

Mass Tort Remedies and the Puzzle of the Disappearing Defendant

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I. Introduction

Most mass tort personal injury claims, like virtually all modern lawsuits, are eventually resolved through settlement. Mass tort settlements, which provide monetary compensation to participating claimants, typically do not involve a court-certified class. Rather, they are usually accomplished through private (and confidential) agreements between the defendant and particular plaintiffs' counsel that seek to resolve the individual claims of a group of plaintiffs in exchange for a specified total, maximum payment. Unlike an agreement resolving a traditional bipartite legal dispute, a mass tort settlement agreement commonly will not specify the compensation to be paid to any particular settling claimant. Rather, the agreement will often state, *inter alia*, that the defendant: (1) will pay a particular, maximum lump sum to resolve the group of covered claims; and (2) will play no role in determining the settlement offer value of any individual claimant, that is, in determining the amount of the total settlement funds to be paid to any individual settling claimant.

This disappearance of the mass tort defendant with regard to specifying a traditionally material term of a settlement agreement raises two initial questions: Why is the defendant apparently not concerned to play a role in determining each claimant's settlement offer value? And how, if not by the defendant, is an individual, mass tort claimant's settlement offer amount determined?

In Part II, this Article explains how mass tort settlement agreements frequently differ from an agreement to settle a typical bipartite dispute. It then speculates on why the mass tort defendant is commonly so uninvolved in determining the settlement offer amount for each individual claimant. Part III takes up the issues that arise for plaintiffs' counsel when the mass tort defendant agrees only to a lump-sum settlement, including the conflict of interests that exists and how it may properly be resolved. This Part concludes that retaining a special master is neither necessary nor sufficient for managing this conflict. Part IV examines why and when, nonetheless, some mass tort plaintiffs' counsel retain a third-party "allocation special master." It goes on to discuss the various

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routes by which an allocation special master may come to be involved in a mass tort settlement, as well as the circumstances under which the claimants may most greatly benefit from such a special master's involvement. The Article concludes in Part V by considering some implications of this examination of allocation special masters for recent broader discussions of the costs and benefits of using special masters in complex litigation.

II. The Mass Tort Personal Injury Settlement

The agreement to settle the typical bipartite legal dispute is relatively straightforward. At its core, the agreement specifies the particular claims against the defendant that the plaintiff will be releasing and the precise sum that the defendant will pay the plaintiff in exchange. The plaintiff and the defendant (or their legal counsel) both sign the agreement.

The "settlement agreement" entered into by a defendant to resolve mass tort personal injury claims (such as those involving pharmaceuticals, medical devices, and toxins) is importantly different. To begin, the agreement will cover a group of plaintiffs and will not itself resolve any individual plaintiff's claims.¹ Moreover, the typical agreement will not indicate the amount that the defendant is offering for the release of any particular claimant's claims but will specify only the total amount that the defendant will pay in exchange for a release of all of the covered plaintiffs' specified claims against the defendant.² The agreement will state a "participation threshold" that must be met in order for the defendant to be obligated to proceed with the settlement.³ That is, the defendant will retain a unilateral right to terminate the agreement and not proceed with the settlement if a specified percentage of claimants

1. This group is typically not a settlement class or a certified litigation class. Rather it is usually a list of individually named claimants, each of whom has retained as counsel the attorney who signs the master settlement agreement on behalf of the covered claimants.

2. Historically, there have been confidential mass tort settlement agreements, such as many involving asbestos-related claims, in which the agreement did specify the settlement offer value of each covered individual's claim. See Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 760-61, 775-76 (1997) (describing an asbestos settlement). Such agreements have taken two general forms. Sometimes, the agreement would provide a list of the covered claimants that included the individual settlement offer value for each claimant's claims, along with a participation threshold that must be met in order for the defendant to be obligated to proceed with the settlement. Other times, the agreement would establish a regime of standing settlement offer values for individual claims based on a simple matrix of injury categories. This latter form of "administrative agreement" would not include any participation threshold in order to become effective.

3. Such a participation threshold is one of many provisions in a private, nonclass settlement agreement that enables a mass tort defendant to obtain finality. See Lynn A. Baker, *Mass Torts and the Pursuit of Ethical Finality*, 85 FORDHAM L. REV. 1943, 1944 (2017) (discussing how "comprehensive finality in nonclass aggregate settlements is both desirable and largely achievable within existing ethical constraints").

covered by the agreement does not agree to settle their claims under the terms of the agreement.⁴ Relatedly, the agreement often will provide for some reduction in the total amount to be paid by the defendant if the agreement is not terminated but some covered claimants do not ultimately participate in the settlement.⁵ In essence, such an agreement simply provides the bare outlines of a process—which, in several material respects, does not involve the defendant—by which plaintiffs will receive individual offers to settle their claims against the defendant.

Why is the mass tort defendant apparently not concerned to play a role in determining each claimant's settlement offer value? There are several possible explanations. First, given the large number of claims involved in the typical mass tort settlement, the defendant's primary concern is to obtain closure for a specified maximum dollar amount. The defendant can accomplish that by specifying the claimants to be covered by the settlement agreement, the maximum dollar amount it will pay to resolve those claims, and the number and/or identity of nonsettling covered claimants that will trigger its unilateral option to walk away from the settlement.⁶ With those constraints in place, the defendant has no reason to care about the allocation of the total settlement fund among the covered claimants. Its sole concern is to obtain as much closure as possible without in effect funding a continuing war against itself.⁷ And toward that end, it is likely that plaintiffs' counsel will have better information earlier about which clients have the strongest potential cases and, therefore, what allocation of the settlement fund is most likely to secure maximum closure.⁸

4. I am aware of numerous confidential settlements in which the agreed participation threshold was not met, but the defendant chose not to exercise its termination right under the agreement. For speculation on why "defendants regularly waive their contractual right to terminate aggregate settlements in which the participation threshold is not met," see *id.* at 1950–51.

5. *Id.* at 1951 n.30.

6. The defendant does not need 100% participation in the settlement in order to obtain de facto closure given the massive cost to a plaintiff of litigating an individual mass tort claim involving complex science and/or medicine. See *id.* at 1952 (explaining the costs to a plaintiff of litigating this type of claim). Simply put,

[t]he defendant will not be overly concerned with the outlier nonsettling claimant. If that claimant hopes to go to trial, any trial date may be years off and the anticipated cost of litigating his or her science- and medicine-intensive case may exceed \$250,000. Even a claimant with a strong claim may have difficulty finding a contingent fee lawyer eager to gamble that much money and time on the client's case.

Id. Put differently, the claims of any nonsettling plaintiffs are highly likely to all be "negative value" claims if litigated individually and are, therefore, not likely to be attractive to any contingent-fee plaintiffs' attorney post-settlement.

7. *Id.* at 1944–45; Silver & Baker, *supra* note 2, at 760–62.

