MASS TORT ETHICS: WHAT CAN WE LEARN FROM THE CASE AGAINST STANLEY CHESLEY?

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I. INTRODUCTION

Stanley Chesley was a titan in the mass torts bar.[1] Known as the "Master of Disaster"[2] and the "Prince of Torts,"[3] Chesley was involved in nearly every major mass tort case since the 1970s.[4] But, in March 2013, the Supreme Court of Kentucky disbarred Chesley for violating the ethics rules on fees and aggregate settlements.[5] A month later, facing disbarment by his home state of Ohio, Chesley voluntarily resigned his license,[6] thus ending a storied legal career.

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[1] *See generally* Lucy May, *Stan Chesley: Beverly Hills Supper Club Fire Would Transform Son of Immigrants into Legal Titan*, WCPO DIGITAL (May 28, 2013), http://www.wcpo.com/news/local-news/stan-chesley-beverly-hills-supper-club-fire-would-transform-son-of-immigrants-into-legal-titan [hereinafter May, *Stan Chesley I*] (referring to Chesley "as the king of the class-action lawsuit").

[2] *See, e.g.*, Lucy May, *Stan Chesley Chapter II: Settling for More, But Losing Plenty*, WCPO DIGITAL (May 29, 2013), http://www.wcpo.com/news/local-news/stan-chesley-chapter-ii-settling-for-more-but-losing-plenty [hereinafter May, *Stan Chesley II*].

[3] *See, e.g.*, Lucy May, *Stan Chesley: How a Single Case Dethroned the 'Prince of Torts*,' WCPO DIGITAL (May 29, 2013), http://www.wcpo.com/web/wcpo/lifestyle/stan-chesley-how-a-single-case-dethroned-the-prince-of-torts.

[4] *See infra* notes 19-31 and accompanying text.

[5] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 585-86, 602 (Ky. 2013). The court also found violations of the rules requiring candor to a tribunal, and conduct involving misrepresentation or deceit. *Id.* at 586, 602.

[6] Lucy May, *Disbarred Local Lawyer Stan Chesley Retires from Practicing Law in Ohio*, WCPO DIGITAL (Apr. 19, 2013), http://www.wcpo.com/dpp/news/

What would cause a lawyer at the pinnacle of his career to risk it all and, as the Supreme Court of Kentucky concluded, disregard the basic principles of professional responsibility?[7] Was it greed, as some have speculated?[8] Greed, after all, is a "robust determinant of unethical behavior." [9] Or, was it something in Chesley's psychological makeup? Research finds that those with higher levels of wealth, occupational prestige, and education are more prone to unethical behavior.[10] A recent study concluded that "the pursuit of self-interest is a more fundamental motive among society's elite, and the increased want associated with greater wealth and status can promote wrongdoing."[11]

We likely will never know the answers to those questions. So, what lessons *can* be derived from Stan Chesley's fall from grace? I have never met Stan Chesley; this essay is based solely on court records and other public reports about his rise and fall. Nevertheless, through these public sources, I identify three baseline lessons for all mass tort lawyers, some blatantly obvious, others perhaps less so. As I discuss in Part II, lesson one is that, in a non-class action mass tort, the plaintiffs' attorney has an attorney-client relationship, and corresponding duty, to each individual client.[12] As the Supreme Court of Kentucky held, "[t]he plaintiffs in the case were [Chesley's] clients, and he assumed the same ethical responsibilities that he would have with any other

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local_news/disbarred-local-lawyer-stan-chesley-retires-from-practicing-law-in-ohio [hereinafter May, *Disbarred Local Lawyer*].

[7] *See Chesley*, 393 S.W.3d at 602 (listing Chesley's ethical violations).

[8] *See* Ky. Bar Ass'n v. Chesley, KBA File 13785, Report of Trial Commissioner, at 27 (Ky. Feb. 22, 2011) (noting that Chesley's "callous subordination of the interests of his clients to his own greed is both shocking and reprehensible"), *available at* http://www.enquirer.com/editions/2011/02/22/FenChesleyStanely.pdf [hereinafter Report of Trial Commissioner].

[9] Paul K. Piff, et al., *Higher Social Class Predicts Increased Unethical Behavior*, 109 PROCEEDINGS OF THE NAT'L ACAD. OF SCI. 4086, 4086 (Mar. 13, 2012), *available at* www.pnas.org/cgi/doi/10.1073/pnas.1118373109.

[10] *Id.* at 4089 (discussing why "upper-class individuals [are] more prone to unethical behavior").

