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Avoiding The Rotten Compromise In Mass Litigation

By **Ted Mayer and Robb Patryk**

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"Beware of rotten compromises," Albert Einstein said.

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Taking off from this attributed quotation, the Israeli scholar Avishai Margalit devoted an entire, thoughtful book to the distinction between justifiable and rotten compromises in international diplomacy.[1] His fundamental thesis is that peace is worth significant sacrifice of opportunity, resources and even principle.

Yet he argues that there are some compromises that are inherently rotten and should not be made. As product liability lawyers on the defense side, we asked ourselves: What is a rotten compromise in the world of mass litigation over tort claims, and how can our clients be sure to avoid one?

In our experience, we have seen both kinds of compromises. We have participated in the negotiation and implementation of the resolution of multiple large litigations. In some, the cost was exceedingly low relative to plaintiffs' investment in the litigation. In others, the cost was low relative to risk going in but higher in absolute terms.

But all have met the goals of certainty and effective closure and have stood the test of time. We also have come in after the fact to clean up the implementation of a settlement that was rotten — rotten because it achieved peace at unknown cost (and the ultimate price was many times the cost announced at signing), because it did not resolve the most serious claims, and because it permitted new claims to be filed up to 70 years after signing.

In our view, a rotten settlement in the mass tort litigation world is one that does not effectively end the litigation, or that ends one litigation at the expense of encouraging others.

A settlement can be rotten by price alone, if the price will inspire significant litigation that otherwise would never be brought, or persistence in prosecuting litigation that should be abandoned. And a settlement can be rotten largely because it comes too early, if it sends the message that there is easy money for anyone who comes forward with a case, without the necessity of more.

But price and timing are not the only sources of rottenness. In any settlement involving large numbers of claimants, there are likely to be other critical terms that the defendants should treat as non-

negotiable from the start of any discussion.

Of course, every mass litigation is different. The nature of the product and its regulatory history, the injuries involved, the quality of any science behind the claims, the courts where the cases are consolidated, the plaintiffs' counsel involved, whether the product remains on the market and its importance to the defendant, and the defendant's financial condition are among many factors that can influence the terms, if any, on which settlement may be justified.

But in nearly every circumstance, our experience suggests that following the rules below will help to avoid the rotten compromise.

1. The settlement must be designed to be implemented fully during the careers of those involved in making it.

Mass torts settlements are by their nature typically complex and can in some cases take considerable time to administer before they are fully closed. Inevitably, novel issues arise during their administration, and those who put their sweat equity and reputations into crafting the settlement usually are the most motivated, and best placed, to deal quickly and collaboratively with such issues in the spirit of the original compromise (especially when the letter of it may be unclear in application to the dispute at hand).

If left to later generations, the willingness and ability to resolve such situations promptly may be lost.

2. The settlement must be open only to claimants already identified or, if it needs to be open to future claimants, only to those who document that they meet very specific standards and within a specified time.

Crafty plaintiffs' counsel will look for any and every opportunity to shoehorn in stray claims, and care therefore needs to be taken to identify eligible claimants, and properly define them, lest you invite more trouble than bargained for and open floodgates you were attempting to slam shut.

Critical to this process, in our view, is inviting into the drafting process colleagues who have not lived with the claims and claimants as long as you have and who are likely, when looking at your attempted definition, to imagine it encompassing or excluding types of claimants you did not intend to capture or omit.

3. The terms must be specific and clear and should not require interpretation by claims administrators or courts.

We all imagine ourselves able to craft settlement terms and criteria which speak for themselves; but we often nonetheless need help, especially where we likely have lived with the litigation at issue for years and may give to certain terms more or different meaning than others might.

So again, put your pride aside and invite into the process a colleague who does not have the benefit — or bias — of your history with the case.

4. The terms should be drafted carefully to cover every possible eventuality.

Just because litigation settlements are negotiated by litigators does not mean that defendants have to

be sloppy about their terms. The defendants are paying the money and should use that leverage to craft airtight language.

Some of the lawyers who are best able to rally the leaders of other plaintiffs' firms to support a settlement are also the least patient with detailed settlement documents. But, especially when the claimants are numerous and varied and the stakes are high, well-structured settlement documents prepared by expert drafters of contracts — painful as this may make the negotiations —- will avoid unnecessary risk and make implementation much smoother.

And part of the drafting process must include consideration of every conceivable type of claim and scenario that can be presently envisioned, including, among others, potential favorable or unfavorable changes in the science.

5. Wherever possible, the total amount to be paid must be fixed or capped.

Defendants usually and rightfully wish to confine their liability, put a number on it and put it behind them. That cannot be done effectively unless the settlement amount is fixed or capped, and, as described earlier, the door to future claimants is narrow and, if possible, eventually shut entirely.

A requirement that a high percentage of eligible claimants must opt in before any settlement payment will be made helps to ensure the defendant will be buying real peace rather than creating a massive sideshow of opt outs. And it puts pressure on plaintiffs' counsel to sell the deal to their clients, which is absolutely critical.

6. The settlement must not expand the scope of compensation to claims beyond those that have a reasonable chance of success in the tort system.

The goal should always be to pay nothing on claims that have little or no chance of success. Most consumer product defendants involved in settling mass litigation will likely face mass litigation again. The last thing they want to do is to fuel the propensity of plaintiffs' firms to file unscreened or frivolous claims, or to seek to expand the litigation to other injuries, or to undocumented or marginal exposures.

Paying a nominal amount for weak cases does not in itself make the settlement rotten, and can be a pragmatic solution in some cases where plaintiffs are unable to persuade their clients to dismiss with prejudice or to enter a process that will pay them nothing. But that should be the exception; often defendants give up too easily on this. And in any such case it is critical that the plaintiffs' firms understand that the defendant attributes no value to those claims, and that the nominal payments will not increase the total pie.

7. The settlement must encourage closure of non-qualifying claims already filed, generally by outright dismissal or by acceptance for processing, with an appeal option that brings automatic dismissal if the appeal is denied.

In settlements that include a claim processing system, an appeal procedure that requires the claimant to agree to dismiss with prejudice if the appeal is denied has been one effective way to achieve finality. This is a way of complying with our rule 6 above that also helps plaintiffs' counsel who can advise their client that entering the process is the best chance the client has of getting anything for the claim.

8. The presiding courts should be invested in the success of a settlement.

This does not mean that the court or anyone appointed by the court necessarily needs to be involved in negotiating the deal. It does often mean that the court should be aware of obstacles that the court can help solve, and that the court should be enlisted to help implement the deal.

9. The settlement should eliminate future litigations or should subject it to conditions.

Where the settlement cannot achieve absolute finality, because the product is still on the market or because of latent injuries, the defendant should do what it can to ensure that the settlement is accompanied by orders that sufficiently constrain the future litigation to make the settlement worthwhile. This may mean orders that impose conditions on future litigation in the form of early provision of medical records and expert reports or evidence of specific causation.

This ensures careful screening of future cases to limit them to those potentially compensable and ensures that plaintiffs' firms understand that if they sign up new plaintiffs, they will have to work and spend money on every case. The chief weapon to achieve this, of course, is persuasion — of both the court and the plaintiffs' leadership — that the time is ripe for this, that it is fair to the litigation and that there is little incentive for the defendant to settle without such orders.

Attention to these maxims should, we believe, position product defendants to avoid the indigestion that accompanies the rotten compromise and to settle mass litigation once and for all. All mass tort settlements are painful, but they need not be rotten.

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[1] Avishai Margalit, On Compromise and Rotten Compromises (Princeton University Press, 2009)

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