8. Plaintiffs' counsel also has incentives to obtain maximum closure, insofar as counsel does not receive contingent fees from unsettled cases. Additionally, "[a] partial settlement can leave a plaintiff's firm or consortium with ongoing expenditures of time and money as it continues to prosecute the unsettled claims against the defendant." Baker, *supra* note 3, at 1944 n.3.

In addition, determining settlement offer values may be a complex process in many mass tort settlements, such as those involving alleged injuries resulting from pharmaceuticals and medical devices. Unlike asbestos claims whose values for settlement purposes were commonly based on five relatively straightforward and objective injury categories,⁹ other mass tort personal injury claims are rarely so easily categorized or valued. Thus, in order for the defendant to specify each covered claimant's settlement offer value in the settlement agreement, the defendant first would potentially need to reach some agreement with the plaintiffs' counsel regarding the allocation "formula"¹⁰ to be used when valuing each individual's claim. In addition, the defendant would need to review and analyze the relevant medical records and proof of use for each of the covered claimants in order to apply the allocation formula to the facts of each claimant's claim. When hundreds or thousands of claimants are included in the settlement, this process of determining each claimant's settlement offer value will be time-consuming and expensive. A defendant that wants to announce sooner rather than later that it has "resolved" a significant number of mass tort claims against it will prefer to avoid this process and enter into a lump-sum settlement with a walk-away provision of the sort described above.¹¹ In addition, by avoiding the process of valuing individual claims, the defendant avoids the substantial related costs including attorney time and the cost of various scientific and medical experts. Those costs instead will ultimately be borne by the settling plaintiffs and their counsel.

9. Silver & Baker, *supra* note 2, at 760–61. These categories were mesothelioma, lung cancer, other cancers, pleural disease, and pulmonary asbestosis. *Id.* Each plaintiff's claims were placed in one of these five categories, as determined by the plaintiff's medical records. *See id.* at 760–61, 775–76 (showing the proportion of plaintiffs in each injury category in one asbestos settlement).

10. For an example of a publicly available allocation formula, see the agreed "Point Award Criteria" used in the Vioxx settlement. Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto, at Ex. 3.2.1 (Nov. 9, 2017), <https://www.beasleyallen.com/alerts/attachments/Vioxx%20Master%20Settlement%20Agreement%20With%20Exhibits.pdf> [https://perma.cc/WCL4-2GUH].

11. A publicly traded defendant may want to mitigate the cloud on its share price as soon as possible. And a privately held corporation may be motivated by tax concerns or a possible merger. Although such an agreement has not in fact resolved any plaintiffs' claims, the official announcements, as well as the press coverage, tend to suggest otherwise. *See, e.g.*, Press Release, Merck Settles Thousands of Vioxx Claims for \$4.85 Billion (Nov. 9, 2007) (on file with author) ("The resulting \$4.85 billion resolution is a resolution which was hard-fought and portended risks for all parties."); *see also* Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES (Nov. 9, 2007), <https://www.nytimes.com/2007/11/09/business/09merck.html> [https://perma.cc/4V64-BF87] (describing Merck's \$4.85 billion settlement); Press Release, FierceBiotech, Merck Agreement to Resolve U.S. Vioxx Product Liability Lawsuits (Nov. 9, 2007), <https://www.fiercebiotech.com/regulatory/press-release-merck-agreement-to-resolve-u-s-vioxx-product-liability-lawsuits> [https://perma.cc/FB7D-7BTP] (describing Merck's agreement to pay \$4.85 billion into a settlement fund).

Whatever the explanation for why a mass tort defendant is not concerned to play a role in determining each claimant's settlement offer value in a particular settlement, the question next arises of how and by whom an individual claimant's settlement offer amount will be determined.

III. Allocating Lump-Sum Settlements¹²

When a defendant agrees to settle a group of mass tort claims for a specified lump sum, there are two obvious candidates for who might determine the individual settlement offer amount for each of the covered claimants: plaintiffs' counsel or a third-party "neutral." Upon further reflection, it might seem that plaintiffs' counsel cannot play this role due to a conflict of interests: every dollar of the lump sum that plaintiffs' counsel allocates to one of her clients covered by the settlement agreement is a dollar no longer available to be allocated to any of her other covered clients.

Under American Bar Association (ABA) Model Rule of Professional Conduct 1.7(a), plaintiffs' counsel's involvement in the allocation of a lump-sum settlement fund "is a potentially prohibited concurrent conflict insofar as '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.'"¹³ As I have previously explained:

The question under Rule 1.7(b) then becomes whether, notwithstanding the conflict, "the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client" and "each affected client gives informed consent, confirmed in writing."

Many lawyers may "reasonably believe" that they cannot zealously represent each of their multiple clients when allocating the limited settlement funds among them and that the concurrent conflict is therefore *not* one to which the affected clients can be asked to consent.¹⁴

Thus, *taken alone*, Rule 1.7 arguably prohibits plaintiffs' counsel from determining each claimant's settlement offer amount in the context of a lump-sum group settlement.¹⁵

Does Rule 1.7 similarly prohibit a third-party "neutral" from allocating a lump-sum settlement fund among the covered claimants? To the extent that the third party is retained by plaintiffs' counsel to perform this task on behalf

12. Some of the discussion in this section draws upon Lynn A. Baker, *Aggregate Settlements and Attorney Liability: The Evolving Landscape*, 44 HOFSTRA L. REV. 291, 316–19 (2015).

13. *Id.* at 317 (quoting MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(1), (4), 1.8(g) (AM. BAR ASS'N 2018)).

14. *Id.*

15. MODEL RULES OF PROF'L CONDUCT r. 1.7(b)(1), (4) (AM. BAR ASS'N 2018).

of the covered clients, plaintiffs' counsel arguably has simply delegated the allocation problem. The same conflict exists; it has simply been transferred to a different person, who is arguably the attorney's agent.¹⁶ Thus, taken alone, Rule 1.7 arguably prohibits lump-sum group settlements since neither plaintiffs' counsel nor a third-party neutral retained by plaintiffs' counsel could permissibly allocate the settlement fund among the claimants covered by the settlement agreement.¹⁷

Importantly, however, Rule 1.7 is supplemented by Rule 1.8(g). Commonly referred to as the "aggregate settlement" rule, the ABA version of Rule 1.8(g) states in relevant part:

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . 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 . . . involved and of the participation of each person in the settlement.¹⁸

Every state has adopted a version of the Rule, either identical to the ABA version or with only minimal changes.¹⁹ Under every variation, the Rule explicitly

imposes two requirements on attorneys representing multiple clients in connection with a proposed [lump-sum] settlement: (1) the attorney must provide each client covered by the proposed settlement certain information regarding the terms of the settlement, including the settlement offers to be made to each of the covered clients; and, (2) the attorney must obtain the informed consent of a covered client in order for that client's claims to be settled.²⁰

16. It is an interesting question whether the neutral is in fact "the attorney's agent" if he is retained "on behalf of" the clients and ultimately paid by the clients. Does the neutral have fiduciary obligations to the clients or just contractual obligations pursuant to the agreement by which the neutral was retained?