[11] *Id.* Specifically, the relative independence of the wealthy may decrease the perception of risk associated with unethical behavior, and "[t]he availability of resources to deal with the downstream costs of unethical behavior may increase the likelihood of such acts among the upper class." *Id.*

[12] *See infra* Part II.A.

clients."[13] Lesson two: A mass tort should not be treated as a class action.[14] Here, the lawyers forgot that the case was not a class action in a couple respects: by using the class action standards governing the reasonableness of attorneys' fees and by arguing for the use of a *cy pres* charitable trust in a non-class action.[15] And lesson three: Assuming joint responsibility for representation with co-counsel means that each attorney can be held liable for the other's acts or omissions.[16] In Chesley's case, this meant that he "had the same responsibility to the clients as his co-counsel" to ensure compliance with the aggregate settlement rule.[17]

Chesley's case is an important reminder to mass tort lawyers. But it also raises the question whether certain aspects of mass tort settlements—specifically lump sum settlement offers—ought to require greater supervision by courts or otherwise be limited.[18] I argue that lump sum settlements create a powerful temptation to engage in wrongdoing, and that future study should be given to the propriety of lump sum settlements. Perhaps limitations on lump sum settlements could prevent another attorney's fall from grace.

II. "THE BIGGER THEY ARE, THE HARDER THEY FALL"[19]

Stanley Chesley burst onto the national legal scene in 1977 as lead counsel for the victims of the Beverly Hills Supper Club fire.[20] The case involved a Memorial Day fire that killed 165

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[13] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 595 (Ky. 2013).

[14] *See infra* Part II.B.

[15] *See id.*

[16] *See infra* Part II.C.

[17] *Chesley*, 393 S.W.3d at 598.

[18] *See infra* text accompanying notes 286-93 (discussing disclosure requirements).

[19] Interview by John Bach with Stanley Chesley, *Stan Chesley: Legal Champion for the Little Guy*, U. CINCINNATI MAG., (Aug. 2010), *available at* http://magazine.uc.edu/issues/0810/chesley.html.

[20] Alison Frankel, *Et Tu, Stan?*, AM. LAW., Jan./Feb. 1994, at 68, 71. As a reminder of the watershed nature of the Beverly Hills Supper Club case to his career, Chesley reportedly kept a piece of a supper club chair cushion in his desk drawer for years after the case ended. *See* May, *Stan Chesley I*, *supra* note 1.

people at the Beverly Hills Supper Club in Southgate, Kentucky.[21] Using a concert of action theory,[22] Chesley sued the aluminum wire industry—some 1,100 wire and insulation manufacturers—alleging that those materials caused the club fire.[23] The vast majority of the defendants settled for a total of about $50 million.[24] Some say Chesley's tactics in the Beverly Hills Supper Club case originated the mass tort class action.[25]

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[21] *Stanley M. Chesley: Plaintiffs' Attorney Perfects Class-Action Strategy*, BUS. INS. (Oct. 29, 1997), http://www.businessinsurance.com/article/19971029/ISSUE01/10009858; *see also* Frankel, *supra* note 20, at 71.

[22] *In re* Beverly Hills Fire Litig., 695 F.2d 207, 210 n.1 (6th Cir. 1982). The plaintiffs alleged three separate liability theories: concert of action, alternative liability, and enterprise liability. *Id.* The trial court, however, granted summary judgment to the defendants on the issues of alternative liability and enterprise liability on the ground that Kentucky law did not recognize those theories. *Id.*

[23] Frankel, *supra* note 20, at 71; *In re Beverly Hills Fire Litig.*, 695 F.2d at 210.

[24] Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 972 (1993); *Stanley M. Chesley: Plaintiffs' Attorney Perfects Class-Action Strategy*, *supra* note 21; *see also* May, *Stan Chesley I*, *supra* note 1. A lone heating, ventilation, and air-conditioning company refused to settle, and eventually won at trial. May, *Stan Chesley I*, *supra* note 1.

[25] *See* Hensler & Peterson, *supra* note 24, at 970 (noting that the fire "resulted in the first tort class action suit"); *see also* Debra Cassens Weiss, *Famed Tort Lawyer Stan Chesley is Disbarred for 'Unreasonable' $20M Fee in Diet-Drug Case*, A.B.A. J. (Mar. 21, 2013), http://www.abajournal.com/news/article/famed_tort_lawyer_stan_chesley_is_disbarred_for_unreasonable_20m_fee_in_die/ (describing Chesley as "the godfather of the modern class-action lawsuit"). Pre-dating the Beverly Hills Supper Club by a few years, the first mass tort case could be considered the consolidation of the 337 wrongful death claims arising out of the March 3, 1974 crash of a Paris Air jet. *See In re* Paris Air Crash of March 3, 1974, 69 F.R.D. 310, 312-13 (C.D. Cal. 1975). The Paris Air Crash litigation, however, was a multi-district litigation, not a class action. *See id.* at 314; *see also* Manuel L. Real, *What Evil Have We Wrought: Class Action, Mass Torts, and Settlement*, 31 LOY. L.A. L. REV. 437, 440 (1998) (commenting that consolidation in the Paris Air Crash litigation would have been more efficient under Federal Rule of Civil Procedure 23). Moreover, the strategy to sue an entire industry, not just a few specific defendants, sets the Beverly Hills Supper Club litigation apart.

