure is often regarded as desirable. Defendants like Merck want closure so they can rehabilitate their goodwill, reassure investors, control uncertainty, and stop spending huge sums of money on litigation. Plaintiffs' lawyers want closure so they can recoup the enormous front-end capital expenditures required to finance mass tort litigation and can turn to other litigation. Judges want closure to clear their dockets and achieve resolution of the mass dispute.

The question is not, however, whether these participants *want* closure—of course they do. The question is whether closure, or a very high level of comprehensiveness in settlement, is *needed*—whether, from a social perspective, closure should be regarded as a *sine qua non* for an acceptable settlement of mass tort claims. We see no reason to suppose an affirmative answer to this question. Mass tort settlements over the past several decades typically have *not* provided closure of the sort that Merck obtained in Vioxx and that the ALI proposal aims to secure. Yet, settlements have occurred, and this fact is not surprising. Even without the absolute closure envisioned by the Vioxx terms and the ALI proposal, a mass settlement can allow a defendant to put the majority of litigation behind it, reduce litigation expenses, and quantify the remaining risk. Even without whatever premium may attach to a settlement that delivers comprehensive peace, a settlement can provide sufficient compensation to persuade most plaintiffs to release their claims. When one steps back to look at how the lawyer-empowerment model took root—the arc from *Amchem* to fen-phen to Vioxx to the ALI proposal<sup>211</sup>—one sees a conflation of the *desire* for closure and the *need* for closure, a merger of ideas that occurs even more easily when one party takes the stance that it needs closure. If one examines both what should, in theory, occur and what has, in fact, occurred, the closure-is-necessary premise is easily refuted.<sup>212</sup>

We are left, then, with the argument that even if closure is not necessary, it is better than a piecemeal solution. Unless a settlement binds nearly all the claimants, a substantial number of unresolved claims will continue to go forward through discovery, motions, trials, appeals, and possible individual or group settlements. A comprehensive settlement, the argument goes, is the best option.

Though appealing, this argument begs the question in multiple ways. One needs to establish independently that comprehensive settlement is an option. One needs to say *for whom* comprehensive settlement is the best option. And one needs to determine *according to whom* comprehensive settlement is the best option. None of these questions can be answered in a manner supportive of the ALI proposal without simply assuming that an individual client's right to make

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<sup>211</sup> See *supra* text accompanying notes 13–33.

<sup>212</sup> See Moore, *supra* note 131, at 403–05.



an authentic decision about whether to settle should, in the end, be overridden. But that is the very point that must be established.

Finally, readers should not imagine that our willingness to take claimants' decisional rights seriously derives from an inclination to throw social welfare to the wind. The converse is more likely true: we suspect that the ALI's willingness to throw claimants' decisional rights to the wind derives from an overconfident view of what social welfare demands. Any adequate evaluation of the comparative value of a comprehensive settlement must include broad considerations that scholars have not even begun to address: Is the deterrent value of products-liability law undermined when a company like Merck can take an episode like the Vioxx debacle in stride? Or, is the legitimacy of our legal institutions in the eyes of the public undermined when a company pays almost \$5 billion for claims that have left only one out of eighteen plaintiffs who went to trial with an unscathed jury verdict<sup>213</sup> and have produced only three plaintiff victories out of almost fifty thousand plaintiffs? Of the roughly \$7 billion Merck will have spent on the Vioxx litigation, approximately \$3.5 billion will have been on attorneys' fees (including roughly \$2 billion for defense litigation fees).<sup>214</sup> Can a healthcare system that is hemorrhaging money afford to pay billions of dollars for highly sophisticated lawyers to hash out deals that end up paying them fifty cents on the dollar? And if Vioxx has killed, as some have estimated, tens of thousands of people, should we stomach a resolution that pays out modest amounts to victims and their families while lawyers are empowered to take home hundreds of millions of dollars?

We do not have answers to these questions, and our point in raising them is not to assert that, after all, the Vioxx settlement was a bad outcome. But the articulation of the issues should give us pause. There are innumerable reasons to question the public-welfare credentials of a resolution such as the Vioxx settlement and those resolutions that would be achieved if the ALI proposal were to become law.

#### CONCLUSION

Consent and closure turn out to be antipodes in the world of mass tort settlements. Many lawyers and scholars, from those involved in the Vioxx settlement to those who drafted the *Principles of the Law of Aggregate Litigation*, believe that the demand for comprehensive settlements dictates a flexible approach toward consent. They have not quite said that closure trumps consent; they have stopped short of saying this because they have taken the position that the need for client

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<sup>213</sup> See *supra* notes 54–57 and accompanying text.

<sup>214</sup> See Berenson, *supra* note 2.

consent in settlement can be accommodated within a system in which clients nominally consent to a deal or in which clients consent in advance to be bound by a collective decision. The advance-consent idea for nonclass aggregate settlements purports to harmonize the need for client consent with the need for closure. We have argued above that the circle cannot be squared: consent and closure cannot, in the end, be accommodated in the manner envisioned either by the Vioxx deal or by the ALI proposal. If settlements of individual claims are to retain legitimacy, it is closure that must give way, not consent.

