Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics

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Abstract

This Essay explores the ethical issues that arise for plaintiffs' lawyers involved in nonclass aggregate settlements. Rule 1.8(g) of the ABA Model Rules of Professional Conduct *requires that each client in an aggregate settlement must give their informed consent to the settlement amount allocated to them by their lawyer. This Essay argues that lawyers' fees in some aggregate settlements are of such a magnitude that they simply overwhelm any proclivity of lawyers to adhere to the rule. The Essay uses the Phillips Petroleum litigation as an example of the more egregious results of perverse incentives created by fees of that magnitude.*

We know little about nonclass aggregate settlements, and what little we do know is unsettling. The American Law Institute's ("ALI") proposal in the *Principles of the Law of Aggregate Litigation* to amend ABA Model Rule 1.8(g)[1] to allow use of advance waivers—accommodating lawyers' interests—has provoked intense debate, but sheds little light on lawyers' actual practices.[2] We do not know, even

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1 Model Rules of Prof'l Conduct R. 1.8(g) (2008).

2 Principles of the Law of Aggregate Litig. § 3.17 (2010). The ALI states that 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." *Id.* § 3.17 cmt. (c)(1). The principal beneficiaries of this change will be lawyers specializing in mass torts. The ALI is often accommodative of lawyers' interests. Consider the ALI's position on whether a party to an agreement which is unenforceable on public policy grounds can nonetheless obtain restitution or quantum meruit. The ALI is of two minds. The *Restatement (Second) of Contracts* provides that, for an agreement to be unenforceable on public policy grounds, the interests in enforcing the agreement must be "clearly outweighed" by a public policy against enforcement. Restatement (Second) of Contracts § 178(1) (1981); *see also* Alex B. Long, *Attorney-Client Fee Agreements that Offend Public Policy*, 61 S.C. L. Rev. 287, 292 (2009). It goes on to articulate the relevant factors that need to be balanced in reaching a conclusion. *See* Restatement (Second) of Contracts § 178(2) (1981). If a contract is unenforceable on public policy grounds, the general rule is that there can be no quantum meruit recovery by one who has rendered performance. *See* John D. Calamari & Joseph M. Perillo, The Law of Contracts 833 (4th ed. 1998). The *Restatement* takes the position that restitution should be the exception, rather than the norm, under these circumstances. *See* Restatement (Second) of Contracts § 197 (1981). The position adopted by the ALI in the *Restatement (Third) of the Law Governing Lawyers* is contrary. Here, the rule adopted is that if a fee agreement between a lawyer and client is unenforceable, the lawyer is nonetheless entitled to the fair value of her services unless the lawyer has engaged

approximately, how many nonclass aggregate settlements take place annually, the number of clients represented, the amounts paid by defendants, the fees that are charged, whether clients are provided with the requisite information so that their consent is informed, and what methods lawyers use to allocate the settlements among the clients (such as a matrix based on injury severity and type, age, residence, etc.). In my experience, there is often a reason for the lack of information about certain lawyers' practices. The less that is known about a practice, the less it is scrutinized, and that suits the practitioners just fine.

Most of what little we do know is due to allegations of serious lawyer misconduct in administering nonclass aggregate settlements. My fellow panelist, Howard Erichson, has provided a detailed description of six such aggregate settlements for us to consider, five of which involve alleged lawyer malfeasance.[3] A key question is whether these five are aberrations or whether they are merely the tip of an iceberg, at the base of which, below our visibility line, lies lawyer malfeasance on a grand scale.

According to Erichson, the principal culprit accounting for lawyer malfeasance in this area is the all-or-nothing settlement.[4] This is where a lawyer files individual claims on behalf of a large number of clients who all claim to have been similarly injured by a single defendant and the defendant agrees to pay a single and often substantial

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in a "clear and serious violation of duty to a client." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 37, 39 (2000). Professor Joseph Perillo characterizes this position as "lawyer-friendly." Joseph M. Perillo, *The Law of Lawyer's Contracts Is Different*, 67 FORDHAM L. REV. 443, 447 (1998). Thus, even when a lawyer engages in a "clear and serious violation of a duty to the client," RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000), the lawyer may still collect a fee, a privilege that Professor Perillo points out is not extended to "[o]ther fiduciaries." Perillo, *supra*, at 447–48; *see also* Long, *supra*, at 296–97. Professor Alex B. Long points out another way in which the ALI's position is lawyer-friendly. In deciding whether to enforce a contract or to permit restitution if a provision in the contract is unenforceable on public policy grounds, the *Restatement (Second) of Contracts* directs courts to take the public interest into account. *See* Long, *supra*, at 297. The *Restatement (Third) of the Law Governing Lawyers* largely ignores the public interest and focuses almost exclusively on the parties to the contract—the lawyer and the client. *See id.* at 298. By turning a blind eye to issues that transcend those of the attorney and client, the *Restatement (Third) of the Law Governing Lawyers* makes it more difficult to justify any fee forfeiture by the lawyer. *Id.* at 299.

3 *See* Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979 (2010). The five cases that involve alleged lawyer malfeasance are the Kentucky fen-phen settlement, the Napoli fen-phen settlement, the Locks fen-phen settlement, the Leeds Morelli settlements, and the Phillips chemical plant explosion settlement.

