§ 3.15 Need for Special Treatment of Non-Class Aggregate Settlements

Significant differences between class and non-class cases require that these two types of cases be treated differently for purposes of settlement.

Comment:

a. Differences between class and non-class settlements. The most common resolution of both class actions and non-class aggregate cases is settlement. As with simpler one-on-one litigation, few such cases go to trial. Nonetheless, there is often judicial involvement with non-class cases in the trial of bellwether cases or preliminary rulings on jurisdiction or evidentiary questions, even if a full-blown trial of the aggregated cases is unlikely. Although much attention has been given to class-action settlements, little scholarly or judicial attention has been given to non-class aggregate settlements.

Non-class settlements arise in a variety of contexts: through multidistrict litigation or consolidation, through informal coordination by multiple claimants’ counsel, or informally as multiple clients of a single lawyer or law firm. In the case of multiple clients of a single law firm, the lawyer’s entire inventory of cases against a particular defendant may be settled as a unit before most cases are even filed and, in some cases, before a single lawsuit is even filed. Moreover, cases may be informally aggregated on the defense side as well, through such mechanisms as joint-defense agreements or as a consequence of substantive rules governing joint and several liability.

The structure, mechanics, and effects of a settlement may vary greatly between class and non-class aggregate litigation on the claimants’ side of the equation. In the non-class aggregate setting, an attorney-client relationship exists between each claimant and at least one attorney in the case. Class actions, by contrast, involve representation by attorneys who typically have a relationship only with the class representatives and not with the unnamed class members, although the lawyer owes fiduciary duties to all class members. Class-action settlements are governed by special procedural rules and occur under court supervision. It is only the judicial imprimatur in a class-action settlement that creates formality and, hence, all parties must structure their settlement agreement so as to secure court approval. By contrast, non-class aggregate settlements may occur with no active judicial oversight whatsoever. Non-class aggregate settlements are governed primarily by ethical rules and are rarely subject to court review or approval for fairness. As discussed in the following Sections, a fresh look needs to be taken at how non-class aggregate settlements should be regulated.
§ 3.16 Definition of a Non-Class Aggregate Settlement

(a) A non-class aggregate settlement is a settlement of the claims of two or more individual claimants in which the resolution of the claims is interdependent.

(b) The resolution of claims in a non-class aggregate settlement is interdependent if:

   (1) the defendant's acceptance of the settlement is contingent upon the acceptance by a number or specified percentage of the claimants or specified dollar amount of claims; or
   (2) the value of each claimant's claims is not based solely on individual case-by-case facts and negotiations.

(c) In determining whether claims are interdependent, it is irrelevant whether the settlement proposal was originally made by plaintiffs or defendants.

Comment:

a. Interdependency of claims. The term “aggregate settlement” is intended to encompass multiclaimant settlements in which potential conflicts of interest stemming from interdependency exist, thus posing a risk of unfairness to individual claimants. This Section seeks to define the concept based on the characteristics that create conflicts of interest. Surprisingly, although the aggregate-settlement rule exists in every state, no state's rule attempts to define the term “aggregate settlement.” The scholarly literature, however, has identified two characteristics that render claims interdependent: collective conditionality and collective allocation.

b. Collective conditionality. Subsection (b)(1) describes conditionality, a characteristic common in aggregate settlements. Conditionality involves the practice of a defendant conditioning its acceptance of a settlement on a specific number or percentage of claimants agreeing to the settlement. Under subsection (b)(1), the degree of conditionality need not be unanimous. Whenever a settlement is conditioned on the acceptance of a set number or percentage of claimants, the settlement is an aggregate one.

c. Collective allocation. Subsection (b)(2) addresses collective allocation. That concept describes the process by which each individual claimant's claim is assigned a monetary value. In most cases involving multiple claimants, individual claimants usually will not have suffered identical injuries. Consequently, in any settlement, it will be necessary to allocate money or other relief to each claimant. A recognized method of allocation is individual, claimant-by-claimant valuation in which each claimant (typically through or with claimant's counsel) and the defense analyze the merits of each claimant's claim and reach an agreement on the settlement value of that claim. This form of allocation is noncollective because the value of each individual claim reflects the strength of that claim, as determined by claimant-specific negotiations, so long as the total value of the settlement is not fixed ahead of time. If the total value of the settlement is a predetermined amount, then the claim-by-claim individual review is nonetheless an aggregate settlement since the final value of each claim is interdependent.

