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AGGREGATE SETTLEMENTS, MDL ATTORNEY BATTLES AND THE USE OF

SPECIAL MASTERS: HAPPY TOGETHER

CUMBERLAND LAW SCHOOL SEMINAR

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I. The Demise of Class Action Settlements and The Rise of MDL Aggregate Settlements

A. 1966 Was A Banner Year For Mass Torts

- (i) Rule 23 becomes book-of-the-month club and attracts mass tort settlements until killed by Ortiz and AmChem.

In 1966, Rule 23 was modified by allowing an opt-out class and eliminating the opt-in requirement. The rationale was to allow the “prosecution of those class actions involving an aggregation of small individual claims, where a large number claims are required to make it economical to bring suit.” Shutts, 472 U.S. at 812-813. Ironically, however, the Rule Advisory Committee did not think mass tort personal injury cases were “ordinally not appropriate” for class treatment. Rule 23(b)(3) Advisory Committee’s note (1966).

At first blush, the new opt-out class action attracted mass tort settlement interest, on both sides of the v. It would help the Defendant preclude further litigation, as class actions are a recognized exception to the prohibition against non-party preclusion, and the Settlement Class could generate res judicata not achievable by piecemeal litigation. Taylor v. Sturgell, 533 U.S. 880, at 894 (2008). The promise of a conclusive end to litigation provided strong incentives for Defendants and Plaintiffs’ lawyers. For Defendants, the Settlement class held out the hope of a more certain grasp on the size of their liability and a defined endpoint to further litigation costs. On the other side of the ball, Plaintiffs’ lawyers were able to facilitate the Defendant’s desire for issue preclusion in return for compensation for Class claimants and for themselves.

There were early successes in the use of Class Actions in settling Mass Torts, with the most prominent being Agent Orange. In re Agent Orange, 818 F.2d 145 (2d Cir. 1987). In the

wake of Agent Orange, the Courts appeared to drop their resistance to Class Action Settlements, and class actions shifted from litigation enablement devices to a global resolution device, resulting in the rise of the Settlement Class, a class often only created in the context of a proposed settlement, with the class to vanish if the settlement is not approved.

Problems soon surfaced, which ultimately doomed large scale use of the Settlement Class device. There were fears of disloyalty by Class Counsel, as they jockeyed for leadership roles in a Class Action, with accusations of reverse auctions, in which Class Counsel could promise a small settlement to defendants in exchange for obtaining case leadership. AmChem, 80 Cornell L. Rev. 1045 (1995), John Coffee. It was also suggested that Class Counsel were incited to shape the class in a way that did not ensure the equitable treatment of all claimants, especially future claimants with unknown maladies. The Supreme Court's decision soon echoed these concerns, hobbling the use of Settlement Classes as global peacekeeping devices.

The first shot across the bow was AmChem, 52 U.S. 591 (1997), which was an attempt by the parties to resolve all asbestos claims related to personal injury liability of the Defendants, including those of future claimants with no symptoms. The Class was struck down, in part, because the symptom-free individuals lacked notice and representation within the Class. Another problem was the Court's finding that individual liability and damage issues predominated, to defeat Class Certification. *Id* at 626-627. Next, Ortiz, 527 U.S. 815 (1999) struck down an attempted mandatory class without opt-out rights, but without the Defendants filing bankruptcy, as an improper end run around the priority scheme governing creditors in Bankruptcy.

In both cases, the Supreme Court expressed concerns about Class Settlements binding future claimants due to inadequate representation.

After AmChem and Ortiz, parties scrambled to design a new process for the global resolution of cases, and turned their eyes to the MDL, where, as a practical matter, cases can be consolidated, usually never to be separated again.

(ii) The MDL statute is enacted, creating Mass Tort Settlement black holes.

The theory of Multidistrict Litigation (MDL) in 1966 was simple, to limit the possibility of inconsistent decisions on key questions of law or fact during litigation, which could occur if there are multiple forums deciding related cases. The MDL process, on its face, does not seem to be a candidate for peacemaking in Mass Torts, because it is so simple:

The MDL statute provides:

When civil actions involving one or more common questions of fact are pending in different districts, such actions may be transferred to any district for coordinated or consolidated pretrial proceedings...Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated....

So, why are related MDL cases not aggregated for discovery and then sent back to the originating courts when this is complete? Answer: they settle.