4 *See id.* at 980 ("All-or-nothing settlements, however, cause a lot of mischief."); *see also id.* at 983 ("All-or-nothing settlements systematically and predictably create opportunities for abuse.").

sum (as opposed to individual amounts for each client which are then totaled up) to settle the claims, provided all of the lawyer's clients sign releases. Erichson lists a litany of ills resulting from the all-or-nothing settlement, including creating and exacerbating conflicts of interest, creating incentives to misallocate funds, the risk of strategic holdouts, and making slush funds in anticipation of the need to buy off the holdouts. This type of settlement also creates incentives for lawyers to misrepresent the nature of the settlement in order to gain clients' consent and to collude with the defendant to secure that consent.[5]

Erichson's solution is to avoid all-or-nothing settlements in order to neutralize the holdout risk and its attendant evils and instead to enter into most-or-nothing settlements, that is, settlements in which only eighty-five to ninety-five percent of the clients are required to sign releases in order for the settlement to go into effect.[6] He argues that these should be acceptable to most defendants, raise far fewer ethical concerns, and minimize the holdout risk and the ethically dubious conduct that it generates.[7]

Erichson's argument strikes me as on target with one notable exception. He states that most-or-nothing settlements do not "present as strong a risk of collusion or disloyalty" as do all-or-nothing settlements.[8] I dissent. I contend that the risk of collusion between counsel and the defendant is not a function of the all-or-nothing settlement, but rather the lucrative nature of this area of practice, which is, in part, a result of the lack of enforcement of ethics rules that purport to limit lawyers' fees to "reasonable" amounts.[9] Put plainly, my thesis—as expressed in a previous article—is that when "money talks, ethics walks."[10]

We are all familiar with the power of money to influence national policymaking. In recent months, we have seen an awesome display of that power in the halls of Congress with reference to fashioning solutions to healthcare issues and regulation of financial markets. Money exerts a similar influence on the application of ethical principles to lucrative litigations.

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5 *See id.* at 1006–07; *see also* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17 cmt. b (2010).

6 *See* Erichson, *supra* note 3, at 1023.

7 *See id.* at 1024.

8 *Id.*

9 MODEL RULES OF PROF'L CONDUCT R. 1.5(a) (2008).

10 Lester Brickman, *ABA Regulation of Contingency Fees: Money Talks, Ethics Walks*, 65 FORDHAM L. REV. 247 (1996).

This point was driven home for me a few years ago when I led an effort to obtain an ethics opinion from the ABA Committee on Ethics and Professional Responsibility regarding the increasing practice of plaintiffs' lawyers negotiating their fees directly with defendants.[11] Consider an example cited in the letter to the ABA Committee that goes to the heart of the issue:

> An attorney comes to her client and indicates that she has received a settlement offer in the amount of $100,000. Having hoped for a higher recovery, the client expresses his disappointment, especially considering that his net recovery after the contingency fee will be two-thirds of that amount. The attorney tells the client that he should not be concerned with the fee because she and the defendant's insurance company have privately negotiated an agreement establishing the size and mode of payment of her fee, so that the client will not have to pay any fee at all. "It's all been taken care of by me and the defendant," the attorney tells her client. "There's nothing for you to worry about." Clearly, the client in such a scenario does have something to worry about, and will and should be less confident in his attorney's loyalty to him.[12]

The letter went on to state that cases in which the plaintiff's attorney negotiates his fee directly with the defendant

> are occurring with increasing frequency and upon a dramatically increasing scale, with the legal stakes often totaling millions and even billions of dollars. The problem is amplified in the class action context where the class is even more dependent on the judgment of the attorney when it comes to accepting the terms of a settlement.[13]

The ethical issues raised by the potential self-dealing described in the letter to the ABA Committee are accentuated by the inclusion of provisions in class actions and other large-scale settlement agreements designed to bulletproof the fee agreements from both judicial and client scrutiny. For example, in the tobacco litigations brought by state attorneys general in partnership, with private attorneys hired on a

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11 *See* Letter from Richard Abel, Michael J. Connell Professor of Law Emeritus, UCLA Sch. of Law, et al., to Stephen C. Krane, Chairman, Standing Comm. on Ethics & Prof'l Responsibility, Am. Bar Ass'n (Sept. 17, 2007) [hereinafter ABA Letter], *available at* http://www.cardozo.yu.edu/uploadedFiles/Cardozo/Profiles/brickman-436/ABA%20Ethics%20Letter%20September%2017%202007%20Edited(1).pdf.

12 *Id.* at 4–5.

13 *Id.* at 5.

contingency fee basis—functionally, an aggregative litigation—the monies that the states were to receive under the settlement agreements were contingent upon the ratification of the agreement negotiated by the contingency fee lawyers directly with the tobacco companies.[14] This device enabled the private lawyers effectively to insulate their multimillion- and billion-dollar fees from any ethical inquiry into their reasonableness. When, in a few cases, the fees were contested, state attorneys general successfully urged the rejection of even an inquiry because that would jeopardize the flow of settlement monies to the state.[15] In class action litigation, class counsel have increasingly negotiated fee agreements with defendants that provide that, in the event the fee is reduced by a court, that amount is credited to the defendant and not to class members. This has increased courts' propensities to ratify such fee agreements without serious consideration because any reduction would not benefit the class.[16]

Given these practices, the signatories to the letter[17] urged the ABA Committee to declare that it is per se unethical for plaintiffs' attorneys to agree to any provision in agreements settling large-scale and aggregative litigations that in any way compromises the right of the clients or classes to recover fees deemed excessive or unethical by such review.

What was the ABA Committee's response? Well, they ducked the request, stating that those ethical issues should be left up to the

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14 *See* W. Kip Viscusi, *Tobacco: Regulation and Taxation Through Litigation*, *in* REGULATION THROUGH LITIGATION 22, 23, 42 (W. Kip Viscusi ed., 2002); Joseph A. Califano, Jr., *Tobacco: The Moral Issues*, AMERICA, Aug. 15, 1998, at 7, 9.

15 *See, e.g.*, State v. Philip Morris, Inc., 763 N.Y.S.2d 32, 41–42 (App. Div. 2003) (vacating trial court's order enjoining the payment of attorney's fees); *see also* Jonathan D. Glater, *Judge Questions Legal Fees in New York Tobacco Case*, N.Y. TIMES, Mar. 27, 2003, at C1.

16 In the vast majority of cases, federal judges ultimately award class counsel about ninety percent of what they request as fees. *See* Theodore Eisenberg, Geoffrey Miller & Michael Perino, *A New Look at Judicial Impact: Attorneys' Fees in Securities Class Action After* Goldberger v. Integrated Resources, Inc., 29 WASH. U. J.L. & POL'Y 5, 22 (2009).