17. Although Rule 1.7 directly addresses only the conflict that exists for plaintiffs' counsel or its agents, Rule 8.4 importantly supplements this Rule by prohibiting defense counsel from proposing a settlement that would require plaintiffs' counsel to violate a Rule of Professional Conduct. Rule 8.4(a) states that "[i]t is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR ASS'N 2018).

18. MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2018). The excerpt omits those portions of the rule relevant to criminal cases, which are not the focus of this Article.

19. Baker, *supra* note 12, at 294. For details regarding the various ways some states have altered Rule 1.8, see *id.* at 294 n.8. From the adoption of the ABA Model Code of Professional Responsibility in 1969 through the present, the Rule has existed in essentially the same form. For a summary of the historical evolution of the ABA version of the Rule, see *id.* at 294 n.9, 295.

20. *Id.* at 295 (citations omitted). Rule 1.8(g) covers "aggregate settlements" and not just lump-sum settlements of the sort that are the primary focus of this Article. For a discussion of the historical evolution of, and continuing confusion surrounding, the definition of an "aggregate settlement" under the Rule, see *id.* at 297–310.

Critically, Rule 1.8(g) provides the plaintiffs' attorney assurance

that aggregate settlements *are* ethically permissible and that the plaintiffs' attorney *may* ethically participate in the "making" of such settlements, including allocating a limited settlement fund. . . . Put differently, Rule 1.8(g) provides a safe harbor for attorneys concerned that an aggregate settlement creates a non-waivable conflict under Rule 1.7. It does not impose any new requirements on an attorney beyond those imposed by the other rules, but rather charts a path by which the plaintiffs' attorney can provide clients the benefits of a non-class-action group settlement without running afoul of Rule 1.7.

When Rule 1.8(g) is understood in this way, the disclosures it requires the attorney to provide each affected client also take on broader significance. Information about "the existence and nature of all of the claims . . . involved and of the participation of each person in the settlement" is consistent with the attorney's obligations under Rule 1.4(b) to explain a settlement offer "to the extent reasonably necessary" for the client to be able to make an informed decision about whether to accept it. At the same time, that information enables the client to decide whether to consent to the concurrent conflict inherent in the attorney's making of the aggregate settlement, consistent with Rule 1.7(b)(4). In sum, the disclosure and consent obligations under Rule 1.8(g) seek to ensure that a client who is accepting her settlement offer gives informed consent both to that offer and to representation by the client's attorney who is laboring under a concurrent conflict in the making of the settlement, including the allocation of the settlement fund.²¹

It merits emphasis that Rule 1.8(g) does *not* state that the attorney can or should resolve her concurrent conflict of interests under Rule 1.7 by handing off to a third party the making of the aggregate settlement or the allocation of any attendant lump-sum settlement fund. Rather, Rule 1.8(g) is explicit that the role of the attorney who represents multiple clients in an aggregate settlement is to make certain disclosures to the clients and obtain their consent to the group settlement including the allocation of the settlement fund.²²

This understanding of Rule 1.8(g) and the ethically proper handling of lump-sum settlements was reaffirmed in a 2006 ABA Ethics Opinion regarding aggregate settlements.²³ The Opinion set out the information that the lawyer must disclose to the clients to be included in the proposed

21. *Id.* at 317–18 (citations omitted).

22. MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2018).

23. See ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006) (discussing the lawyer's duties to disclose relevant information and obtain informed consent from clients when an "aggregate settlement" is involved).

settlement in order to obtain their consent and noted that “[t]hese 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.”²⁴ The Opinion also explained:

Rule 1.8(g) deters lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement. That information empowers each client to withhold consent and thus prevent the lawyer from subordinating the interests of the client to those of another client or to those of the lawyer.²⁵

The above discussion makes clear that a lump-sum aggregate settlement is ethically permissible and that the settlement offers to be made to individual plaintiffs from the settlement fund may be made by the plaintiffs’ counsel or a third-party retained by that counsel. No matter who ultimately determines the individual settlement offer values, however, the disclosure and consent obligations of Rule 1.8(g) must be fulfilled.²⁶

IV. The Allocation Special Master

The previous Part explained that retaining a special master is neither necessary nor sufficient for plaintiffs’ counsel to ethically navigate the conflicts inherent in determining individual settlement offer amounts when the settlement agreement provides only a lump-sum settlement value. Nonetheless, some mass tort plaintiffs’ counsel do retain an “allocation special master” to determine the amount of each client’s individual settlement offer. This Part offers a typology of when and why these counsel do so. It goes on to explore when claimants may most greatly benefit from the involvement of a special master in the settlement allocation process.

24. *Id.* (citing *In re Hoffman*, 883 So. 2d 425, 433 (La. 2004) (“The requirement of informed consent cannot be avoided by obtaining client consent in advance to a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement.”)).

25. *Id.* (citing *In re Hoffman*, 883 So. 2d at 432; *Arce v. Burrow*, 958 S.W.2d 239, 245 (Tex. App. 1997), *judgment aff’d in part, rev’d in part on other grounds*, 997 S.W.2d 229 (Tex. 1999)).

26. Thus, for example, it would not seem to comply with Rule 1.8(g) for a special master retained by plaintiffs’ counsel to allocate a lump-sum settlement fund and tell each claimant only his or her own individual settlement offer amount in seeking each claimant’s consent to the settlement. The fact that the special master is a “third-party neutral” and not plaintiffs’ counsel would not seem to change the fact that in order for each claimant to be able to give valid consent to the settlement under Rule 1.8(g), plaintiffs’ counsel must ensure that each claimant also knows the nature and settlement offer value of every other covered claimant’s claim, as well as the total value of the settlement. *See, e.g.*, ABA Comm. on Ethics & Prof’l Responsibility, *supra* note 23 (explaining that Rule 1.8(g) requires counsel to disclose the total amount of the aggregate settlement along with the “existence and nature” of the other claimant’s claims); Baker, *supra* note 12, at 310–11 (same).

There are three general scenarios under which a special master assists with allocating a lump-sum mass tort settlement. Sometimes the settlement agreement will provide that a named individual will serve as the allocation special master and will further specify whether the defendant, plaintiffs, or both will be responsible for the special master's fees. Sometimes the defendant will require a provision in the settlement agreement mandating that plaintiffs' counsel retain an allocation special master and that the special master's fees are to be paid from the lump-sum settlement amount. And sometimes the settlement agreement will be silent on the issue of an allocation special master, but plaintiffs' counsel will nonetheless choose to employ one. Across all three scenarios, there is the further option for the defendant, plaintiffs' counsel, or both to formally request a court to "appoint" the allocation special master notwithstanding the otherwise private and (typically) confidential nature of the settlement. I now examine each of these scenarios in turn and the possible advantages and disadvantages of each for the defendant, the mass tort claimant, and plaintiffs' counsel.