Under subsection (b)(2), allocation is collective if the value of any claimant's claim is determined by a method other than individual, claimant-by-claimant analysis. For example, an allocation is collective whenever a defendant
conditions the settlement of the claims of multiple claimants and leaves to claimants' counsel the responsibility of proposing the allocation of that money among the members of the group. When a defendant conditions its offer to claimants' counsel to settle all existing claims on a lump-sum basis, the claims are interdependent because the parties have not assessed the precise value of each claimant's claim in arriving at the settlement figure. More realistically, the defendant's and claimants' attorneys simply looked at the claims as a whole and negotiated a figure that would compensate claimants with either an average award or an award based on a matrix of categories (e.g., depending on the nature of the injuries). Because the settlement does not reflect the value of each individual's claim, there is a possibility that the settlement undervalues some claims relative to others, or in any other way fails to provide equity in treatment among the affected claimants.

The same problem arises if the settlement allocates an identical sum to each claimant, without regard to the facts and circumstances of each claim, or if it apportions identical sums based on a few broad categories (e.g., property damage, personal injury).

d. Multiclaimeant nonaggregate settlements. It is theoretically possible for a lawyer to settle multiple claimants' claims without creating issues under the aggregate-settlement rule. For example, a lawyer might have 10 claimants as clients. When the lawyer commences settlement negotiations, the defendant might be willing to negotiate an individual, fact-specific settlement for each claimant without setting a cap on the aggregate damages or insisting that a set percentage of the potential claimants agree to the settlement. As long as each claimant's claim is settled on an individual basis, such a settlement would not fall within the definition of an aggregate settlement, although in practice each claimant will insist on learning the amount to be received by the lawyer's other clients involved in the joint representation before agreeing to the settlement sum proposed for that claimant. In the real world, however, a defendant generally knows the amount it is willing to pay to settle a group of claims, so the notion that the defendant will treat each of the lawyer's multiple claimants as separate and unrelated does not represent the typical manner in which such claims are negotiated. If a settlement is subject to implicit caps, matrices, or other collective methods of allocation, then the settlements constitute an aggregate settlement.

Illustrations:

Illustrations: 1. An attorney represents 100 plaintiffs complaining of various injuries caused by an allegedly defective drug manufactured by Defendant. During settlement negotiations, the attorneys for the plaintiffs and Defendant individually assess each claim with a goal that the total settlement would equal $1 million. Defendant agrees to the settlement only if at least 95 percent of all of the claimants agree. The settlement is an aggregate one under subsection (b)(1), even though the amounts were individually negotiated, because Defendant has conditioned its acceptance of the settlement on a set percentage of claimants agreeing to the settlement and because Defendant placed a cap on the collective settlement. The settlement is also an aggregate one under subsection (b)(2) because of the overall $1 million cap.2. Same group of 100 claimants as in Illustration 1. Defendant offers to settle each claimant's claim for $10,000, regardless of the facts of any particular underlying claim. Defendant does not require that a certain percentage of claimants agree to the settlement. The settlement is an aggregate one under subsection (b)(2) because the amount of compensation allocated to each claimant is linked to the others.3. Same group of 100 claimants as in Illustration 1. Counsel for claimants and Defendant individually negotiate each claimant's claim based on the facts of each claim,
§ 3.17 Circumstances Required for Aggregate Settlements to Be Binding

(a) A lawyer or group of lawyers who represent two or more claimants on a non-class basis may settle the claims of those claimants on an aggregate basis provided that each claimant gives informed consent in writing. Informed consent requires that each claimant be able to review the settlements of all other persons subject to the aggregate settlement or the formula by which the settlement will be divided among all claimants. Further, informed consent requires that the total financial interest of claimants' counsel be disclosed to each claimant.

