CONSENT VERSUS CLOSURE

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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. Despite the headlines proclaiming the settlement--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.
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. 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, and particularly since the fen-phen settlement class action a few years later resulted in a disastrous ballooning of costs for the defendant, 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, 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, and in work by leading academics, 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 thinking 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.

*269 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. [FN10] 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-win proposal.

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.
To understand the Vioxx settlement, we need an understanding of the dispute that brought the parties to court. 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. 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. 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. 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 underplaying"277 the grounds for concern about the drug's safety. 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.

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. [FN47] 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. [FN48] 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.

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. [FN50] Even larger "278 statewide consolidated litigation took place before Judge
Carol Higbee in New Jersey, [FN51] and sizable coordinated proceedings took place before Judge Victoria Chaney in California [FN52] and Judge Randy Wilson in Texas. [FN53] 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. 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. In yet another case, the court drastically reduced the compensatory damages award. [FN56] In only one case (where the plaintiff went through a second trial) did a plaintiff not have his verdict vacated or trimmed on appeal. 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. Moreover, the compensatory damages for pain and suffering were high in all five cases. In other words, five juries found enthusiastically for plaintiffs.

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 *280 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. [FN66]

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.

Some Vioxx plaintiffs’ lawyers, troubled by the mandatory-recommendation and mandatory-withdrawal provisions, sought a declaratory judgment that these terms were unenforceable. 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.” 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.

2. Legal Ethics Problems

The mandatory-recommendation and mandatory-withdrawal provisions of the Vioxx settlement run afoul of several legal ethics rules, as a number of commentators, including ourselves, pointed out. *282 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. [FN75] 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. [FN76] 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. [FN77] 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 settlement.*283 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.

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.” [FN78] In class actions, lawyers may seek court approval of settlements over the objections of class representatives, but the Vioxx personal-injury and wrongful-death litigation was not a certified class action. 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 or 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.

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