

Settling with Thousands? Ethical Issues Involving Minors, Potential Incompetents, and Wrongful-Death Estates

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This is Part II of a two-part article on mass tort settlements. Part I appeared in the Fall 2009 issue of The Environmental Litigator.

The settlement of mass-tort cases is particularly fraught with peril when minors, incompetents, and estate representatives are involved. Settling claims by these plaintiffs requires additional attention to ensure that the settlement is valid and binding.

Minor Plaintiffs

Ensuring Proper Representative Capacity

There are numerous potential dangers if a minor's claims are not settled with the correct individual. First, minors lack legal capacity to sue and to settle potential claims in every jurisdiction. Instead, a "next friend" or a court-appointed legal guardian must initiate litigation on a minor's behalf. Second, contracts entered into by minors are voidable in most jurisdictions. To bind minors as a matter of contract, written settlement documents must be executed by someone with proper legal authority to contract for each minor under applicable state law. Failure to ensure that an appropriate representative execute the settlement documents may destroy the contractual value of the minor's written settlement agreement and release (including any beneficial covenants and warranties therein). Third, most states have statutes specifying the persons who can, as a matter of law, receive payments in satisfaction of debts owed to minors (including settlement amounts). Even if an authorized individual settles a minor's claims and has the legal authority to execute contractual settlement documents, defendants may still face future liability if the settlement payment is not made to an appropriate recipient. Depending on the state, the amount at issue, and

other circumstances, defendants may only be able to satisfy settlement obligations to a minor by making payments to a court-appointed conservator, legal "custodian," clerk of probate court, or other person specified by state law. An individual authorized to bring suit on the minor's behalf may not necessarily be authorized by law to receive the settlement payment.

Thus, to ensure that each minor's claims are properly extinguished, it is imperative for defendants to determine whether each minor's representative or guardian has binding legal authority under relevant state law to (i) settle the minor's claims, and (ii) receive settlement payment. One potential option is to require plaintiffs' counsel to confirm the identity of each minor plaintiff and provide proof of the representative's authority as a precondition to final settlement. The plaintiffs' counsel, of course, may resist this option because it potentially requires each minor's guardian to incur the expense of seeking conservator status in probate court and to post bond in the amount of settlement.

Defendants may also obtain comfort that the correct individuals are settling minor claims by negotiating representations and warranties in the release or settlement documents. Each individual settling claims for a minor plaintiff should be able to represent and warrant that he or she has full legal authority to execute the settlement documents on the minor's behalf. These individuals should also be able to represent and warranty that they have full legal authority, under applicable state law, to receive the minor's share of any settlement fund.

Defendants also may be able to negotiate indemnification from the individual settling the minor's claims in the event that the claims are later reasserted by the minor (or by someone on the minor's behalf). Obviously, however,

the representations and warranties and related indemnity provisions are only as valuable as that signatory's future ability to fulfill his or her indemnity obligation. In cases where signatories are of limited financial means, this may provide limited comfort.

Although plaintiffs' counsel are unlikely to accept any indemnity obligations themselves, defendants may nonetheless be able to negotiate helpful representations and warranties from the plaintiffs' counsel. Federal Rule 11 and its state law counterparts, for example, arguably require plaintiffs' counsel to make good-faith efforts to ensure that each person asserting a claim (whether on his or her own behalf or for another) has proper legal capacity to do so. Thus, mass-tort settlement agreements can potentially include representations by plaintiffs' counsel that to the best of counsel's knowledge and after reasonable inquiry, each individual executing the settlement documents on behalf of a minor is properly authorized to settle the minor's claims and receive any settlement payments on the minor's behalf.

Ensuring Fairness (and Enforceability) of Minor Settlements

Beyond the question of whether a duly authorized representative signs the settlement documents and receives payment of the minor's settlement amount, state substantive law may also require a fairness hearing and court-approval order before a mass-tort settlement binds minor plaintiffs.

Pro Ami or "Fairness" Hearings

Courts routinely recognize "the special nature of an attempted settlement of a minor's claim." To that end, many jurisdictions require a *pro ami*¹ or "fairness" hearing to confirm a settlement's fairness before it becomes binding on minor

plaintiffs. Depending on the jurisdiction, fairness hearings may be mandated either by statutory or common law.

During a *pro ami*/fairness hearing, the court will determine whether the settlement is in each minor plaintiff's best interests. The court has wide latitude in making this determination and may consider how the settlement proceeds will be used, if at all, during the minor's life prior to the age of majority.² The court may consider evidence produced during discovery, as well as hear testimony from the minor's parents or guardians. The court may also choose to examine each minor directly or to review "day in the life" videos establishing the minor's situation.