(b) In lieu of the requirements set forth in subsection (a), individual claimants may, before the receipt of a proposed settlement offer, enter into an agreement in writing through shared counsel allowing each participating claimant to be bound by a substantial-majority vote of all claimants concerning an aggregate-settlement proposal (or, if the settlement significantly distinguishes among different categories of claimants, a separate substantial-majority vote of each category of claimants). An agreement under this subsection must meet each of the following requirements:

1. The power to approve a settlement offer must at all times rest with the claimants collectively and may under no circumstances be assigned to claimants' counsel. Claimants may exercise their collective decisionmaking power to approve a settlement through the selection of an independent agent other than counsel.
2. The agreement among the claimants may occur at the time the lawyer-client relationship is formed or thereafter, but only if all participating claimants give informed consent. Informed consent requires that the claimants' lawyer fully disclose all the terms of the agreement to the claimants to facilitate informed decisionmaking regarding:
   a. Whether to enter into the settlement agreement;
   b. Whether to subsequently challenge the fairness of the settlement agreement under subsection (d) or (e);
   c. Whether to subsequently challenge the compliance of the settlement agreement with the requirements set forth in subsections (b) and (c); and
   d. The desirability of seeking, along with a reasonable opportunity to seek, the advice of independent legal counsel.
3. The agreement must specify the procedures by which all participating claimants are to approve a settlement offer. The agreement may also specify the manner of allocating the proceeds of a settlement among the claimants or may provide for future development of an appropriate allocation mechanism.
4. Before claimants enter into the agreement, their lawyer or group of lawyers must explain to all claimants that the mechanism under subsection (a) is available as an alternative means of settling an aggregate lawsuit under this Section. A lawyer or group of lawyers may not terminate an existing relationship solely because the claimant declines to enter into an
agreement under subsection (b), and the lawyer must so inform the client. A lawyer who is simultaneously representing claimants proceeding under subsection (a) and claimants proceeding under subsection (b) must notify the subsection (a) claimants that they continue to exercise independent control over their cases and that they may refuse an offered settlement after its terms are disclosed.

(c) An agreement pursuant to subsection (b) is permissible only in cases involving a substantial amount in controversy, a large number of claimants, and when the agreement requires approval by a substantial majority of claimants, with the foregoing minimum criteria to be determined by the applicable legislative or rulemaking body.

(d) The enforceability of an agreement under subsection (b) should depend on whether, based on all facts and circumstances, the agreement is fair and reasonable from a procedural standpoint. Facts and circumstances to be considered include the timing of the agreement, the sophistication of the claimants, the information disclosed to the claimants, whether the terms of the settlement were reviewed by a neutral or special master as defined in § 3.09(a)(2), whether the claimants have some prior common relationship, and whether the claims of the claimants are similar.

(e) In addition to the requirements of subsection (d), the enforceability of a settlement approved through an agreement under subsection (b) should depend on whether, under all the facts and circumstances, the settlement is substantively fair and reasonable. Facts and circumstances to be considered include the costs, risks, probability of success, and delays in achieving a verdict; whether the claimants are treated equitably (relative to each other) based on their facts and circumstances; and whether particular claimants are disadvantaged by the settlement considered as a whole.

(f) Responsibility for compliance with the prerequisites for the enforceability of an agreement under subsection (b) rests with the claimants' lawyer.

Comment:

a. Aggregate-settlement rule. Subsection (a) sets forth the current aggregate-settlement rule, with the modification that informed consent is satisfied if the claimants are allowed to review the formula by which the settlement will be allocated. Under the aggregate-settlement rule, a claimant may not challenge a settlement if, after disclosure of all pertinent information, the claimant agrees in writing to be bound. A version of that rule exists in all 50 states and the District of Columbia. Under subsection (a), compliance with the aggregate-settlement rule is one way to bind parties to a non-class aggregate settlement. Subsection (a) provides that compliance with the aggregate-settlement rule remains a viable way of achieving a settlement.

The aggregate-settlement rule is based on the view that, without reviewing and analyzing the existence and nature of all claims and of the participation of each person in a proposed settlement (including but not limited to all proposed settlement terms), a claimant cannot make an informed decision whether to agree to a proposed aggregate settlement. Moreover, the rule posits that, because of this need to review all relevant information before making a decision, a claimant cannot waive in advance the right to challenge a conditional—or collective—allocation settlement. Further,
the aggregate-settlement rule is intended to preserve in the claimants' hands—as opposed to the lawyers'—the power to decide whether and when to settle.

b. Alternative to aggregate-settlement rule. Subsection (b) provides an alternative to the aggregate-settlement rule as a vehicle for finalizing aggregate non-class settlements. Subsection (b) departs from the current aggregate-settlement rule by providing that a waiver of individual approval may be valid and binding provided that it is knowingly and voluntarily made, is in writing, is signed by the claimants after full disclosure, and vests decisionmaking power in the claimants either collectively or through some preestablished voting structure.