17 Richard Abel, UCLA School of Law; David Barnhizer, Cleveland-Marshall College of Law; Lester Brickman, Benjamin N. Cardozo School of Law; Robert Cochran, Pepperdine University School of Law; Roger Cramton, Cornell University Law School; Leonard Gross, Southern Illinois University School of Law; Allison Hayward, George Mason University School of Law; Michael Horowitz, Hudson Institute; Michael Krauss, George Mason University School of Law; Lisa G. Lerman, The Catholic University of America; Judith Maute, The University of Oklahoma College of Law; Tom Morgan, The George Washington University Law School; Jeffrey O'Connell, University of Virginia School of Law; Deborah Rhode, Stanford Law School; Howard Rosenberg, University of Denver Sturm College of Law; Ronald Rotunda, George Mason University School of Law; George Schatzki, Arizona State University College of Law; Peter H. Schuck, Yale Law School; William Simon, Columbia Law School; and Bradley Wendel, Cornell University Law School. *See* ABA Letter, *supra* note 11, at 30.

courts[18]—the very institution that has often relegated ethical enforcement to an afterthought.

Another example of how rules of ethics are mown down by the power of money is the hiring of screening companies by plaintiffs' lawyers to generate hundreds of thousands of claimants in the asbestos, silica, fen-phen, silicone breast implant, and welding fume mass tort litigations.[19] These litigation screenings have no intended health benefit; they are conducted solely to obtain mass numbers of litigants and to generate mostly bogus medical records to support the claims.[20] The first order of business when a potential litigant attends a litigation screening is to sign a retainer agreement with the law firm sponsoring the screening.[21] I estimate that approximately 1.5 million potential litigants have participated in these litigation screenings;[22] that a comparative handful of litigation doctors have found that approximately 1 million of those screened had the requisite condition to confer a right of compensation;[23] that approximately 900,000 of these claims were based on medical reports that were, in the words of Judge Janis Jack, "manufactured for money";[24] that the settlement value of these claims is in the range of $35 to $40 billion;[25] that the contingency fees generated are in the range of $13 to $14 billion;[26] and finally, that the litigation doctors, sonographers, X-ray, and other medical technicians, etc., who produced the medical records for the screened litigants have been paid well in excess of $250 million by the law firms and screening companies that hired them.[27] If that does not violate the Model Rule prohibiting lawyers from compensating or giving anything of value to a person who has recommended their services or soliciting employment from a client,[28] then nothing does.

It is not an overstatement to conclude that if a provision were added to the rules of professional conduct promulgated by state supreme courts that the rules would not apply to mass tort litigations,

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18 *See* Letter from Steven C. Krane, Chairman, Standing Comm. on Ethics & Prof'l Responsibility, Am. Bar Ass'n, to author (Feb. 27, 2008) (on file with author).

19 *See generally* Lester Brickman, *The Use of Litigation Screening in Mass Torts: A Formula for Fraud?*, 61 SMU L. REV. 1221 (2008).

20 *See id.* at 1226.

21 *See id.* at 1227.

22 *See id.* at 1313.

23 *See id.* at 1228.

24 *See id.* at 1313.

25 *See id.*

26 *See id.*

27 *See id.*

28 *See* MODEL RULES OF PROF'L CONDUCT R. 7.2(b), 7.3(a) (2008).

then actual practices in such litigations would remain unchanged. The Rules already are largely ignored by courts and by disciplinary agencies—with one notable exception. Ironically, that one exception is Rule 1.8(g), which the ALI now seeks to effectively amend.

Rule 1.8(g) applies to aggregate settlements.[29] In these nonclass aggregate litigations, lawyers solicit or otherwise obtain hundreds and even thousands of clients who have similar claims against a single defendant, and typically charge contingency fees ranging from one-third to forty percent. Indeed, forty percent appears to have become the standard contingency fee in nonclass mass tort litigation.[30] While the use of the class action device in certain mass torts has been circumscribed by the U.S. Supreme Court in *Amchem Products, Inc. v. Windsor*[31] and *Ortiz v. Fibreboard Corporation*,[32] another reason for bringing nonclass mass tort actions is that lawyers can charge fifty to one hundred percent higher fees than what they would be awarded in a class action. It strikes me as mind-boggling that commentators on nonclass mass tort litigations largely, if not entirely, ignore the fact that mass tort lawyers are charging contingency fees that even exceed the fees that lawyers charge in "retail" personal injury litigation—fees which are already excessive in many cases.[33] United States District Court Judge Jack Weinstein, in a mass consolidation of thousands of individual actions against the manufacturer of the antidepressant Zyprexa, was critical of the failure of the lawyers to adjust their fees to reflect the huge economies of scale realized by the lawyers and slightly reduced the lawyers' forty-percent fees.[34] Judge Weinstein reasoned that in mass torts, there is a special concern about excessive fees, which "can create a sense of overcompensation and reflect poorly on the court and its bar" and that "[p]ublic understanding of the fairness of the judicial process in handling mass torts . . . is a signif-

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29 *See id.* R. 1.8(g).

30 *See* LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 58, 60 (2011).

31 Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1996).

32 Ortiz v. Fibreboard Corp., 527 U.S. 815 (1998).

33 For a discussion of contingency fees in ordinary tort litigation, see Lester Brickman, *The Market for Contingent Fee-Financed Tort Litigation: Is It Price Competitive?*, 25 CARDOZO L. REV. 65 (2003).

34 *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 490 (E.D.N.Y. 2006). Judge Weinstein's action incurred the wrath of Professors Charles Silver and Geoffrey P. Miller. *See* Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 110, 136–38 (2010). For my critique of the Silver-Miller argument, see BRICKMAN, *supra* note 30 (manuscript at 58–60) (on file with author).

icant aspect of complex national litigations involving thousands of parties."[35] A unique provision in the New Jersey state court rules purports to take economies of scale into account and significantly limit lawyers' fees in nonclass aggregate litigations.[36] Lawyers need not worry, however; there is no evidence that this provision is ever complied with or that any steps have been taken to enforce it.