At the end of the *pro ami* process, courts typically enter an order approving the settlement as to each minor plaintiff (the minor approval order). To increase the protections afforded by a mass-tort settlement, the defendant should seek as many favorable recitations as possible in the minor approval order. Defendants are well served if the order includes express findings that

- (i) settlement as a whole is fair, reasonable, and in the best interest of the each minor plaintiff
- (ii) that the specific settlement amounts to be paid to individual minor plaintiffs are fair, reasonable, and in each minor's best interests
- (iii) that the fees requested by any guardian ad litem appointed to represent the interests of each minor are fair and reasonable
- (iv) that upon payment of the settlement amount and costs, the defendants are discharged from any further liability to the minor plaintiffs

Guardians Ad Litem

The court may also appoint one or more guardians ad litem to represent the interests of minor plaintiffs during the *pro ami*/fairness process. While not necessarily required in every case, the appointment of a guardian ad litem is highly advisable in mass-tort

settlements. This is especially true where the minor's representative for settlement purposes is also a plaintiff asserting his or her own claims. In such situations, a guardian ad litem is virtually required because the "lump sum" nature of the settlement makes the minor's interests potentially (or actually) adverse to the parent/guardian's interests.

Failure to Insist on a Pro Ami / Fairness Hearing

Burke v. Smith highlights the potential dangers that can arise if defendants fail to insist on a *pro ami*/fairness hearing as part of the settlement process.³ In *Burke*, a minor plaintiff asserted claims, through her mother as next friend, for the wrongful death of her father. After the case settled and the mother attempted to release the daughter's claims, the district court dismissed the daughter's claims without conducting a fairness hearing. Upon reaching the age of majority, the daughter successfully petitioned the court to set aside the dismissal as void under Federal Rule 60(b) (4). On appeal, the Eleventh Circuit first found that federal courts sitting in diversity must apply Alabama's fairness hearing requirement as a matter of state substantive law. Based on the district court's failure to hold a fairness hearing with respect to the settlement agreement, the Eleventh Circuit then found the settlement agreement invalid as to all plaintiffs. Accordingly, the court affirmed the trial court's order finding that the prior judgment of dismissal was void.

The Fifth Circuit construed Louisiana's fairness hearing requirement very similarly in *Carter v. Fenner*.⁴ In *Carter*, a minor plaintiff's mother was appointed to act as the minor's guardian for settlement purposes. The parties sought entry of a consent judgment to effectuate the settlement, but failed to seek judicial approval of the minor's settlement through a fairness hearing. The trial court later granted the minor's motion to set aside judgment and reopen the litigation. On appeal, the Fifth Circuit held that the original consent judgment entered in federal court

approving the settlement agreement was "of no legal effect."⁵ According to the court, the failure to seek judicial approval of the settlement agreement was "fatal."⁶ Because of the affirmative judicial obligation to review a [guardian's] requests regarding the protected interests of the minor, the Fifth Circuit affirmed the district court's order setting aside the consent judgment.

In addition to the power to review and approve minor settlements, some courts have recognized an affirmative "duty to prevent the rejection of settlement offers which in the minor's best interests should be accepted."⁷ In *Will v. Northwestern University*, for example, the defendants proposed a wrongful-death settlement offer to the decedent's estate, including three minors.⁸ The court appointed a guardian ad litem to determine whether the settlement would be in the minors' best interests. After considering discovery materials, conferring with the parties, reviewing mediation information, and weighing trial risks, the guardian concluded not only that the settlement was in the minors' best interests, but that "refusal of the proposed settlement amounted to waste and mismanagement of the estate."⁹

The trial court approved the settlement over vigorous objections by the estate administrators, who were also the minors' parents. On appeal, the administrators/parents argued that the trial court improperly coerced settlement and deprived them of control over the minors' claims. The Illinois Appellate Court disagreed:

[T]he trial court not only had the power to accept the settlement and execute all pertinent documents, but that it did so properly and without any abuse of discretion. [Mother], as the Estate's representative, refused to effectuate the settlement in direct contradiction to the trial court's reasoned determination that the settlement was in the best interest of the minor beneficiaries she had been entrusted to represent. While she as an adult plaintiff would otherwise have the ability to reject any settlement

no matter how advantageous to her in an individual cause of action, this was not the case here, where we have already concluded that she did not have an individual cause. Rather she stood in this cause as co-administrator and, as such, the trial court here had a duty to prevent the rejection of this settlement, which it determined to be in the best interest of the minors, *regardless of whether it impeded her ability to control her minor child . . . or to direct the resolution of the case as co-administrator of [the] estate.*¹⁰