The vast majority of MDL's settle, and few settle as Class Actions anymore after AmChem and Ortiz. The Quasi-Class Action Method of Managing Multi-District Litigation, Problems and a Proposal, Silver and Miller, 63 Vanderbilt L R 107 (2010). Indeed, only 3% of MDL cases ever go back to the original District. Judging Multi-District Litigation, NYU L R in 2015, Elizabeth Burch.

MDL practice now usually means the transfer of a large number of similar cases to a

selected District Court to begin a process leading to a global resolution of the litigation. The transferee judge usually selects Lead Plaintiff Counsel, shepherds a Master Settlement Agreement and decides the compensation of Plaintiffs' Counsel. It appears to be a blend of informal aggregation for discovery with active judicial involvement similar to that in the old Class Action.

If the Class Action Settlement is not available in the MDL, what is a Transferee Judge to do after Amchem? Rule 23 is now "a mandate of perfection", The Class Action, by Elizabeth Cabraser, 57 Stanford LR 1476

The current settlement vehicle of choice is sometimes called a Quasi-Class Action Settlement, which, in reality, is an Aggregate Settlement under ABA Rule 1.8(g). Though the definition of an Aggregate Settlement is debated, it simply is the settlement of two or more cases with a fixed or capped lump sum of money, so that the recovery amount of each settling individual is interdependent with the recovery amount of the others. To resolve the case, there is usually a series of bellwether trials, followed by a Global Settlement. The MDL Transferee Judges are often rewarded for so settling complex disputes with additional MDL referrals. See, for example, the Vioxx Settlement supervised by Judge Eldon Fallon and the Zyprexa Settlement supervised by Judge Jack Weinstein.

In reality, the power of the MDL Transferee Judge to delay dispositive motions, dismiss cases, price claims through bellwether trials, and set plaintiffs lawyer compensation, in many ways resembles the power of judicial supervision in Class Actions, helping facilitate MDL Settlements. Toward a Bankruptcy Model for Non Class Aggregate Litigation, Troy A. McKenzie, at page 986.

There is a clear tension between, on the one hand, the theoretical workings of the MDL

and the right of individuals to exit collective proceedings and litigate alone, with, on the other hand, the desire of the Court and the lead lawyers to resolve the cases in one global settlement. Nothing in the MDL statute, as you can see, expressively authorizes MDL Judges to select Lead Counsel or set their compensation.

This recent practice of Quasi-Class Action Settlements greatly reduces the ability of parties to untangle their individual actions from others gathered in the MDL Forum and to exit and litigate them individually.

II. Aggregate Settlements: The New Mass Tort Resolution Vehicle

A. Fundamental Requirements and Practical Results

Let us now discuss the settlement vehicle you now usually see in MDL's and outside MDL's, following the large scale demise of Class Actions: the Aggregate Settlement.

Much as the MDL statute, the ABA Aggregate Settlement Rule is surprisingly sparse:

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, unless each client consents after consultation, including disclosures of the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.
ABA Rule 18(g)

ABA Formal Opinion 06-638 identifies the following information that the lawyer must communicate to each client in order to obtain his or her authorization to settle in compliance with Rule 18(g):

- The total amount of the aggregate settlement
- The existence and nature of all of the claims, defenses, or pleas involved in the

aggregate settlement or aggregated agreement.

- The details of every other client's participation in the aggregate settlement of aggregate agreement, whether it be their settlement contributions, their settlement receipts, the resolution of their criminal charges, or any other type of remuneration or contribution.
- The total fees and costs to be paid to the lawyer as a result of the aggregate settlement, if the lawyer's fees and/or costs will be paid, in whole or in part, from the proceeds of the settlement of by an opposing party...
- The method by which costs (including costs already paid by the lawyer as well as costs to be paid out of the settlement proceeds) are to be apportioned among the clients.

What does an Aggregate Settlement typically look like? Below is a table from a presentation by Eliot Jubelirer of Schiff Hardin of San Francisco:

Are These Aggregate Settlements?

- 1) Lump sum settlement of \$1,770,000
- 2) Lump sum settlement by disease category







5 mesothelioma cases	500,000	(\$100,000 each)
20 lung cancer cases	500,000	(\$ 25,000 each)
35 asbestosis cases	350,000	(\$ 10,000 each)
140 disputed asbestosis cases	<u>420,000</u>	(\$ 3,000 each)
	\$1,770,000	
- 3) Individual analysis and negotiation with the defendant of the value of each case with a cap on the total.
- 4) Individual analysis and negotiation with the defendant of the value of each case with no set cap.