Given the absence of any enforcement of reasonable fee provisions in states' ethics codes, lawyers are free to (and do) realize windfall fees of millions and even tens of millions of dollars in nonclass aggregate litigations.[37]

Fees of this magnitude pose temptations that simply overwhelm any proclivity to adhere to ethics rules, and especially to the requirements set forth in Rule 1.8(g). This risk is magnified exponentially when a lawyer sets out from the start to: (1) identify a defendant against whom colorable claims could be asserted, such as claims that an employer violated employment laws with regard to overtime or employment discrimination; (2) actively solicit employees of the defendant-to-be to join in the litigation; (3) obtain a sufficient number of clients to command the attention of the employer; (4) file the claims and then enter into settlement negotiations with the employer; (5) structure an aggregate settlement whereby the employer will pay

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35 *In re Zyprexa*, 424 F. Supp. 2d at 493–94.

36 The rules provide:

> When representation is undertaken on behalf of several persons whose respective claims . . . involve substantially identical liability issues, the contingent fee shall be calculated on the basis of the aggregate sum of all recoveries . . . and shall be charged to the clients in proportion to the recovery of each.

N.J. CIV. PRAC. R. 1:21-7(i). Substantial savings to clients would result if, as the New Jersey rule provides, contingency fees were applied on the aggregate amount in mass settlements such as those that have frequently taken place in asbestos litigation. For example, if an attorney for 200 plaintiffs reached a settlement with 5 defendants that provided for an aggregate payment of $48 million (and it is allocated evenly among the clients so that each gets $240,000)—and the facts alleged would fall under the ambit of Rule 1:21-7(i), but the rule is ignored—then under New Jersey Civil Practice Rule 1:21-7(c)—which limits contingency fees in tort cases to 33⅓% on the first $500,000, 30% on the next $500,000, 25% on the next $500,000, and 20% on any amounts in excess of $1.5 million—the total contingency fee would be $16 million. *See id.* R. 1:21-7(c). However, if the fees are calculated pursuant to Rule 1:21-7(i), which would take into account the aggregate nature of the mass settlement, the total fee would be $9,741,667—39% less. Higher settlements involving larger numbers of clients will widen the spread between the Rule 1:21-7(c) fee and the Rule 1:21-7(i) fee. For example, if the number of clients in the settlement were 1000 and each received $480,000, then the yield difference between the two fee calculations would approximate 40%.

37 In the Phillips Petroleum aggregate settlement, contingency fees amounted to approximately $65 million. *See infra* text accompanying note 59. In the Nextel aggregate settlement, the fees totaled $5.5 million. *See* William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1580 (2008).

either a set sum to be divided up by the lawyer among the clients or pay whatever sums are determined by an arbitration process; and (6) receive a contingency fee adding up to a substantial sum or agree to a substantial fee to be paid by the employer directly to the lawyer based upon the number of clients that accept the settlement. The Florida Supreme Court said that by use of the latter provision, the lawyer "became an agent for [the defendant] while still representing his . . . clients against [the defendant]."[38] This modus operandi roughly equates with that of the firm of Leeds, Morelli & Brown PC, described by William Simon in one of the most pathbreaking and courageous statements of conscience to ever appear in a law review.[39]

The cure for this problem is not to be found in tinkering with the universality of the settlement. The problem is avarice, and the solution—if there is one—is not structural, but rather the threat of sanctions not limited to loss of some or all of the fee and including a disciplinary component as well. While a handful of lawyers have been severely sanctioned for violating Rule 1.8(g),[40] disciplinary agencies would appear to have a strong aversion to enforcing Rule 1.8(g) absent very compelling circumstances, such as highly visible criminal conduct.[41]

One possible solution to curb lawyers' failures to adhere to the requirements of Rule 1.8(g) is to require that lawyers submit all aggregate settlements for approval by a designated judicial official in the jurisdiction where the lawyer practices or where the calamity occurred.[42] Alas, this proposal is unlikely to cure the problem of lawyers' failures to adhere to Rule 1.8(g). Even were such a requirement

38 Fla. Bar v. Rodriguez, 959 So. 2d 150, 160 (Fla. 2007).

39 *See* Simon, *supra* note 37, at 1576–86.

40 For descriptions of sanctions against lawyers for violating Rule 1.8(g), see Katherine Dirks, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 515–16 (2008), and Sybil L. Dunlop & Steven D. Maloney, *Justice Is Hard, Let's Go Shopping! Trading Justice for Efficiency Under the New Aggregate Settlement Regime*, 83 ST. JOHN'S L. REV. 521, 561 (2009).

41 *See, e.g.*, Erichson, *supra* note 3, at 983–89 (describing the Kentucky fen-phen settlement and the criminal convictions that were obtained).

42 The ALI proposal allows for limited judicial review of nonclass aggregate settlements when one of the clients seeks such review. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.18 (2010). A possible model for such a requirement is the New York Appellate Division rule requiring that lawyers file a copy of their contingency fee retainer agreements in personal injury and wrongful death cases with the state Office of Court Administration. *See* N.Y. COMP. CODES R. & REGS. tit. 22, § 691.20(a)(1) (2011). Attorneys are also required to file a closing statement indicating the disposition of the claim, the gross amount received, the disbursements made, and the fee charged. *Id.* § 691.20(b). There is no indication, however, that the Office of Court Administration reviews the forms filed.

adopted, we can anticipate that some lawyers would fail to file their settlements with a court, maintaining that they had not entered into an aggregate settlement even when they had done so. For example, in the Phillips Petroleum and fen-phen aggregate settlements, the plaintiffs' lawyers maintained that they had not entered into aggregate settlements even though the clear weight of the evidence was that they had.[43] Even when lawyers acknowledge that they have entered into an aggregate settlement, they may nonetheless claim that they made the necessary disclosures though their clients maintain that no such disclosures were made.[44]

In this brief Essay, I advance the view that lawyer adherence to ethical rules appears to be inversely related to the financial stakes for the lawyer. The aggregate settlement in the Phillips Petroleum explosion—which I next explore—shows how the financial incentives, in the form of a $65 million fee, drove the lawyers to abandon adherence to the requirements of Rule 1.8(g). It appears unlikely that the situation would have unfolded any differently had the settlement in *Phillips Petroleum* provided that only ninety percent of the firm's clients would have to agree for the settlement to be effective.