Waivers of important rights are valid in a variety of areas, including the most cherished of constitutional rights. Subsection (b) rejects the view that individual decisionmaking over the settlement of a claim is so critical that it cannot be subject to a contractual waiver in favor of decisionmaking governed by substantial-majority vote. To that end, subsection (b) proposes a contractual-waiver mechanism for settling aggregate cases, while subsection (a) reaffirms that the aggregate-settlement rule remains the default mechanism for aggregate settlement.

Although an aggregate settlement may be binding on a claimant, the claimant remains free to terminate the attorney-client relationship. Subsection (b) does not change existing law governing a claimant's right to pursue malpractice or breach-of-fiduciary-duty claims against his attorney. Further, subsection (f) emphasizes that the risk of improper inducement into an aggregate settlement falls with claimants' counsel.

Current law prohibits waiving individual-claimant settlement decisionmaking, thereby empowering individual holdout claimants to exercise control over a proposed settlement and to demand premiums in exchange for approval. Moreover, in many instances, multiple claimants derive substantial benefits from joint representation by one lawyer or law firm, particularly one with expertise and stature in the particular area of law in which the claimant's claims arise. To the extent that reasonable aggregate settlements—achieved after good-faith, arm's-length negotiations and independent review—cannot go forward because one claimant (or a small number of claimants) objects, the other claimants lose the benefit of the collective representation. Indeed, there are numerous reported cases invalidating collective settlements for noncompliance with the aggregate-settlement rule. Even the threat of such a holdout may cause the defendant to withhold the premium associated with complete peace, thereby inuring to the detriment of all the represented claimants. Subsection (b) sets out an alternative mechanism for settling an aggregate lawsuit in certain circumstances, provided that specific safeguards, as described in subsections (b) through (e), are in place.

In form, agreements subjecting group settlements to a substantial-majority rule may be agreements solely between or among clients or agreements between or among clients that also include their attorneys. The form of agreement may affect the governing law, the revocability of the agreement, or other matters. Subsection (b) assumes that the Restatement Third of the Law Governing Lawyers—which sets limits on lawyer-client agreements—applies to agreements subjecting group settlements to a substantial-majority rule, even when the agreements are nominally client-client agreements rather than client-lawyer agreements. The assumption is especially warranted when the lawyer acting for a group of clients is involved in the creation of the agreement. Subsection (b) further assumes that the existence of an agreement does not obviate the lawyer's duty of faithful representation, nor does it act as a prohibition on subsequent challenges to the attorney's discharge of his or her duties.
Four requirements must be satisfied for an agreement under subsection (b) to be valid:

(1). Power to settle must remain with claimants. Subsection (b)(1) recognizes that, under prevailing ethics rules, a lawyer may not obtain a nonrevocable assignment of the client's individual authority to decide whether to settle a case and for what amount. Consequently, the authority to settle without complying with the aggregate-settlement rule is not given to counsel but, instead, remains with the collective claimants, who may act to accept a settlement pursuant to a waiver only upon agreement of a substantial majority of the claimants who are covered by the proposed settlement (or a substantial majority of the claimants in each significant settlement category).

(2). Informed-consent requirement for a waiver of individual-claimant decisionmaking. As stated in subsection (b)(2), a waiver under subsection (b) is valid only when the claimant gives informed consent. Because the decision to settle is fundamental, when agreements encumbering control of settlement are made, clients must be fully informed. The amount of information required for informed consent depends on the facts of the case. In some cases, the lawyer may wish to discuss with the claimant the substantial benefit the claimant may potentially receive from the lawyer's ability to represent the claimant more effectively as a result of the waiver. The lawyer must discuss with the claimant the potential material disadvantages that could result from agreeing to such a waiver. Informed consent also requires advising the client (or prospective client) of the desirability of seeking the advice of other counsel before executing a waiver, and the client must be given a reasonable opportunity to do so. The affording of such an opportunity to seek independent legal counsel tends to indicate that the lawyer did not apply improper pressure to the client and that the client was given time to consider the implications of the agreement.