In answering the question, the critical part of the Aggregate Settlement definition is interdependence of the recovery of a group of plaintiffs. Thus, example one, with a lump settlement to be allocated among a group of plaintiffs, is clearly an Aggregate Settlement. Same with example two. Same with example three, because there is a cap on the total. Four is not an Aggregate Settlement because there is no cap. If example four is pursued, the Aggregate Settlement rule does not apply, with all of its ethical problems that we are now going to describe.

For those who are not Auburn grads, Professor Erichson of Notre Dame Law Review has the below table summarizing all the Aggregate Settlement possibilities:

Conditionality

		All-or-nothing	Tiered: all-or-nothing/ walk-away	Walk-away	Tiered: walk-away/ independent	Independent
Allocation	Zero-sum interdependence					
	Lump sum					
	Total cap					
Limited allocation	Per capita					
	Matrix or formula					
	Claims mechanism					
Individual amounts						

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

A Typology Of Aggregate Settlement, by Howard Erich M. Erichson, (80 N.D.L.R. 1797)

Looking at the table, the lower left hand box is clearly not an Aggregate Settlement and the upper left hand box, in which all Plaintiffs must agree to a lump sum's allocation, clearly is an Aggregate Settlement. All the rest are arguable. However, when in doubt, the safe harbor is to follow the Aggregate Settlement Rule, which we describe in detail below. Simply put, the Aggregate Settlement Rule is followed correctly for a group of plaintiffs if a disinterested neutral allocates the proposed compensation lump sum among all of the plaintiffs with their prior consent, shares the allocation results with all fellow plaintiffs, and obtains their written consent to the allocation and their payment. There are many twists and turns along the way, such as how to resolve a problem when, say, 97 out of 100 Plaintiffs agree and the other 3 want more, when Plaintiffs who are not hurt try to hold hostage those who are hurt by taking some of their recovery, and so on. Typically, a Defendant insists on either 100% resolution or substantially all resolution of the Plaintiffs cases.

Bells and whistles are often added as an incentive to Plaintiffs' lawyers to push their clients to agree to the deal, and to punish the clients if they don't. Such bells and whistles may very well be unethical.

For example, in the \$4.85B Vioxx Global Settlement, 85% of Plaintiffs had to agree to the deal or it was off the table. Plaintiff firms had to recommend the deal to all of their claimants to have any of their of claimants participate. And, if a claimant did not agree to the deal, his or her lawyer had to withdraw from the claimant's representation, effectively putting the claimant in the cold. If a claimant in an MDL does not agree to a Global Settlement, where does the claimant go? As we have seen, it is almost impossible to leave the MDL, and what lawyer will

help the claimant if, as in Vioxx, lawyers with knowledge of the case are required to boycott the recalcitrant claimants?

Unlike in Class Actions, the Aggregate Settlement Rule greatly empowers the dissident Plaintiff, with much time being spent in each Aggregate Settlement bringing the naysayers into the fold. As a result, there is an ongoing effort to move toward majority rule in approving an Aggregate Settlement. See, proposed ALI Rule § 3.17 (2010):

[I]ndividual 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).

This is not the rule by the ABA, or practically any state in the nation. It is not the rule in Alabama.

By contrast, the Class Action does not include a mechanism for group consensus, and limits the opportunities of Class Members to voice their approval by not opting out or their disapproval by not opting out but filing an objection. Aggregate Settlements allow disapproval by silence while silence means the opposite in a Class Action Settlement. The theory of the Class Action is that the named Class Representatives, Class Counsel and the Court will act as fiduciaries for the Class, protecting them from unfavorable settlements. Zyprexa, 424 F2d 488, at 491-494 (E.D.N.Y 2006). All of these mechanisms are often in place for an Aggregate Settlement, but individual claimants have much more power.

B. Aggregate Settlement Mechanics

The rule of the road for every Aggregate Settlement is to get State Bar approval of it up front. State Bar approval on the back end, if the Aggregate Settlement goes sour or you have a dissident claimant, is almost impossible to get. The Alabama State Bar is very cooperative in reviewing proposed Aggregate Settlements and approving them if they pass muster under Rule 1.8(g). The themes of successfully carrying out an Aggregate Settlement are transparency and informed consent.

The best approach to a potential Aggregate Settlement is, first, to get client consent to an attempted Aggregate Settlement, up front before negotiations begin. In drafting the consent, the client should agree that you may reveal information relating to the client's representation to other clients, which is necessary to carry out the rule, and which consent is required so as not to violate Rule 1.6(a) respecting unauthorized client disclosures. For a Plaintiff firm or firms to do the allocations, instead of having a neutral do them, may run afoul of Rule 1.7(a)(2) which provides in pertinent part:

A lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest. A concurrent conflict of interest exist 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.