THE AGGREGATE SETTLEMENT IN THE PHILLIPS PETROLEUM EXPLOSION

On October 23, 1989, an explosion at the Phillips Petroleum Company's Houston plant killed twenty-three people and injured

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43 *See In re* N.Y. Diet Drug Litig., No. 700000/98, 2007 WL 969426, at *1 (N.Y. Sup. Ct. Mar. 27, 2007) (discussing the fen-phen litigation); Peter Passell, *Challenge to Multimillion-Dollar Settlement Threatens Top Texas Lawyers*, N.Y. TIMES, Mar. 24, 1995, at B6 (discussing the Phillips Petroleum case). In a proceeding before New York Supreme Court Judge Charles Ramos, the issue whether the law firm of Napoli Kaiser & Bern ("Napoli firm") entered into an aggregate settlement with Wyeth of 5000 claims for a reported $1 billion and whether it conformed to New York Disciplinary Rule 5-106, *see* N.Y. COMP. CODES R. & REGS. tit. 22, § 1200.25 (2011), with regard to notifying its clients that there was an aggregate settlement and getting their informed consent, was determined. *See In re N.Y. Diet Drug Litig.*, 2007 WL 969426, at *3–4. Though the Napoli firm maintained that it did not enter into an aggregate settlement and produced a legal ethics expert to support its position, Judge Ramos found that "[i]t is clearly a lump sum collective or aggregate settlement." *Id.* at *4. Also under review was an allegation by the law firm of Parker & Waichman LLP, that when the Napoli firm allocated the settlement proceeds among its 5000 clients, it allocated disproportionately larger amounts to its own clients and lesser amounts to the clients referred to the firm by Parker & Waichman, so that the Napoli firm could capture contingency fees at the expense of Parker & Waichman. *See* Parker & Waichman v. Napoli, 815 N.Y.S.2d 71, 73–74 (App. Div. 2006), *recalling and vacating* 806 N.Y.S.2d 19 (App. Div. 2005); *see also* Anthony DePalma, *9/11 Lawyer Made Name in Lawsuit on Diet Pills*, N.Y. TIMES, Mar. 30, 2008, at A23. This discussion draws substantially from a prior article, Brickman, *supra* note 19, at 1265 n.198.

44 *See* Simon, *supra* note 37, at 1590 (referring to the Nextel settlement).

hundreds.[45] Phillips Petroleum was determined by the Occupational Safety and Health Administration ("OSHA") to have operated the plant in violation of OSHA safety standards and was fined.[46] Thus, there was not only no issue with regard to Phillips' liability for the explosion, but punitive damages were a distinct possibility.[47] Indeed, one of the lead lawyers representing the victims testified that in his "thirty years-plus of practice [he] never had as good a set of liability facts to work with."[48] Phillips settled virtually all of the resulting claims for an amount said to exceed $400 million.[49] Despite the payout, Phillips was able to realize a net profit of $256 million from the explosion because of its casualty, property, and business interruption insurance.[50] Most of the claimants came to be individually represented by three of the major plaintiffs' firms in Texas.[51] One was the firm of Umphrey, Burrow, Reaud, Williams & Bailey ("Umphrey Burrow")—which was formed in 1988 by some of the leading Texas law firms to handle asbestos suits in the refinery-rich Houston ship channel area.[52] The families of 126 Phillips employees—the lion's share of those with claims—were solicited by or directed to Umphrey Burrow by officials of the Oil, Chemical and Atomic Workers Union, whose own lawyer was David Burrow.[53]

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45 *See* Passell, *supra* note 43.

46 *See* Phillips 66 Co., 16 BNA OSHC 1332 (No. 90-1549, 1993).

47 There was a possibility that compensation would be paid under the Texas workers' compensation statutes. *See* TEX. LAB. CODE ANN. §§ 401–408 (West 2009). This would have materially reduced the amounts paid to the Phillips employees who were injured by the explosion but would also have reduced the risk born by the lawyers from negligible to nonexistent. As it turned out, given Phillips' egregious conduct, compensation was determined through the tort system. *See* Passell, *supra* note 43.

48 Deposition of David Burrow at 189–90, Arce v. Burrow, No. 92-049658 (Tex. Dist. Ct. Feb. 5, 1995), 1995 WL 17856378.

49 *See* Passell, *supra* note 43.

50 Deposition of Cecil Jesse Silas at 280–81, *Arce*, No. 92-049658, 1995 WL 17856378.

51 *See* Passell, *supra* note 43.

52 Brenda Sapino*, 'Super-Firm' Partners Profit Feud Nears Trial*, TEX. LAW., May 2, 1994, at 1. At the time of the firm's formation, tens of thousands of mostly bogus asbestos claims were being filed in Texas courts by lawyers, mostly charging forty-percent contingency fees. *See* Lester Brickman, *On the Theory Class's Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 PEPP. L. REV. 33, 36, 64 (2003). For in-depth discussion of the issues of false claims that arise in such cases, see generally *id.*; Lester Brickman, *Disparities Between Asbestosis and Silicosis Claims Generated by Litigation Screenings and Clinical Studies*, 29 CARDOZO L. REV. 513 (2007).