When the settlement agreement provides that a named individual will serve as the allocation special master, the defendant may believe that it benefits by not leaving the allocation process within the control of the plaintiffs' counsel. The defendant may be concerned that the plaintiffs' counsel may not allocate the settlement fund "correctly,"²⁷ may do so strategically,²⁸ or may be of the (mistaken) view that it is not ethically permissible for the plaintiffs' counsel to determine the covered plaintiffs' individual settlement offer amounts. It is also possible that the defendant believes that the plaintiffs each will consider their settlement offers to be more "legitimate" in some way, or more "fair," if they are determined by a special master rather than by plaintiffs' counsel (or by the defendant). The defendant may be of the further view that such a perception by the plaintiffs may cause them to be more likely to accept their settlement offers, thereby affording the defendant greater (and quicker) finality with all the attendant benefits.²⁹

27. With some obvious exceptions, such as allocating a larger settlement offer amount to Claimant A who is less seriously injured than but otherwise similarly situated to Claimant B, there are few clearly "incorrect," and many permissible and defensible, allocations of any given settlement fund. *See, e.g.,* Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1475–76, 1515–27 (1998) (explaining the variety of methods that may properly be used to allocate settlement funds).

28. From the perspective of a defendant, whether an allocation of the settlement fund by plaintiffs' counsel is strategic (and "incorrect") will depend in part on the other provisions of the settlement agreement, such as those setting out how the rebate to the defendant will be determined for any eligible claimant who may decline her settlement offer.

29. *See, e.g.,* Baker, *supra* note 3, at 1444 (discussing the benefits of finality to defendants); Silver & Baker, *supra* note 2, at 760–63 (detailing reasons why defendants who settle group lawsuits "want finality and are willing to pay for it").

In addition, such a provision in the settlement agreement enables the defendant to exercise some control over who will allocate the settlement fund while simultaneously being able to disavow any (direct) involvement in its allocation or, therefore, in the determination of any individual claimant's settlement offer value. Indeed, settlement agreements with such provisions typically also include a statement that the defendant shall play no role in the allocation of the settlement fund.³⁰ This disavowal by the defendant may seem odd. After all, there is nothing improper about the defendant itself determining each claimant's individual settlement offer amount—indeed, doing so is a primary obligation of the defendant in the traditional, bipartite settlement. So what is the defendant's concern here? One (uninteresting) possibility is that the defendant wants to minimize any potential liability for the special master's particular acts or omissions. Another possibility is that the defendant (and/or its counsel) more generally wants to minimize its liability related to the allocation of the settlement fund as well as any threat that issues related to the fund's allocation might pose to the validity of the larger settlement.³¹

Consummated mass tort aggregate settlements increasingly are the focus of litigation by the participating claimants who allege, *inter alia*, various ethical and other violations in the attorneys' handling of the settlement and the allocation of the settlement fund.³² To the extent that plaintiffs' counsel do not comply with the requirements of the aggregate settlement rule (Rule 1.8(g)) in their handling of a lump-sum settlement, they may be found to have breached a fiduciary duty to their clients.³³ And that breach may subsequently result in a judicial determination that partial or complete forfeiture of the attorneys' fees is mandated.³⁴ Of course, neither the defendant nor defense counsel owes any fiduciary obligations to the plaintiffs. However, Rule 8.4(a) states that it “is professional misconduct for

30. See, e.g., Master Settlement Agreement at 13, *In re Am. Med. Sys., Inc. Pelvic Repair Sys. Prods. Liability Litig.*, No. 12-MD-2325 (S.D. W.Va. June 14, 2013), <https://www.sec.gov/Archives/edgar/data/1100962/000110096213000038/ex10144meshsettlementagree.htm> [<https://perma.cc/7CLF-THUY>] (“The Parties expressly disclaim that AMS has any responsibility or liability for any allocations or any distributions of the Settlement Fund . . .”). This document is the rare instance of a “confidential” inventory settlement that is publicly available in redacted form as a result of being filed with the Securities and Exchange Commission.

31. It is not clear what liability the defendant might face. The defendant owes the claimant no fiduciary obligations regarding the allocation of the settlement fund. Any such obligations are owed to the claimant by his or her retained counsel. See Baker, *supra* note 12, at 297 (explaining that plaintiffs' counsel must adhere to the relevant ethics rules to “avoid breach of fiduciary duty claims or disciplinary sanctions or both”).

32. See, e.g., *id.* at 291–92 n.1 (listing cases involving liability claims filed by clients against their attorneys in connection with aggregate settlements).

33. See *id.* at 291–93, 291–92 n.1 (explaining the rise of liability claims centered on the aggregate settlement rule).

34. *Id.* at 292 n.2.

a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, *knowingly assist* or induce another to do so, or *do so through the acts of another*.³⁵ Thus, to the extent that plaintiffs' counsel is determined to have violated any ethical or other rules in the handling of the lump-sum settlement, defense counsel may be found under some circumstances also to have engaged in professional misconduct. In addition, and perhaps of greater concern to the defendant, such a finding of an ethical violation and breach of fiduciary duty by plaintiffs' counsel may cause the participating plaintiffs to seek to void the entire settlement.³⁶ All that said, it is not immediately obvious why the defendant would expect its explicit disavowal of playing any role in the allocation of the settlement fund to aid it in preserving the settlement against any challenge based on claimed improprieties in the allocation process or in the obtaining of each client's properly informed consent.

What are the possible benefits to the individual mass tort claimants when the settlement agreement provides that a named individual will serve as the allocation special master? Some claimants may consider the allocation process to be more "legitimate" and their individual settlement offer amount

35. MODEL RULES OF PROF'L CONDUCT r. 8.4(a) (AM. BAR. ASS'N 2018) (emphasis added).

36. It is far from clear, however, that such an attack on the validity of the consummated settlement will be successful. See, for example, *G.H. v. Eli Lilly & Co.*, 412 S.W.3d 326 (Mo. Ct. App. 2013), involving an unsuccessful appeal of a Missouri circuit court's decision to deny the settling mass tort plaintiffs' Motion to Reopen Case, Void the Settlement and Releases, and Vacate Orders Affirming Awards of Special Master. In this case, the settling mass tort plaintiffs, the appellants,

filed a motion with the circuit court seeking to void a settlement agreement that they entered into with the pharmaceutical companies over ten years ago. In so moving, they asserted that the attorneys, who represented them during the settlement agreement, allegedly violated rule 4-1.8(g) of the Missouri Rules of Professional Conduct regarding aggregate settlements. Because of the alleged violation of Rule 4-1.8(g), the appellants claimed that the settlement agreement was void because it was against Missouri law and because it violated their rights to due process.