(3). Procedures for settlement approval. An agreement under subsection (b) must specify the procedures for approval of any settlement offer by participating claimants. Claimants may, but are not required to, exercise their collective decisionmaking power to select an independent agent to represent the best interests of the claimants, provided that the agent is not affiliated with claimants' counsel. Although claimants must be fully informed when subjecting their control of the settlement decision to majority rule, they need not know, and typically will not know, the terms of a proposed settlement when doing so. To reduce uncertainty regarding the allocation of settlement proceeds, claimants may, but are not required to, agree on an allocation plan when providing for substantial-majority rule. For example, they may agree that a settlement fund will be divided pro rata on the basis of each claimant's monetary loss. They may also specify that each claimant will receive at least a specified sum or a specified percentage of the recovery. When the allocation mechanism is unresolved at the time of proposed settlement, counsel for the participating claimants should normally provide for a disinterested neutral to oversee the allocation of settlement proceeds to the settling claimants.

(4). Disclosure of alternatives. Subsection (b)(4) requires that the lawyer inform claimants that they have the option of insisting upon compliance with the aggregate-settlement rule under subsection (a) as an alternative to the approach under subsection (b), and that a lawyer may not terminate an existing representation because the claimant elects an approach under subsection (a) rather than under subsection (b). This requirement ensures that claimants' choices about how to structure settlements are freely made, and is designed to eliminate any possibility that a claimant may feel improperly pressured to follow the approach in subsection (b) in order to secure his or her preferred choice of
counsel. Those who elect to proceed under subsection (a) rather than subsection (b) remain free to negotiate their own individual settlements. Subsection (b)(4) also ensures that the decision about whether, when, and how to settle remains with the claimants rather than the lawyer. In addition, subsection (b)(4) requires lawyers who are simultaneously representing separate groups of claimants under subsection (a) and subsection (b) to inform claimants represented under subsection (a) of their power to refuse the settlement after its terms are disclosed.

Subsection (b) does not prevent counsel from refusing to represent claimants who choose representation under subsection (a); however, if a legislature finds, after adopting the approach of subsection (b), that claimants choosing representation under subsection (a) are consistently unable to secure representation, it may choose to prohibit counsel from refusing to represent claimants solely because such claimants opt for representation under subsection (a).

c. Limits on availability of subsection (b) agreements. The approach under subsection (b) is available as an alternative to the traditional aggregate-settlement rule in certain situations only when the following requirements are satisfied:

(1) Numerical and monetary limits. The purpose of modifying the strict requirements of the aggregate-settlement rule is to facilitate large-scale settlements that may have been impeded by the mechanical application of the aggregate-settlement rule to a substantial multiparty settlement. Although such cases are not handled on a class basis, they share similarities with class actions, both in terms of numbers and amounts at stake. In such cases, strong reasons exist for allowing claimants to waive the formalized protections of the aggregate-settlement rule while retaining the underlying aim of protecting all claimants and maximizing their capacity for individual recovery. It is not the intent of subsection (b), however, to address every multiparty claim that falls within the definition of an aggregate settlement under § 3.16. For example, in a multiparty automobile-accident case involving a small number of claimants, the aggregate-settlement rule is easy to administer and poses few practical difficulties for the lawyer representing multiple claimants. The same is not true, however, for a lawyer representing hundreds of asbestos claimants and negotiating multimillion-dollar settlements. Thus, under subsection (c), the waiver provisions in subsection (b) apply only to situations involving claims that, in the aggregate, are substantial and involve large numbers of claims.

However, subsection (c) does not set a minimum number of claimants or minimum amount in controversy; those decisions are left to legislative drafting. One potential model for the number of claimants is the “numerosity” requirement of Rule 23(a)(1). Cases under that rule generally find classes of 40 or more members to be numerous. Similarly, one model for the aggregate amount of claims is the $5 million jurisdictional minimum under the Class Action Fairness Act, 28 U.S.C. § 1332(d)(2).