Having a neutral do the allocation will avoid a conflict of interest, that would exist if there is a high risk that your ability to consider, recommend or carry out an appropriate course of action for one client will be materially limited as a result of your obligations to another client,

which is inherent in the Aggregate Settlement allocation process.

Prior client consent to enter into an Aggregate Settlement cannot substitute for the requirement of subsequent client consent to the final proposed Aggregate Settlement allocations, following the disclosures that must be made to the client. Hayes v. Eagle - Pitcher Industries, Inc., 513 F2d 892 (10th Cir. 1975).

How do you handle errors and inaccuracies in the allocation process and the strong possibility that the neutral doing the allocations was unaware of or did not fully appreciate certain damages criteria of one or more claimants? The practical answer is to have a hold back of between 10 and 20 percent, which is revealed, up front, to the participating claimants at the time they are asked to consent to their proposed Aggregate Settlement amount, giving all claimants the right to appeal the award, while noting that the award may be adjusted upward only if the appeal has merit.

Some Aggregate Settlements have tried to penalize claimants so appealing, to discourage them. However, in my opinion, this may violate the rule, whose theme is informed and free consent. After the appeals have been vetted and any additional awards have been made, any remaining appeals reserve is then ratably paid to all Aggregate Settlement Claimants.

When an Aggregate Settlement is presented by one of more law firms to a group of plaintiffs, do the plaintiffs lawyers have an irreconcilable conflict of interest, being incented to close the deal and get their fee, while the client has to decide whether to take or leave the award? That is, in the Aggregate Settlement approval or disapproval right process, are the Plaintiffs' exit rights real or fictitious? One solution to the problem would be to appoint a guardian ad litem to represent the claimants at the time they decide to accept or reject the deal. I have never heard of

this being done.

Is it ethical for a Court to require or for a lawyer to threaten withdrawal from the client's representation if the client disagrees with the proposed Aggregate Settlement? The answer appears to be no. See, for example, DeFlumer v. LeSchack, 200 Westlaw 654608 (N.D.N.Y May 19, 2000). To Tsavaris v. Tsavaris, 244 S 2d 450 (Florida Dis. Ct. Ap. 1971). Of course, Vioxx crossed the line here.

Is it ethical for a Defendant to enter into different aggregate settlements with different law firms for the same tort, while paying claimants equally hurt different amounts? This is done all the time, with plaintiffs with the same level of damages receiving different award levels based upon the bargaining strength of the law firm representing them. See, for example, Administration of the 2003 Tolbert Settlement, 60 Ala. C.R. 1249 (2009), by Ed Gentle, where Monsanto had two simultaneous \$300 million Aggregate Settlements, one for 18,000 Plaintiffs and one for 3,500.

Is there no consequence to the law firm if it can show that the client was not hurt by the firm's non-compliance with the Aggregate Settlement Rule? No, the law firm can forfeit its fees. See, Burrow v. Arce, 997 So. W. 2d 229 (Texas 1999).

C. Mass Tort Client Representation Issues

How hard is it to carry out an Aggregate Settlement and get 100% Plaintiff approval, the obvious safe harbor? Surprisingly, it's not very difficult. I have done Aggregate Settlements for a 4,000 claimant PCB case, in which all but 7 claimants agreed, an 80 claimant x-ray overdose

case where all claimants agreed, and three different Chantix Aggregate Settlement cases with between 90 and 300 plaintiffs each, with unanimous approval.

Aggregate Settlements require a lot of contact between the Plaintiffs and the neutral doing the allocating, in order to generate understanding and trust. Often, Plaintiffs only want to be heard and to understand fully how their award was computed and how they were scored relative to other Plaintiffs. My approach has been to talk with every single Claimant during the Aggregate Settlement process. The most difficult claimants appreciate the appeals process, in which they have an individual hearing with me and their lawyer to vet their concerns. Almost always, the claimant finally agrees that the Aggregate Settlement allocation is fair.