Id. at 329 (citations omitted). In affirming the order of the Missouri circuit court denying the motion, the appeals court concluded that

there was no judgment entered in appellants' cases because all of the appellants voluntarily dismissed with prejudice their cases against the pharmaceutical companies. "A voluntary dismissal is effective on the date it is filed with the court." Once a party voluntarily dismisses a case, "it is as if the suit were never brought." "The circuit court may take no further steps as to the dismissed action, and any step attempted is viewed a nullity." Therefore, once the appellants voluntarily dismissed their cases, there was nothing more the circuit court could do in these cases.

Thus, to the extent that the appellants sought a declaration from the circuit court within their dismissed cases that the settlement agreement that they entered into with the pharmaceutical companies was void because it was against Missouri Law and because it violated their rights to due process, the circuit court could take no further steps within these dismissed actions.

Id. at 331–32 (citations omitted).

to be more “fair” than if plaintiffs’ counsel played this role.³⁷ Indeed some claimants may believe that plaintiffs’ counsel simply cannot or should not allocate the lump-sum settlement fund, given the obvious conflict among the claimants that is involved. Although the special master confronts a similar conflict among the claimants in allocating a lump sum,³⁸ claimants may view it differently and may in any event prefer the allocation to be performed by a neutral who has no prior relationship with them or any of the other clients eligible to participate in the settlement.³⁹ Relatedly, claimants may not readily grasp how and why the disclosures mandated by the aggregate settlement rule (along with their ability to decline their individual settlement offer) are their true protection against the conflicts of interest that confront whoever allocates the settlement fund.⁴⁰ It is also possible that the claimants do not readily appreciate that the apparent neutrality of the special master is not an unalloyed benefit to them and comes with tradeoffs relative to what plaintiffs’ counsel may bring to the allocation task. Those tradeoffs may include plaintiffs’ counsel’s greater knowledge of each plaintiff’s case, including the legally relevant science and medicine; a richer understanding of the overall litigation to date and the impact of various developments on the relative value of each plaintiff’s claims; and a better ability to predict the likely outcome if each plaintiff’s claims were tried to a jury.⁴¹ Unfortunately and unsurprisingly, all of this is merely speculation; I am aware of no systematic empirical studies or data that shed useful light on mass tort

37. Indeed, there is reason to think that at least in some contexts claimants may even prefer that their settlement offer amount be determined by a third-party neutral rather than by the defendant. In the BP America settlement, for example, Ken Feinberg reported that claimants were upset to learn that he was employed by the defendant and was essentially settlement counsel for the defendant BP, rather than a neutral. KENNETH R. FEINBERG, WHO GETS WHAT: FAIR COMPENSATION AFTER TRAGEDY AND FINANCIAL UPHEAVAL 146 (2012). To be sure, the claimants’ disquiet in this instance may have been due to a sense that they had been misled about whether and by whom Ken Feinberg was being paid. That is, the clients might not have been upset if they had had a clear sense at the outset that the defendant BP was determining their settlement offer amount rather than a neutral. In addition, Ken Feinberg may have had special, iconic status as a “super neutral” of sorts in the minds of the claimants as a result of his thoroughly unique role in the equally thoroughly unique 9/11 Victim Compensation Fund (VCF). In that instance, Feinberg personally received no compensation (although he did receive reimbursement for the other expenses incurred by his law firm). See KENNETH R. FEINBERG, WHAT IS LIFE WORTH? THE UNPRECEDENTED EFFORT TO COMPENSATE THE VICTIMS OF 9/11 26, 204 (2005) (detailing costs associated with the administration of the September 11th VCF). In addition, the funds for the 9/11 VCF were made available by Congress and were not paid by any of the plausible defendants. *Id.* at 20–23.

38. See *supra* note 16.

39. See *supra* note 29.

40. See Baker, *supra* note 12, at 317–19 (“[T]he disclosure and consent obligations under Rule 1.8(g) seek to ensure that a client who is accepting her settlement offer gives informed consent both to that offer and to representation by the client’s attorney who is laboring under a concurrent conflict in the making of the settlement, including the allocation of the settlement fund.”).

41. See Baker, *supra* note 3, at 1953–54 (illustrating the role plaintiffs’ counsel plays for her clients in an aggregate settlement).

claimants' views regarding their participation in private, lump-sum settlements, including who they believe should allocate the settlement fund and why.⁴²

From the perspective of plaintiffs' counsel, what are the potential benefits of a special master rather than plaintiffs' counsel allocating a lump-sum settlement fund? Some of these benefits may be perceived rather than actual, and some may be due to a misunderstanding of existing rules of professional responsibility. To begin, some plaintiffs' counsel may believe—erroneously—that they are simply not permitted as an ethical matter to allocate a lump-sum settlement fund due to the concurrent conflict of interests inherent in that task. They therefore may believe that a special master *must* allocate the settlement fund. Other counsel may understand that they are ethically permitted to allocate the settlement fund, but may believe—erroneously—that having a special master do so instead reduces or alters the disclosures the covered clients must receive in order to accept their individual settlement offers and give ethically proper consent to the settlement.⁴³

42. The one empirical study of which I am aware involving mass tort claimants' view of the settlement process involved the 9/11 VCF. See generally Gillian Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC. REV. 645 (2008) (reporting the results of an empirical study studying the views of certain 9/11 VCF claimants regarding the decision to settle or litigate claims). Of course, the VCF involved a settlement process that was sui generis in virtually every conceivable way: the settlement fund was unlimited in amount; it was not an "aggregate settlement" of any sort, therefore no disclosures were mandated or given pursuant to Rule 1.8(g); the fund was provided by Congress and not by any potential defendant; and the special master did not receive compensation from any source for his work. See WHAT IS LIFE WORTH?, *supra* note 37, at xv–xvi, 204 (describing the creation and terms of the settlement fund). In addition, the claimants who participated in the empirical study were a small and not entirely representative sample. Hadfield, *supra*, at 651–53.

43. For example, some plaintiffs' counsel might believe—erroneously—that having a special master determine each claimant's settlement offer amount will enable each claimant to give valid consent to the claimant's individual settlement offer without needing to be informed about the settlement offers to be made to each of the other claimants covered by the settlement. The language of Rule 1.8(g) provides no such exception to its consent and disclosure requirements. Even when an allocation special master is involved, the relevant plaintiffs' counsel still "represents two or more clients" and is still "participat[ing] in making an aggregate settlement of the claims of . . . the clients." Thus, the lawyer is still responsible for ensuring that the claimants covered by the settlement receive information about "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement." MODEL RULES OF PROF'L CONDUCT r. 1.8(g) (AM. BAR ASS'N 2013). See also Baker, *supra* note 12, at 310–11 ("[T]he text of the Rule can reasonably be understood to require that all claimants eligible to participate in the settlement must receive certain information about the terms of the larger group settlement, including . . . each individual's settlement offer value."). Relatedly, some plaintiffs' counsel might believe—erroneously—that having a special master determine each claimant's settlement offer amount will permit each claimant to give irrevocable consent in advance to whatever portion of the lump-sum settlement fund the special master may allocate to them. As the 2006 ABA Ethics Opinion on aggregate settlements made clear, however, the various disclosures mandated by Rule 1.8(g) regarding the total amount of the settlement, "[t]he existence and nature of all of the claims" involved in the settlement, and the "details of every other client's participation in the aggregate