(2) Need for substantial-majority approval. The object of subsection (b) is to provide a means by which a group of clients may respond to a settlement offer requiring the participation of a specified number or percentage of the clients. Subsection (c) does not define “substantial majority” but leaves that issue to legislative drafting. One possible model for legislatures or rulemaking bodies is Section 524(g) of the Bankruptcy Code, which requires a substantial majority of 75 percent of the “class or classes” of asbestos creditors (typically asbestos claimants) to approve a plan of reorganization in an asbestos bankruptcy.
Depending on the sophistication of the claimants, the subsection (b) agreement may specify such working arrangements for group representations as are deemed to be in the best interest of the participating claimants as a whole. For example, the claimants may appoint certain members to act on behalf of the group by receiving communications and overseeing the day-to-day conduct of the lawsuit. They may also allocate responsibility for litigation costs. Subsection (b) also gives claimants the freedom to design their own voting rules, again subject to the informed consent of the participating claimants. They may, by way of example, select a substantial-majority rule requiring that 90 percent of all claimants approve a settlement for all claimants to be bound. They may also select a lower threshold, consistent with the statutory minimum.

\[ d. \text{Criteria to apply in evaluating an agreement under subsection (b).} \] As stated in subsection (d), the enforceability of an agreement under subsection (b) depends on all of the relevant facts and circumstances. Several facts and circumstances may be relevant to evaluating the procedural fairness and reasonableness of a contract:

\( (1) \text{ Timing of the agreement.} \) The Restatement Third of the Law Governing Lawyers allows clients to enter into agreements with other clients at any time. Consequently, clients in litigation groups may decide how to handle group-wide settlement offers when a joint representation begins or after one commences. Timing is important, however. Under the Restatement Third of the Law Governing Lawyers, clients' consent to lawyer-client agreements must be reasonably informed. Claimants under this Section are likely to have more information about the benefits and risks associated with group-wide voting arrangements after some litigation has occurred than at the time of formation of the lawyer-client relationship. This consideration provides a circumstance surrounding the agreement that weighs in favor of postretention agreements, and against the use of agreements entered into at the outset of representation. At the same time, a voting rule should be in place before the evaluation of any particular settlement offer. The concern is that settlement structures created once a settlement is in place will induce cram-down efforts against individuals disadvantaged by the terms of the settlement.

\( (2) \text{ Sophistication of the clients.} \) Claimants who subject themselves to substantial-majority rule should understand the potential consequences of the decision, including the effects and any material disadvantages of their decision. Sophisticated clients, such as businesspersons or investors, are more likely than others to appreciate the benefits and the risks of subjecting themselves to some form of substantial-majority rule. Consequently, it is easier to justify the use of such voting rules when sophisticated clients are involved.

\( (3) \text{ Information disclosed to clients.} \) The considerations discussed in Comment b regarding the amount and nature of disclosure required to obtain informed consent are also relevant in assessing whether a settlement is procedurally fair and reasonable under subsection (d).

\( (4) \text{ Review by a neutral.} \) Approval of a proposed settlement by a neutral or special master is another factor that may increase the likelihood of enforceability of an agreement pursuant to subsection (b). Recognizing that unintended overreaching by lawyers may occur in agreements between lawyers and clients, review of the terms of the underlying settlement by a neutral or special master provides a safeguard to ensure a contract's fairness and reasonableness for the claimant. The neutral or special master selected to review the terms of the settlement must have no stake in the adoption of the settlement, such as a hope of future employment as a mediator for the parties or their counsel.
(5). Prior relationship and relative similarity of claims. A settlement agreement is more likely to be fair and reasonable when claimants have some prior common relationship and relatively similar claims. For example, an aggregate settlement executed under § 3.17(b) is more likely to be procedurally fair and reasonable for claimants who share some prior relationship that accustoms them to working together. Thus, it is likely that agreements to proceed collectively will be more readily realized for claimants with common membership in a trade association or union sharing similar grievances against such organization than for asbestos claimants with no prior relationship to one another and relatively different claims.

e. Substantive fairness of a settlement. Even if the facts and circumstances indicate that an agreement under subsection (b) is procedurally fair and reasonable pursuant to subsection (d), subsection (e) provides that a settlement is not enforceable unless its terms are substantively fair and reasonable. Subsection (e) utilizes several of the fairness criteria articulated in § 3.05 in the context of class-action settlements.

f. Choice of law. This Section does not definitively specify which law will govern when, for example, the attorney and claimant are in different states. Consistent with other Sections of these Principles, this Section accepts existing choice-of-law rules as they currently stand. See also § 2.05. Such issues concerning representation and litigation that stretch across state boundaries frequently arise in multistate litigation, and the body of choice-of-law jurisprudence governing ethical rules would apply here.