Additional Considerations for Claims by Incompetent Persons

As with minors, it is crucial that a duly authorized person settle any claims by legally incompetent plaintiffs. Incompetents generally lack authority to sue on their own behalf. Moreover, the majority rule is that contracts with incompetent persons are voidable even if that person has never formally been deemed incompetent by a court. Depending on the jurisdiction, contracts made by an individual previously declared incompetent by a court are either voidable or void. Further, final judgments against incompetent plaintiffs may be subject to later attack. Defendants should therefore attempt to identify any potentially incompetent plaintiffs during discovery and as part of the settlement process. If any plaintiffs have previously been deemed legally incompetent, the defendants should request copies of court orders confirming that each person attempting to settle an incompetent plaintiff's claims has been duly appointed as legal guardian. To avoid future problems caused by potentially incompetent plaintiffs who have never been identified as such, defendants should also consider requiring

plaintiffs' counsel to represent and warrant that each plaintiff (or representative signing on a plaintiff's behalf) has both legal capacity and legal authority to sign all releases and other settlement documents. Again, Rule 11 arguably imposes a good-faith obligation to confirm that clients are legally capable of pursuing litigation.

As when settling with minors, defendants should ask the court to appoint a guardian ad litem to represent the interests of incompetents during the settlement process and move for an order approving the settlement as to each incompetent plaintiff. Courts are generally authorized to appoint guardians ad litem to represent the interests of incompetent plaintiffs.¹¹ In the context of mass-tort settlements, the guardian can investigate the facts and circumstances surrounding

DEFENDANTS SHOULD TAKE STEPS TO ENSURE THAT EVERYONE ATTEMPTING TO RELEASE WRONGFUL-DEATH CLAIMS ACTUALLY HAS AUTHORITY TO DO SO.

each incompetent plaintiff's claims, assess the proposed settlement, and advise the court as to whether the settlement is in each incompetent plaintiff's best interests. The court may then enter an order approving the settlement as to each incompetent, whether as a matter of judicial discretion or as state law or applicable court rules may require. By erring on the side of caution, seeking input from an independent guardian ad litem, and obtaining a conclusive court order, defendants may help protect the settlement from later challenge.

Wrongful-Death Claims

State law governs who may bring and compromise wrongful death claims on behalf of a decedent's estate. Only an executor or an administrator

(collectively a "personal representative") may bring a wrongful-death claim. A wrongful-death claim belongs to the estate representative, who is charged with prosecuting the claim for the estate's beneficiaries. Therefore, verifying that putative estate representatives settling wrongful-death claims are properly authorized to do so is critical to long-term settlement enforceability.

Todd v. Adams is a textbook example of why defendants must ensure that the proper individual execute the settlement agreement and release of wrongful-death claims.¹² In *Todd*, the decedent's widow executed a release of all claims arising from the automobile accident that caused the decedent's death. Shortly after executing the release, the widow was appointed to represent the decedent's estate and filed a wrongful-death action. The North Carolina Court of Appeals reversed the trial court's dismissal of the wrongful-death action based on the release, holding that an estate administrator "cannot execute a release for [a wrongful-death] claim that would

be binding on the estate unless she is *first* appointed the personal representative of the estate."¹³

Defendants should therefore take appropriate measures to ensure that everyone attempting to release wrongful-death claims in a mass-tort settlement actually has authority to do so. One time-tested technique is to require plaintiffs' counsel to provide recorded copies of either letters testamentary (issued to the executor of decedent's will) or letters of administration (issued to a person appointed as administrator of the decedent's estate) for each representative settling a wrongful-death claim. These papers are typically issued by probate courts pursuant to state procedural requirements.

An additional protective measure

would be to require each individual settling wrongful-death claims to represent and warrant that they have full legal authority to execute the settlement documents on the estate's behalf. Defendants may also be able to negotiate indemnification from the individual settling the claims if someone else later attempts to reassert the claims for the estate. Finally, plaintiffs' counsel may be willing to represent and warranty, consistent with good-faith pre-filing obligations, that each individual executing the settlement documents on an estate's behalf has been duly authorized to do so. ♻️

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Endnotes

1. *Pro ami* is shorthand for the French *prochein ami*, or "next friend."

2. *See* Roby v. Benton Express, Inc., No. 2:05-cv-494-MHT, 2006 WL 1375949, at *1 (M.D. Ala. May 19, 2006).
3. 252 F.3d 1260 (11th Cir. 2001).
4. 136 F.3d 1000 (5th Cir. 1990).
5. *Id.* at 1008.
6. *Id.*
7. Will v. Nw. Univ., 881 N.E.2d 481, 496 (Ill. Ct. App. 2007).
8. *Id.* at 498.
9. *Id.*
10. *Id.* at 498–99 (emphasis added).
11. *See, e.g.*, Fed. R. Civ. P. 17(c).
12. 208 S.E.2d 237 (N.C. App. 1974).
13. *Id.* at 239. *See also* Morrison v. Fleck, 697 N.E.2d 1064, 1067 (Ohio App. 1997) ("Because it is the statutory beneficiaries who are the real parties in interest and because the amount received as a result of the action, whether by settlement or otherwise, is to be distributed to them, justice requires that they, in turn, be bound by the [administrator's] execution of any general release.").