Plaintiffs' counsel who understand that their disclosure obligations under Rule 1.8(g) are unaffected by the involvement of a special master in the allocation of a lump sum may believe that the special master's involvement will cause the covered claimants to consider the overall allocation and their individual settlement offer amount to be more legitimate and/or more "fair" than if the plaintiffs' counsel did the allocation. This belief in turn may cause such plaintiffs' counsel to think that the involvement of the special master will result in a higher rate of claimant participation in the settlement and increased claimant satisfaction with, and fewer claimant complaints about, the overall allocation or their individual settlement offer amounts. In addition, the involvement of the special master may enable the plaintiffs' counsel to better handle and more amicably resolve any claimant complaints about the settlement allocation by being able to deny any direct involvement with the allocation and referring the claimant to the special master, thereby preserving goodwill with the claimant and saving plaintiffs' counsel's time.

Some plaintiffs' counsel may believe that when a special master allocates a lump-sum settlement fund, the counsel is better insulated from any eventual client lawsuits regarding the allocation. That is, that the counsel will not be liable for any acts or omissions by the special master. As noted above, however, Rule 1.8(g) is clear that plaintiffs' counsel is still ultimately responsible for ensuring that the claimants eligible to participate in the settlement all receive the appropriate disclosures mandated by the Rule. Thus, any post-settlement claimant allegations regarding those disclosures would still arguably be properly directed against plaintiffs' counsel. With regard to claimant allegations regarding any other aspect of the allocation of the settlement fund, the extent to which plaintiffs' counsel may be liable— notwithstanding the involvement of a special master—will likely depend on whether plaintiffs' counsel, the defendant, or both formally retained the special master, the terms of that contract, and who is responsible for paying the special master's fees.

One context in which the use of an allocation special master may provide particularly significant benefits to plaintiffs' counsel—and to the covered claimants—is when the settlement agreement involves clients of

settlement" all "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." ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006) (citing *In re Hoffman*, 883 So. 2d 425, 433 (La. 2004) ("The requirement of informed consent cannot be avoided by obtaining client consent in advance to a future decision by the attorney or by a majority of the clients about the merits of an aggregate settlement.")).

multiple law firms.⁴⁴ In that context, the special master may be uniquely useful in expeditiously reconciling disagreements among the various plaintiffs' firms regarding which claim characteristics will be given how much weight in the categorization and valuation process and therefore, ultimately determine the appropriate allocation of the lump sum among various categories of claimants. This may enhance the comfort of each of the participating plaintiffs' firms with the resulting allocation and therefore also ultimately the perception of each firm's clients that the allocation is fair.

One apparent benefit to plaintiffs' counsel of a special master allocating the settlement fund is that the relevant work is no longer counsel's obligation. Whether and to what extent the involvement of the special master actually reduces the work to be performed by plaintiffs' counsel, however, will depend on the precise role to be played by the special master as well as the extent to which each claimant's claim has already been "worked up" by plaintiffs' counsel at the time the special master begins work. Typically, in order for a mass tort settlement to be reached, the potentially eligible claims each must be worked up sufficiently in terms of documentation of the claimant's injuries and (for example) use of the allegedly dangerous product. This information is needed by plaintiffs' counsel in order to determine the number of claimants in the inventory with legally viable claims as well as the potential settlement value of those claims. The defendant will also need this information from plaintiffs' counsel in order to assess the size and settlement value of plaintiffs' counsel's inventory. Thus, a significant portion of the work necessary to establish settlement offer categories and values for purposes of allocating a lump sum may well have been performed by plaintiffs' counsel prior to retaining an allocation special master. And plaintiffs' counsel's experience in and knowledge of the relevant litigation is

44. Such a situation may arise primarily due to the concerns and preferences of either the defendant or the plaintiffs' counsel. Sometimes, the defendant may want a truly "global" settlement or to have a single settlement include the inventories of multiple plaintiffs' firms in order to increase or better ensure finality in resolving pending litigation. Baker, *supra* note 3, at 1945. To the extent that the defendant is able to obtain increased finality, the settling claimants and their counsel should also benefit through the defendant's willingness to pay a "finality premium" as reflected in increased settlement values. *Id.* at 1944.

Other times, certain plaintiffs' counsel may form a consortium of their inventories for settlement purposes. Such a consortium may benefit the plaintiffs insofar as it results in settlement negotiation involving a larger group of claimants, which is likely to increase both the attention the defendant gives to the group of claimants and the plaintiffs' bargaining power with the defendant. See Silver & Baker, *supra* note 2, at 745–47 (describing the tendency of claim aggregation to increase plaintiffs' leverage in settlement negotiations); Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425, 440–41 (2011) (discussing the benefits of consortia to mass tort plaintiffs and their attorneys). Depending on the composition of the different inventories to be combined and whether the defendant is concerned not to exceed a specified "per claim average" when entering into agreements to resolve groups of claims, combining inventories may also benefit plaintiffs by resulting in increased settlement values for the relatively higher valued claimants within the settling group.

likely to give them and the defendant a good sense of the particular claim characteristics that likely would be relevant at trial. All of this information is potentially available to be shared with the special master.

This means that in at least some instances, whether by design or default, the initial task of the special master may largely involve reviewing and approving (with any changes the special master considers appropriate) an allocation formula or matrix essentially proposed by plaintiffs' counsel or the defendant. The remainder of the special master's work will typically include reviewing each claimant's medical and other records (provided by claimants' counsel) in order to determine each claimant's injury category and settlement offer value.⁴⁵ Relatedly, the special master will likely be responsible for handling any claimant inquiries or complaints regarding the allocation and the claimant's individual settlement offer amount. Given all this, it is not clear what the effect of involving a special master in the allocation process will be on the speed with which claimants receive their individual settlement offers and ultimately receive their settlement payments. Virtually all of this same work will need to be done even if claimants' counsel rather than a special master determines each claimant's individual settlement offer value, and whether the special master is able to do so more quickly or efficiently is likely to depend on the facts and specific procedures of a particular settlement. Finally, if the settlement process provides claimants the opportunity to "appeal" their initial claim categorization and related settlement offer value, the special master will likely hear those requests for reconsideration and issue a final decision on each such request.⁴⁶

Whatever the ultimate details of the special master's role in the allocation process, the participation of the special master *may* result in greater claimant satisfaction with that process, including the resulting individual settlement offer amounts, than if a special master were not involved.