Another problem with Aggregate Settlements is resource competition between the haves and the have nots. Almost every deal has a handful of claimants that are seriously hurt and a handful that are not hurt at all. The Defendants do not want to allocate any of the Settlement to the second category, but they want closure. Inevitably, some of the Aggregate Settlement money has to be allocated to those that are not hurt. Is this unfair to those who are hurt? This is a difficult topic that Plaintiffs Counsel must wrangle with in negotiating an Aggregate Settlement and the neutral much tackle in doing the Aggregate Settlement distribution. The argument for going forward is that there is power in numbers, so that the serious cases get more in an aggregate deal than they would alone. This is sometimes true and sometimes not. Clearly, the have nots have no argument against taking the deal and usually do so. Occasionally, a have not understands his bargaining position and tries to take advantage of the problem. Once this is exposed diplomatically, the claimant tends to come back to his or her senses.

III. Organizing and Managing Mass Tort Common Benefit Lawyers

A. Selecting Plaintiff Leadership

When a Federal Judge is assigned an MDL, an initial organizational step is to select Plaintiff leadership. Should experienced repeat players be selected by the Court, where dissent may be absent, or should the Court have a more diverse leadership team? If a case comes in, how should the fee be split between such common benefit lawyers and the lawyers with clients? In the process, it is appropriate to cut the plaintiff lawyers' contingent fees, even though the clients agreed to them in writing?

We have a square peg in a round hole problem, because MDL's were created to streamline discovery and the pretrial process, and then to return the cases to their home Districts for trial. Lexecon, 523 U.S. 26 (1998). The Federal District Court Judge is therefore saddled with managing an MDL for settlement on a non-class basis without Rule 23, with such Aggregate Settlements being presumptively private and out of his or her control.

Should there be uniform rules in selecting Plaintiff leadership? Is this something the MDL Panel should draft? When I asked an unnamed MDL Panel member this question, he expressed doubt.

Professor Burch advocates a "cognitively diverse" method in appointing lead lawyers, under which they would be selected based upon interviews and merit, and would represent a broad array of clients and backgrounds.

Even though there are no rules, the selection of leadership is akin to appointing Class Counsel, as the individual client attorneys are largely relegated to observers in many Mass Tort

cases, with the lead lawyers having a fiduciary obligation to these lawyers, and their clients.

Indeed, lead Plaintiff lawyers may represent all of the clients. San Juan DuPont Plaza Fire Litigation 111 F 3rd 220 (1st Cir. 1997): “Whether or not there is a direct or formal attorney-client relationship between plaintiffs and the PSC, the PSC...necessarily owed a fiduciary interests in the plaintiff pool, to ensure adequate representation, even though you may not have a class action.” AmChem Products, Inc., 521 U.S. 591 (1997).

Is it appropriate to appoint to leadership Plaintiffs lawyers who have no clients? Silver and Miller say no: “A clientless lawyer will rationally want to settle on any terms a defendant will offer...[because he or she] has no stake in the MDL’s upside potential, and will suffer greatly if negotiations fail.” Silver and Miller, 79 Fordham Law Review (2011), at 151.

Should a consensus model be used to select lead lawyers, in which an agreed slate is presented to the Court for sign-off? Doesn’t this encourage undisclosed fee sharing arrangements among the lawyers or log rolling in other cases these lawyers share? This approach is probably desirable for Liaison Counsel, who has to get along with everyone, but it does encourage repeat players, which can stifle creativity and adequate representation.

According to Professor Burch, in the 73 product liability and sales practices MDL’s that were pending in May 2013, 750 out of 1200 available leadership positions were occupied by lawyers who had leadership positions in more than one MDL. 50 of the lawyers were named as lead lawyers in 5 or more MDL’s and they have 30% of all leadership roles.

One Judge named the same lawyers as leads in 4 of the 5 MDL’s he had.

Is this “mainstreaming” of the leadership the reason for certain “runaway settlements” such as in Vioxx, where the PSC approved a Settlement that required Plaintiff lawyers to

recommend it to all of their clients and to withdraw from representing their clients who did not settle?

To help solve the problem, Professor Burch advocates appointing new entrants to leadership positions, appointing them on an interim basis, implementing Plaintiff Lawyer governance rules that tolerate and promote dissent, and having special appointments to represent Plaintiffs with conflicting interests.

She suggests that the recipe for collusive Settlements is repeat Plaintiff leadership Aggregate Settlements and Judges who want to settle in order to get more MDL's.

B. Mass Tort Plaintiff Lawyer Compensation

Common benefit compensation is controversial. In Guidant, Vioxx, and Genetically Modified Rice, the common benefit lawyers negotiating a settlement inserted fee provisions for themselves, and required individual plaintiff lawyers to waive their objections to the common benefit fees if they wanted to enroll in the settlement. Is this not unethical self-dealing, because it violates the lead lawyers' fiduciary obligation to principals?