53 *See* Passell, *supra* note 43. (David Burrow is the "Burrow" in Umphrey Burrow.) Two days after the explosion, several Umphrey Burrow lawyers came to the union hall to sign up clients. *See* L.M. Sixel, *Victims of Phillips Blast Assail Settlements*, HOUS. CHRON., Aug. 23, 1992, at 1E. Other clients said they signed up with the firm after they were visited at home by a lawyer or after they were solicited by union shop stewards. *Id.*

Umphrey Burrow lawyers had little or no contact with their clients for almost a year. The litigation was largely in abeyance while a federal investigation ensued, though settlement negotiations were taking place.[54] In February 1991, Umphrey Burrow's clients were summoned to the firm's office to be told that Phillips had offered to settle each of the cases for sums ranging from $25,000 to $9.5 million.[55] Though the firm had initially demanded $271,605,000, apparently on the basis of adding up individual claims,[56] a $190 million settlement was reached between Umphrey Burrow and Phillips after protracted negotiations.[57] In exchange, Umphrey Burrow agreed not to litigate on behalf of any of its clients. The amount of the settlement was not arrived at by toting up individual settlements for each client, but rather was a lump sum, dictated by insurance availability, which the firm was to divide up as it saw fit.[58] The individual fee agreements between the firm and its clients provided for contingency fees of either one-third or forty percent, amounting to approximately $65 million.[59] The trick, then, was to convince the 126 clients to accept the amounts that the firm had allocated to them. Over a ten-day period, starting February 22, 1991, the 126 clients were called to the firm's office to be told the terms of the settlement in individual meetings with one of three lawyers, scheduled to last twenty minutes each.[60]

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54 Shortly after the explosion, the firm obtained an injunction that forced the company to allow union investigators onto the site. *See* Sixel, *supra* note 53.

55 *See* Passell, *supra* note 43.

56 *See* Letter from David H. Burrow, Attorney, Umphrey, Burrow, Reaud, Williams & Baily, to Otway Denny, Attorney, Fulbright & Jaworski (Dec. 17, 1990) (on file with author).

57 *See* Passell, *supra* note 43.

58 *See id.*

59 *See id.* At least one of the clients stated that, though the retainer agreement she signed provided for a one-third contingency fee, the lawyer promised her that her fee would be reduced to between 20 and 25% if more clients signed up. Her fee was not reduced. *See* Interview with Julane Campbell in Hous., Tex. (Mar. 2, 1995). Another client asserted that he thought he signed a retainer agreement providing for a one-third fee but that he was charged a 40% fee. *See* Affidavit of Gary McPherson ¶ 6, Arce v. Burrow, No. 92-049658 (Tex. Dist. Ct. Feb. 5, 1995), 1995 WL 17856378 (on file with author). Still another client stated that, though he signed a blank fee contract, he was told the fee would be 25% of the recovery; he was charged 33⅓%. Affidavit of Stephen Bryant ¶ 6, *Arce*, No. 92-049658, 1995 WL 17856378 (Jan. 24, 1995) (on file with author). My rough, back-of-the-envelope calculation is that, based on a $65 million fee and payment of $17 million in referral fees, the Umphrey Burrow lawyers' effective hourly rate was approximately $20,000.

60 *See* Passell, *supra* note 43. These meetings were quite perfunctory, and at least one client never actually met his attorney, Mr. Burrow. *See* Letter from Calvin Williams to Robert Nelson, Senior Investigator, State Bar of Tex. (on file with author) (claiming that Burrow did not handle his case as an individual case, and that he never actually met Burrow or spoke to him before signing a settlement agreement).

The lawyers told them that the amount had been the subject of individual negotiations with Phillips; that it was the best offer they would get; that it was based on a review of their medical records, which had been obtained and evaluated; and requested that they sign the release form. In fact, the statements that the amounts were fixed in the course of negotiations with Phillips and were based on a review of their medical records were false. Not only was there an aggregate settlement, but few of the clients' medical records had been accessed when these meetings took place.[61] Twenty-five of the clients who objected were offered larger sums.[62] These added amounts were "paid" for by reducing the amounts allocated to fifteen others.[63] Those clients who objected were told that if they did not sign, the firm would not pursue their case in court and that if they hired other counsel, both firms would each be entitled to one-third of their recovery, leaving them with only one-third.[64] Those who still remained recalcitrant were brought before Texas District Court Judge Alice Oliver-Parrot, who told them that the settlement was fair and that if they turned it down, they would likely not fare as well.[65] Before going on the bench

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61 *See* Affidavit of Roberta M. Edwards ¶¶ 4–7, *Arce*, No. 92-049658, 1995 WL 17856378 (Jan. 17, 1995) (on file with author); Sixel, *supra* note 53.

62 *See* Final Settlements Chart, *Arce*, No. 92-049658, 1995 WL 17856378 (on file with author).

63 *See id.* One client stated that he rejected the $36,000 that the firm offered and that it was then raised to $125,000. He stated that he was told by Ken Bailey that they took the money from someone else. Affidavit of Gary McPherson at 4, *Arce*, No. 92-049658, 1995 WL 17856378 (on file with author). In a similar situation, another client had his offer raised from $375,000 to $475,000. *See* Letter from Silverrol Ferguson to State Bar of Texas (Apr. 11, 1991) (on file with author). A total of twenty-five clients had their final amounts increased by a total of $1,740,000, and fifteen clients had their amounts decreased by $1,155,000. *See* Injury Claims—Summary of Demands and Offers, *Arce*, No. 92-049658, 1995 WL 17856378 (on file with author).

64 *See* Letter from Calvin Williams to Robert Nelson, *supra* note 60 (claiming that he was told that his offer "was a good offer and that I could not get any more and could not go to court" and that "he made me think that I had no other choice"); *see also* Brief of Appellants at 12–13, Arce v. Burrow, 958 S.W.2d 239 (Tex. Ct. App. 1997) (No. 14-95-00360-CV) (collecting client recollections regarding alleged ploys used by the attorneys to secure the clients' agreements to the settlement, including being told that this was the best offer they would get; that trial would result in a smaller or no recovery; that if they were to use another attorney, the defendants would still take one-third in addition to what they would have to pay the second attorney; and that, in one case, salacious information about one client's family would be introduced if the case went to trial).