By whatever route the special master comes to participate in the allocation process—whether the defendant insists on that participation and it is specified in the settlement agreement or the settlement agreement is silent on the entire issue and the special master is voluntarily retained by plaintiffs'

45. This review may also involve a de facto determination of each claimant's eligibility to participate in the settlement at all.

46. A settlement process that provides claimants a formal appeal opportunity commonly restricts such reconsiderations to clerical-type errors in a claim's injury category or related gross settlement offer amount. The appeal procedures typically also require claimants to provide specific reasons why they believe their claim should be categorized differently and to provide or reference the particular medical records or other documents that support the injury category the claimant believes is correct. That is, such an appeal process is not usually an opportunity for claimants simply to express disappointment in their settlement offer amount or injury category. The decision of the special master on any such appeals is typically denoted as being "final and nonappealable."

counsel—there are two additional aspects of that participation that merit discussion: Will the special master be appointed by a court? And who will pay the special master?

When an allocation special master is involved in a private aggregate settlement, she will sometimes be appointed by a court to serve in that capacity. Importantly, however, such an appointment is sought by the parties; it does not originate with the court. Sometimes the settlement agreement will specify both that the allocation will be handled by a special master and that the parties will jointly seek her appointment by a specified court.⁴⁷ Other times, the settlement agreement will not reference an allocation special master at all, but plaintiffs' counsel may choose to retain one and may also seek to have her appointed by a specified court (with the consent or nonopposition of the defendant).⁴⁸ The benefits to the individual claimants, the defendants, and plaintiffs' counsel of the special master being formally appointed by a court are an enhanced version of the same benefits that each receives when a special master allocates the settlement fund but is not formally appointed by a court. That is, to the extent a lump-sum settlement fund allocation determined by a special master is viewed by the claimants as more "legitimate" and more "fair" than an allocation determined by plaintiffs' counsel, the claimants' sense of the legitimacy and fairness of the allocation may be enhanced even further when the special master has been appointed by a court. That in turn can be expected to result in a higher rate of claimant participation in the settlement and increased claimant satisfaction with the overall allocation, which redounds to the benefit of both the defendants and plaintiffs' counsel as explained above. The major potential disadvantage of having the special master be appointed by a court is that some claimants erroneously may believe that the court itself is speaking regarding the allocation and may therefore also believe that they must accept their settlement offer, notwithstanding explicit language to the contrary in the settlement disclosure documents mandated by Rule 1.8(g).⁴⁹

A special master, even if appointed by a court, must be paid by one or both of the parties.⁵⁰ At first glance, it may seem that the claimants benefit

47. The identity of the "settlement court" that will make this appointment is a matter of some discretion when a private settlement is involved. The cases included in the settlement may be filed in multiple state and federal courts, may be on tolling agreements, or may not be filed in any court. When the settlement agreement provides for the creation of a Qualified Settlement Fund (QSF), that court will typically also be the court that appoints the special master.

48. See *supra* note 47.

49. Also, appointment of the special master by a court may cause some claimants to think that the court itself is more involved in the settlement allocation process, including the selection of the special master, than is ever likely to be the case.

50. The only exception likely would be an instance in which a federal court appoints a federal magistrate judge (who receives a salary from the U.S. government) to assist with a particular

financially if the defendant pays some or all of that cost. In fact, however, that financial benefit is likely to be illusory. In most instances, one would expect the defendant to have a budget for resolving a particular group of cases. In much the same way that the defendant often will not care how a lump-sum settlement fund is allocated among a group of claimants, a defendant is unlikely to care whether the total amount it budgeted to resolve the group of cases is allocated entirely to the lump-sum settlement fund or a portion is separately denoted to pay an allocation special master. In either event, the total amount the defendant pays will be the same, with every dollar the defendant agrees to pay the special master effectively reducing, dollar for dollar, the total amount of the settlement fund. Thus, when a settlement agreement states that a special master is to allocate the settlement fund, a rational claimant should be largely indifferent as to whether the defendant will be paying the special master.⁵¹

If the defendant does not require that a special master allocate the lump-sum settlement fund but plaintiffs' counsel nonetheless chooses to retain one to do so, the financial calculus for the claimant will be different. The use of a special master will inevitably reduce each claimant's net settlement amount relative to what each would receive if plaintiffs' counsel instead allocated the fund.⁵² Against this obvious financial cost, however, one must weigh the

litigation. I am aware of no instance, however, in which a magistrate judge was appointed to serve as the allocation special master in connection with a private, mass tort aggregate settlement.

51. If the attorney-client contract provides that expenses "come off the top," before attorneys' fees are calculated, there will be no difference in the amount the claimant nets if there is a dollar-to-dollar reduction in the total settlement fund if the defendant agrees to pay the special master directly. Consider a hypothetical in which a claimant's gross settlement value will be \$9,900 if the defendant directly pays the special master \$100 per claimant. Assuming that the claimant has agreed to pay her attorney a 40% contingent fee, this results in a net settlement value to the claimant of \$5,940 ($\$9,900 \times 0.6$). If the special master is paid by the plaintiff instead, the claimant's gross settlement value will be \$10,000, with the \$100 fee for the special master coming off the top. This leaves \$9,900, of which the claimant will receive \$5,940 ($\$9,900 \times 0.6$). Under scenarios in which the attorney-client contract instead provides for expenses to be deducted from the client's share of any recovery after attorneys' fees are deducted, the claimant may be a few dollars better off if the defendant pays the special master directly, even with a dollar-to-dollar reduction in the total settlement fund. Consider a hypothetical example of a \$10,000 gross settlement to a claimant, with a 40% attorneys' fee contract and a \$100 per claimant special master cost. This will result in a net of \$5,900 to the client if the defendant does *not* pay the special master fee ($\$10,000 \times 0.6 = \$6,000$; $-\$100 = \$5,900$). If instead, the defendant pays the \$100 per claimant special master fee and reduces the total settlement fund by \$100 per claimant, the claimant now receives a net of \$5,940 ($\$9,900 \times 0.6 = \$5,940$).