Here are three suggested fee solutions:

- (i) Cap the tax before you leave port.

Judge Pointer, in MDL 926, the Breast Implant Litigation, capped the common benefit lawyers' portion of the settlement at 6% at the beginning of the case. Common benefit lawyers kept their time and expenses, which were audited by a Special Master, and were paid on a quantum meruit basis. When the case resolved, 2% (1/3) of the 6% was given back to the Plaintiffs, because there was too much common benefit money.

This allowed all Plaintiff lawyers to know the tax of participating in the MDL when the case began.

(ii) Enter into a lodestar agreement up front.

The common benefit and individual plaintiff lawyers can enter into an agreement on how they will propose to the Court to split the fee award if the case comes in, perhaps with the help of a Special Master. Though not necessarily binding, it will help make peace and encourage all lawyers to work together for the common benefit of their clients, instead of angling for fees.

(iii) Have the MDL Panel make Fee Rules.

Though this is ambitious, it would help encourage all MDL's to have uniform and hopefully more fair fee rules.

Theoretically, the Federal Judge has no legal authority to approve or disapprove an Aggregate Settlement. However, because fees are involved, they may be a lever that the Judge could push to take a look at the fairness of an Aggregate Settlement.

There is no authority for capping private Plaintiff contingency fee contracts in Aggregate Settlements, although it is done frequently. The Quasi-Class Action Model for Limiting Attorneys' Fees in Multi-District Litigation, Jeremy Hayes, 667 NYU Annual Survey 589 (2012). Thus, Judge Weinstein capped Zyprexa fees at 35% citing public perception as the reason. Judge Frank capped them at 20% in Guidant, Judge Fallon capped them at 32% in Vioxx, and Judge Hellerstien reduced them from 33 to 25% in Ground Zero Workers Litigation.

Intervention by the Judges in the Aggregate Settlement compensation issue may be based on arguments of cost-savings due to economies of scale in representing large groups of Mass Tort clients or the Judge's thinking that the Aggregate Settlement substitutes for the old Class

Action Settlement, when 20% fees were common.

IV. Role and Use of the Special Master

Federal Rule 53 basically says that a Judge, when faced with a complex or difficult matter, that will take up too much valuable time, can appoint a personal aide to get help, with or without consent of the parties, in the form of a Special Master. Much of this work has typically been done by Magistrate Judges, which numbered 570 in 2012. Magistrates have been with us since 1968, and have increased in number from 470 in 1990, although the number of cases that they have resolved skyrocketed by 227% from 4,600 to 15,000 cases during this same period.

Special Masters can be used for a variety of purposes, including negotiation and oversight of multiparty e-discovery protocols, deciding motions involving intricate facts or law, assuring ongoing compliance with sophisticated consent judgments, resolving internecine disputes between plaintiffs over fees, facilitating and mediating a settlement or administering a settlement claims process.

The Supreme Court has cautioned that Judges should use Special Masters to aid in the performance of specific Judicial duties...and not to displace the court. Labuy v Howes Leather Company, 352 US 249, at 256 (1957). Docket congestion is not enough. Ibid at 259.

The suggested rule of thumb in hiring a Special Master is to do so when a case is so complex that it takes up too much of the Court's time without obtaining help. As the parties usually split the Special Master costs, related factors are whether the case is already very expensive or when the parties are driving up the cost of litigation unnecessarily without the help

of a Special Master to cool things down.

It is submitted that engaging a Special Master actually increases and does not reduce Judicial authority, kind of like a Police Chief hiring additional cops on his or her beat.

See, Special Masters Versus Magistrate Judges, The Federal Lawyer September 2014, at 73, by David R. Cohen.

A Special Master appointed early in the case can help with the lawyer representing the parties selection of plaintiff leadership, resolve discovery disputes, and facilitate status conferences and cooperation between the parties. Such a Special Master who helps the Court organize and carry out the case, is often well positioned to help the case settle. This has been my experience.

If a Special Master is built into an Aggregate Settlement, claimants are more objectively scored, providing a higher degree of immunity for lawyers representing the parties. To facilitate further due process, assuming the case is not too big, each claimant may be allowed an oral presentation to the Special Master as was done in the BioLab Case in 2006. An appeals process is also advisable, possibly funded by a 10% to 20% hold back depending on the precision of the grading process, to pay for the possible appeal relief. The grid allocation Special Master could conduct the appeals or a second appeals Special Master could be appointed to provide another layer of objectivity.