65 *See* Passell, *supra* note 43. Judge Oliver-Parrot's involvement in the case began when she was assigned as the trial judge in the case of *Bogle v. Phillips Petroleum Co.*, No. 89-46055 (151st Dist. Ct., Harris Cnty., Tex. 1991) (on file with author). At the time that Judge Oliver-Parrot was the district court judge assigned to the *Bogle* case, her name was Alice Oliver Trevathan, and she was known as Alice Trevathan. All references to her in this Essay, however, identify her as Alice Oliver-Parrot—a name which she assumed subsequently. *See* Sixel, *supra* note 53. Judge Oliver-Parrot appointed Theodore Goller, for whom she had previously worked

in 1986, Judge Oliver-Parrot had joined the firm of Gibbons, Burrow & Bratton ("GBB") in 1981.[66] During the time when Umphrey Burrow was bringing clients before her, she was receiving payments from the GBB law firm for her share of past work.[67]

The firm's efforts largely succeeded, and all but a handful agreed to settle for a total of $190 million.[68] The settlement, however, would

at the law firm that was representing Phillips, to act as guardian ad litem for roughly 160 minor children of those who had suffered personal injury. *See id.* She then presided over hearings approving all of the settlements on behalf of the children. Those claims were all settled for $500 for each of the children, with the money taken out of their parents' settlement amounts. *See id.* These settlements were sought by Phillips in order to terminate whatever claims the children had against Phillips. *See id.* Goller's investigation of the claims of these 160 children, which began on February 21, 1991, and ended on February 25, 1991, consisted of reviewing the medical records of five clients. Mr. Goller never spoke with the children, their parents, family or friends, or any counselors or healthcare providers. *See id.* For this work, Judge Oliver-Parrot approved payment to Goller of $60,000. *See* Check to Theodore Goller, *Bogle*, No. 89-46055 (on file with author). During the minors' hearings, Umphrey Burrow lawyers asked her to talk with other clients who did not have children. *See* Deposition of Alice Oliver-Parrot at 67, *Arce*, No. 92-049658, 1995 WL 17856378. She agreed, in response to the lawyers' requests for her assistance in closing the settlements, because "[she] liked all the lawyers in the case, so they knew [she'd] help them out" by having hearings on weekends and at night in order to accommodate their clients' work schedules. *Id.* at 66. She denies that she had been asked to convince the clients that they should accept the applicable settlement amounts that had been agreed to, but to "[j]ust tell them what the deal is. What's the settlement? What . . . are we doing here?" *Id.* at 67. She stated that she advised them that since they hired their lawyers for their expertise, they should listen to their advice and that if they went to trial "you can get zero or you can get more. It's a gamble." *Id.* at 72. The judge insisted that "I never told anybody to settle their case. I told them, 'You do what you think is right, but listen to the lawyers, that's why you hire them.'" *Id.* at 73. At one of the settlement hearings, a client testified that Ken Bailey had said that "[y]ou may get to meet . . . [Judge Oliver-Parrot] because she's going to have you down there to chew you out" if you refuse the settlement. Settlement Hearing at 10, *Bogle*, No. 89-46055 (on file with author). At that hearing, Judge Oliver-Parrot stated to that recalcitrant client: "Look, I'm telling you from the gut I'm afraid you're going to get nothing and then you will really think the system is horrible." *Id.* at 11.

66 Deposition of Alice Oliver-Parrot at 6–7, *Arce*, No. 92-049658, 1995 WL 17856378.

67 *See id.* at 10. In her deposition, Judge Oliver-Parrot was asked about the amount of these payments. She replied that she could not recall and that she had not maintained any records of the payments because of concerns of "confidentiality." *Id.* at 9–11. Though David Burrow was subpoenaed to supply copies of the checks, none were ever produced. *See* Deposition of David Burrow at 6–7, *Arce*, No. 92-049658, 1995 WL 17856378. One of the reasons that Umphrey Burrow was anxious to conclude a settlement with Phillips' insurance carrier was the concern that Judge Oliver-Parrot would be elevated to a higher court and would therefore "not be around" "to assist" the firm in "successfully convincing . . . clients that they should take the applicable settlement amounts." Letter from Kenneth Bailey, Jr., to Blake Tartt and Otway Denny (Feb. 14, 1991) (on file with author). Two months after the settlement, Judge Oliver-Parrot was appointed Chief Justice of Texas's First Court of Appeals. *See* Passell, *supra* note 43. Her deposition took place after this appointment. In 1994, she ran for the Texas Supreme Court and lost. *See id.* Umphrey Burrow contributed $80,000 to her campaign. *See id.*

68 *See* Passell, *supra* note 43.

come to have an afterlife. Silverrol Ferguson, a thirty-nine-year-old mechanic at the plant, who had settled his claim for $500,000, had been angered by the firm's tactics and complained to the Texas Bar Association that the firm had done shoddy work, including failing to even obtain his medical records before the settlement showing the medical care he received after the explosion.[69] The Texas Bar Association determined that Mr. Burrow had not committed an ethical breach.[70] Ferguson then attempted to hire a lawyer to attack the settlement. No Texas lawyer, however, would take his case.[71]

Ultimately, Ferguson hired William Skepnek,[72] a Lawrence, Kansas, trial lawyer, who, in 1992, brought a malpractice action against Umphrey Burrow on behalf of forty-six of the firm's clients.[73] The complaint alleged a conflict of interest stemming from a "secret 'agreement'" between the plaintiffs' lawyers and the defendant and its law firm, the existence of an aggregate settlement, and the failure to inform clients and obtain their informed consent to the aggregate settlement.[74] Skepnek moved for pro hac vice status.[75] A year and a half later, days before the trial, Judge Mark Davidson turned down his request, delaying the trial.[76] Skepnek then took the MPRE exam and successfully petitioned for admission to the Texas bar on grounds of

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69 *See* Letter from Silverrol Ferguson to the State Bar of Texas (Apr. 11, 1991) (on file with author).

70 Letter from the State Bar of Texas to Silverrol Ferguson (Aug. 12, 1992) (on file with author) (stating that Burrow did not commit professional misconduct as defined by the Texas Code of Professional Responsibility); *see also* Letter from David H. Burrow to Robert E. Nelson, Senior Investigator, State Bar of Texas (Sept. 9, 1991) (on file with author) (responding to Ferguson's letter to the State Bar of Texas claiming that Burrow's office had treated Ferguson fairly and that the net settlement "was not only very fair, but extremely generous").