52. Plaintiffs' counsel's work allocating the settlement fund would be included in the contingent fee they are already charging the claimants. Thus, using the same hypothetical numbers as in note 51 above, a claimant with a gross settlement offer of \$10,000 and a 40% contingent fee contract will receive \$6,000 ($\$10,000 \times 0.6$) if plaintiffs' counsel allocates the settlement fund. If, instead, the special master is paid \$100 per claimant to do this task, the claimant will receive \$5,940 if the attorney-client contract provides for expenses to come off the top ($\$10,000 - \$100 = \$9,900 \times 0.6$). If the attorney-client contract instead provides for expenses to be deducted from the claimant's share of any recovery, the claimant will receive \$5,900 ($\$10,000 \times 0.6 = \$6,000 - \100).

potential (largely noneconomic) benefits to the claimants of employing an allocation special master. As discussed at length above, these benefits *potentially* include: the claimants viewing the allocation process as more legitimate and their individual settlement offer amount as more fair; the claimants receiving their settlement funds more quickly;⁵³ and, when the settlement includes clients from a group of plaintiffs' firms, individual settlement offer values that better reflect the relative expected value of each claimant's case if tried to a jury.⁵⁴

V. Conclusion: Lessons for the Larger Debate Regarding the Use of Special Masters in Complex Litigation

The above examination of allocation special masters in mass tort settlements has important implications for recent broader discussions of the use of special masters in complex litigation. In 2019, the ABA formally adopted the *ABA Guidelines for the Appointment and Use of Special Masters in Federal and State Civil Litigation*.⁵⁵ In its accompanying Report, the ABA Working Group that drafted the Guidelines stated that the appointment of special masters "could aid in the 'just, speedy and inexpensive' resolution of cases," and "encourage[d] courts to make greater and more systematic use of special masters to assist in civil litigation."⁵⁶ In addition, now-retired United States District Court Judge Shira Scheindlin recently published two short articles recommending the use of special masters in complex cases, based on her own experience as both a judge and a special master.⁵⁷ Judge Scheindlin

53. Even if the allocation process itself does not proceed more quickly with a special master, the potentially greater sense of legitimacy that the claimants may attribute to that process may cause more of them to accept their individual settlement offers and to do so more quickly than if plaintiffs' counsel allocates the settlement fund. See *infra* note 54.

54. When clients represented by various plaintiffs' counsel are included in a single settlement, each counsel is likely to have a preferred view regarding the allocation of the total settlement fund, which most greatly benefits the particular subgroup of claimants they represent. Involving a special master may expedite the allocation process in such settlements by more quickly resolving the inevitable disagreements among the counsel regarding the appropriate allocation, thereby also potentially resulting in individual settlement offer values that better reflect the likely value of each claimant's claim if tried to a jury. For a discussion of the various baselines that might be used for determining a claimant's settlement offer value including the economic model and satisficing model of settlement decision-making, see Silver & Baker, *supra* note 27, at 1475–78, 1520–21.

55. American Bar Association, *Report to the House of Delegates: Resolution 100* (Mar. 2, 2020) [hereinafter ABA Report], <https://www.americanbar.org/content/dam/aba/images/news/2019mymhodres/100.pdf> [https://perma.cc/NW7G-LVSD].

56. *Id.* at 1–2.

57. Shira Scheindlin, *How Courts and Litigants Can Benefit from Special Masters*, LAW360 (Jan. 8, 2020) [hereinafter *Benefit*], <https://www.law360.com/articles/1231761/how-courts-and-litigants-can-benefit-from-special-masters> [https://perma.cc/N8PU-SVGC]; Shira Scheindlin, *The Use of Special Masters in Complex Cases*, LAW360 (Aug. 15, 2017) [hereinafter *Use*], <https://www.law360.com/articles/950395> [https://perma.cc/X64G-V6Z9]. Judge Scheindlin was a member

noted that special masters may “reduc[e] cost and delay”⁵⁸ and “urge[d] courts and litigants to take full advantage of this extrajudicial tool whenever either believes that the benefits that will accrue from the appointment of a special master warrant such an appointment.”⁵⁹

At the same time, however, two scholars have sought to collect empirical data about the use of special masters in a subset of products liability multi-district proceedings, and contend that their data suggest that the appointment of special masters may mean that the proceedings “cost more and last longer.”⁶⁰ With regard to empirical data, the ABA Report conceded that “no scientific study has empirically established that special masters reduce the cost of litigation.”⁶¹ The ABA Report went on to note, however, that the “benefits of a special master cannot always be measured entirely in dollars” and that “using a special master may be justified if the master adds a resource, expertise, or process that enhances the effective administration of justice.”⁶²

As this debate continues regarding the benefits and costs to the parties of the use of special masters, it may usefully be informed by the discussion of allocation special masters presented in this Article. In particular, this Article suggests two important cautions. First, this discussion of allocation special masters makes clear that one cannot usefully generalize about even a specific subset of special masters, let alone about special masters more generally. Significant case-by-case variation will inevitably exist regarding who is ultimately paying for the special master, which party was concerned to involve a special master, what the financial costs and benefits of using a special master are expected to be, and what the effect of a special master is likely to be on various nonfinancial aspects of the particular case, critically including the parties’ perception that justice is being done.

Second, this discussion of allocation special masters suggests that gathering and presenting empirical data regarding the arguable “effects” of

of the ABA Working Group that drafted the ABA Guidelines. ABA Report, *supra* note 55, at 2 n.3. She has also served as a special master in several cases since leaving the bench. *Benefit*, *supra*; see also Shira Scheindlin, *We Need Help: The Increasing Use of Special Masters in Federal Court*, 58 DEPAUL L. REV. 479, 486 (2009) (arguing that the increased use of special masters in federal court is beneficial).

58. *Use*, *supra* note 57.

59. *Benefit*, *supra* note 57.

60. Elizabeth Chamblee Burch & Margaret S. Williams, *Judicial Adjuncts in Multidistrict Litigation* 6 (Feb. 18, 2020) (unpublished manuscript) (on file with author); see also Judge George C. Hanks, Jr., *Searching from Within: The Role of Magistrate Judges in Federal Multi-District Litigation*, 8 FED. CTS. L. REV. 35, 62 (2015) (finding that “cases that used only a special master took longer to resolve than cases using only a magistrate judge,” but noting that could be due to other facts such as judges appointing special masters in more difficult or complicated proceedings).

61. ABA Report, *supra* note 55, at 5.

62. *Id.* at 9. Importantly, the ABA Report acknowledged that “[d]etermining whether that value outweighs the cost requires a case-by-case assessment.” *Id.*

involving a special master in even a specified subgroup of proceedings may be more likely to mislead than to inform. Publicly available information for multi-district litigations (MDL) is especially problematic in this regard. Virtually all cases in every MDL are resolved through settlement, and the overwhelming majority of those settlements are confidential inventory settlements. There is no reason to believe that the handful of fully public MDL proceedings, including public settlements, are a representative sample of this universe of proceedings. In addition, publicly available information about particular MDLs will often be incomplete and misleading. Basic facts about an MDL proceeding, such as the number of “actions” involved, for example, may be accurate and complete for some proceedings but in other proceedings may exclude large numbers of cases that are on confidential tolling agreements.⁶³ Simply put, some empirical data is not always better than no empirical data. And with regard to the subgroup of allocation special masters discussed in this Article, perhaps the most useful empirical data to (attempt to) obtain going forward would be whether the involvement of a special master increased the claimants’ feeling that the allocation of the settlement fund, including their individual settlement offer amount, was just.

63. As another example, allocation special masters are sometimes appointed in state courts when the claimants’ counsel and the defendant agree in the confidential settlement agreement that such a court will be the “settlement court.” *See supra* note 47. So, information regarding special masters which is taken solely from the docket of the relevant federal MDL court will inevitably be incomplete and misleading.