§ 3.18 Limited Judicial Review for Non-Class Aggregate Settlements

(a) Any claimant who is subject to a settlement entered into pursuant to § 3.17(b) is entitled, within the time period set by the legislature or rulemaking body, to challenge the settlement on the grounds that the settlement does not satisfy some or all of the requirements of § 3.17(b) and § 3.17(c), or is not procedurally and substantively fair and reasonable pursuant to § 3.17(d) and § 3.17(e). Such a challenge may be brought in the court in which the claimant’s case is or was pending or, if no case is or was pending, in any court of competent jurisdiction.

(b) Any claimant who contests the amount of his or her share of a settlement approved under § 3.17(b)-(e) is entitled, within the time period set by the legislative or rulemaking body, to challenge the fairness of the settlement. Such a challenge may be brought in the court in which the case is or was pending or, if no case is or was pending, in any court of competent jurisdiction.

(c) The right to challenge the settlement under subsections (a) and (b) of this Section is nonwaivable.

(d) A claimant’s lawyer who negotiates a settlement that a court later determines to be unenforceable under § 3.17(b)-(e) may be required to pay the reasonable attorneys’ fees and costs incurred by the challenging claimant.

Comment:

a. Challenging the settlement. Although a claimant may waive the protections of the aggregate-settlement rule, this Section nonetheless provides a safety valve for a claimant who executed (or is purported to have executed) a
waiver of the aggregate-settlement rule to seek relief if the settlement did not comply with § 3.17(b)-(c) or if the settlement is alleged to be unfair to the claimant under § 3.17(d) or (e). A challenge to the settlement may be brought in the court where the case is or was pending or, if no action was commenced in a judicial forum before the challenged settlement, in any court of competent jurisdiction, i.e., any court capable of exercising jurisdiction over the defendants to any such challenge. Normally, the defendants to such a challenge would include claimants' counsel and the defendant who entered into the settlement. The challenge must be brought within a specified time established by the legislature or rulemaking body, and should be brought and adjudicated promptly to allow for distribution of the settlement proceeds within as short a time as possible. The legislature or rulemaking body shall specify the relevant discovery procedures that are available to a claimant bringing such a challenge. If a challenge is successful, the court has discretion to consider all relevant facts and circumstances to determine whether relief should be limited to the claimant who filed the challenge or should extend to other parties to the settlement agreement.

b. Why the ability to challenge the settlement is not waivable. The challenges permitted under this Section are designed to ensure that (1) the lawyer representing all affected claimants complies with all of the requirements of § 3.17(b) and (c), and (2) the terms of the settlement are fair to the claimant challenging those terms as provided in § 3.17(d) and (e). Making the right to challenge the settlement nonwaivable provides a strong incentive to claimants' counsel to make sure that each claimant understands precisely what is being waived and understands the benefits and potential disadvantages of the waiver, along with alternatives to the proposed waiver that the claimant ought to consider, including but not limited to representation on an individual basis by another lawyer who is not subject to conflicts arising from multiple-client representations. Making the right nonwaivable also provides an important incentive for the parties to ensure that the total settlement and the allocation of the settlement to each claimant are fair.

c. Payment of challenger's attorneys' fees. This Section authorizes the court to award attorneys' fees to the challenger who is successful in contesting the settlement. Fees shall be paid by the counsel who represented the claimant in the settlement.

Illustrations:
Illustrations:1. Claimants' counsel has 10,000 clients complaining of injuries caused by Defendant's allegedly defective product. None of the claimants signs a waiver of the right to informed consent, in a writing signed by the client, for any proposed settlement. Defendant offers—and claimants' counsel accepts—a $1 million lump-sum settlement. No claimant who files a timely challenge is bound by the settlement. The court may also decide to extend relief to those who do not file timely challenges.2. Same situation as in Illustration 1, except that all claimants executed a purported waiver of their right to informed consent pursuant to § 3.17(b). The waiver fails to warn the claimants that they will be bound by any proposed settlement that a substantial majority of claimants approves. The settlement is unenforceable against any claimant who files a timely challenge because the waiver was based upon inadequate disclosure. The court may also decide to extend relief to those who do not file timely challenges.3. Same situation as in Illustration 1, except that the waivers obtained comply with § 3.17(b). Each client is allocated the same amount of money, even though some clients suffered serious permanent injuries, while others suffered only minor or temporary injuries. A claimant with serious personal injuries who mounts a timely challenge under this Section is not bound by the settlement. The court may also decide to extend relief to those who do not file timely challenges.