71 Peter Passell, *Plaintiffs Win Right to Sue Lawyers in Malpractice Case*, N.Y. TIMES, Sept. 11, 1997, at A28.

72 Skepnek would later take on the Texas firm of Baron & Budd over its use of a "script memo" to "implant false memories" in the minds of its asbestos clients resulting in the near demise of his professional career. For a detailed account of the "script memo" and Skepnek's courageous but probably foolhardy attempt to have the merits of the "script memo" adjudicated, see Brickman, *supra* note 52, at 141–66. This account became the subject of a micturating match between myself and Professor Charles Silver of The University of Texas School of Law. *See generally* Charles Silver, *A Rejoinder to Lester Brickman: On the Theory Class's Theories of Asbestos Litigation*, 32 PEPP. L. REV. 765 (2005); Lester Brickman, *A Rejoinder to the Rejoinder to* On the Theory Class's Theories of Asbestos Litigation, 32 PEPP. L. REV. 781 (2005) (abstract available at http://www.ssrn.com/abstract=761845).

73 *See* Passell, *supra* note 43.

74 *See* Plaintiffs' Second Amended Petition, Arce v. Burrow, No. 92-049658 (Tex. Dist. Ct. Feb. 5, 1995), 1995 WL 17856378.

75 *See* Interview with William Skepnek in Hous., Tex. (Mar. 2, 1995).

76 *See id.*

reciprocity with Kansas.[77] After resumption of the trial, Judge Davidson granted the defendant's summary judgment motion, holding that while there was "sufficient evidence of an aggregate settlement . . . to create a fact issue,"[78] based upon the opinion of an expert witness for the firm which was contradicted by expert testimony for the plaintiffs, the plaintiffs could not show they had been damaged—that is, received less than the amounts they would have received had their cases gone to trial.[79] At least some explosion victims who were represented by other law firms obtained far more favorable settlements than did the Umphrey Burrow clients. The one death case represented individually was settled for $40 million—four times as much as the largest sum received by an Umphrey Burrow plaintiff.[80] Carole Griffin, an Umphrey Burrow client who refused to accept her $150,000 offer, later hired another lawyer who negotiated a $797,000 settlement.[81]

A panel of the Texas Court of Appeals overturned Judge Davidson's dismissal.[82] Prior to oral arguments before a panel of the Texas Court of Appeals in March 1996, attorneys Umphrey, Reaud, and Williams reached confidential settlements in the malpractice case, leaving only Burrow and William's partner, F. Kenneth Bailey, Jr., to soldier on.[83]

In 1999, in *Burrow v. Arce*,[84] a shot heard around the bar, the Texas Supreme Court held that lawyers who breach their fiduciary duties to their clients can be required to forfeit their fees even if the clients cannot show that they have suffered any actual damages.[85]

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77 *See id.*

78 *Arce*, No. 92-049658, 1995 WL 17856378.

79 *See id.*

80 Jim Morris, *Phillips Settlement Worth $40 Million*, HOUS. CHRON., Oct. 13, 1994, at 1A.

81 Affidavit of Carol Griffin at 2, *Arce*, No. 92-049658, 1995 WL 17856378 (Jan. 16, 1995) (on file with author).

82 Arce v. Burrow, 958 S.W.2d 239 (Tex. Ct. App. 1997), *aff'd in part, rev'd in part*, 997 S.W.2d 229 (Tex. 1999) (holding that, while the plaintiffs were not entitled to actual damages, a question existed as to whether a breach of fiduciary duty took place with regard to the alleged failure to obtain the informed consent of their clients as mandated by the aggregate settlement rule, that fee forfeiture is an appropriate remedy in Texas for breach of fiduciary duty, and that plaintiffs were not required to prove actual damages, as proof of breach was sufficient).

83 Burrow v. Arce, 997 S.W.2d 229, 234 (Tex. 1999).

84 *Id.*

85 *Id.* at 238–39 (holding that fee forfeiture is the appropriate remedy when there is a breach of fiduciary duty that does not result in actual damages because "[i]t is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. An agent's compensation is not only for specific results but also for loyalty"). The court found that the purpose of the remedy of fee forfeiture is to act as a deterrent to attorneys who may think to breach their duty of loyalty because "[t]he remedy of forfeiture removes any incentive for an agent to stray from his duty of loyalty based on the possibility that

Thereafter, Burrow also settled the case. All of the settlement amounts are confidential.[86]

The actions by the attorneys in this nonclass aggregate settlement illustrate the powerful influence that a $65 million fee had on a quintet of wealthy lawyers and possibly others involved in the litigation. Would their actions have been different if section 3.17 of the ALI's *Principles of the Law of Aggregate Litigation* had been adopted in Texas? Perhaps. And then again, perhaps not.

the principal will be unharmed or may have difficulty proving the existence or amount of damages." *Id.* To require proof of damages would therefore undermine the purpose of the remedy. *See id.*

86 Arce v. Burrow, No. 92-49658, 2000 WL 35633123 (Tex. Dist. Ct. Oct. 12, 2000). On November 19, 1992, Umphrey Burrow and all of its constituent attorneys filed suit against the *Arce* plaintiffs, William Skepnek, and others. *See* Plaintiff's Original Petition, Umphrey v. Arce, No. 92-52674 (Tex. Dist. Ct. 1992). They alleged that the *Arce* plaintiffs had committed perjury, violated court orders with respect to confidentiality and settlement agreements, and committed libel and slander. *See id.* They also claimed that the plaintiffs' lawyers had caused defamatory articles to appear in the *Houston Chronicle* and *The National Law Journal*, and had interfered with the attorney-client relationship existing between the plaintiffs in this action and their clients. *See id.* Finally the suit alleged that the *Arce* plaintiffs and their lawyers had engaged in a civil conspiracy. *See id.* Presumably, this suit was dismissed in the course of the various settlements with Umphrey Burrow lawyers.