Chesley has been involved in nearly every major mass tort for the past three decades.[26] Chesley helped secure $208 million in the MGM Grand Hotel fire litigation.[27] He was involved in the Agent Orange settlement[28] and in the Bendectin litigation.[29] He won a $3.2 billion settlement with Dow Corning over silicone breast implants.[30] He participated in the *Castano* case.[31] against the tobacco companies. He negotiated a $2.7 billion settlement with the Libyan government for the victims of the Lockerbie, Scotland bombing.[32] And then, there is the case that ended Chesley's career: Fen-phen.[33]

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[26] *See infra* text accompanying notes 27-33.

[27] Frankel, *supra* note 20, at 71; *see also* Hensler & Peterson, *supra* note 24, at 974-76 (detailing settlement amounts by defendant).

[28] Frankel, *supra* note 20, at 71; May, *Stan Chesley II*, *supra* note 2. Reported amounts for the Agent Orange settlement range from $180 million to $200 million. *Compare* Frankel, *supra* note 20, at 71 (reporting a settlement offer of $180 million), *with* May, *Stan Chesley II*, *supra* note 2 (reporting a settlement of $200 million). For a discussion of the Agent Orange litigation, see Hensler & Peterson, *supra* note 24, at 1001-03.

[29] *See* MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 168 (1996) (discussing Chesley's role in the Bendectin litigation). Although Chesley helped negotiate a $120 million settlement in the Bendectin litigation, the settlement was overturned by the United States Court of Appeals for the Sixth Circuit and the plaintiffs ultimately lost at trial. *See id.* at 213, 220; Frankel, *supra* note 20, at 72.

[30] May, *Stan Chesley II*, *supra* note 2; Amanda Bronstad, *Storied Plaintiffs Lawyer Chesley Disbarred Over Excessive Fees*, NAT'L L. J. (Mar. 21, 2013). For a discussion of the breast implant litigation, see Hensler & Peterson, *supra* note 24, at 992-98.

[31] Castano v. Am. Tobacco Co., 84 F.3d 734, 735, 737 (5th Cir. 1996); *see, e.g.*, Peter Pringle, *The Chronicles of Tobacco: An Account of the Forces That Brought the Tobacco Industry to the Negotiating Table*, 25 WM. MITCHELL L. REV. 387, 391 (1999); *accord* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 393 n.38 (2000).

[32] Bronstad, *supra* note 30; *see also* Robert C. Mirone, *Bringing Suit Against a Foreign Sovereign*, 36 CASE W. RES. J. INT'L L. 491, 491 & n.3 (2004) (noting that Chesley was a member of the Plaintiff's Committee in the Lockerbie litigation).

[33] *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prod. Liab. Litig., 582 F.3d 524, 529 (3d Cir. 2009) [hereinafter *In re Diet Drugs*]; Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 587, 601 (Ky. 2013); *see also* Brett

Fen-phen was an appetite suppressant named for the combination of fenfluramine (the "fen") and phentermine (the other "phen").[34] The drug was used by millions of Americans during the mid-1990s.[35] In 1997, researchers discovered that fenfluramine was linked to an increased risk of valvular heart disease,[36] which ranges from a mild asymptomatic condition to a severe disorder requiring valve replacement.[37] In September 1997, the drug's manufacturer, American Home Products (AHP),[38] voluntarily withdrew fenfluramine from the market at the FDA's request.[39]

"Overnight, a 'mass litigation' was born."[40] Thousands of lawsuits against AHP flooded state and federal courts throughout the United States.[41] The Judicial Panel on Multidistrict Litigation consolidated the federal cases before Judge Louis Bechtle of the United States District Court for the Eastern District of

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Barrouquere, *Ky. Court Disbars Class-Action Specialist Chesley*, ASSOCIATED PRESS (Mar. 21, 2013), http://bigstory.ap.org/article/ky-court-disbars-class-action-specialist-chesley.

[34] *See, e.g.*, *In re Diet Drugs*, 582 F.3d at 529; *see also* Lawrence T. Hoyle, Jr. & Edward W. Madeira, Jr., *"The Philadelphia Story": Mass Torts in the City of Brotherly Love*, 2 SEDONA CONF. J. 119, 140 (2001).

[35] *See* Hoyle & Madeira, *supra* note 34, at 141; *see also* United States v. Cunningham, 679 F.3d 355, 363 (6th Cir. 2012).

[36] Hoyle & Madeira, *supra* note 34, at 141; *see also Cunningham*, 679 F.3d at 363. Fenfluramine also was linked to an increased risk of primary pulmonary hypertension (PPH), but the settlement ultimately reached in the case excluded the PPH claims. Hoyle & Madeira, *supra* note 34, at 141, 146.

[37] Hoyle & Madeira, *supra* note 34, at 141.

[38] AHP changed its name to Wyeth in March 2002. *In re Diet Drugs*, 582 F.3d at 529 n.2. Wyeth, in turn, became part of Pfizer Inc., in October 2009. *Wyeth Becomes Part of Pfizer*, BUS. STANDARD (Oct. 17, 2009), http://www.business-standard.com/article/companies/wyeth-becomes-part-of-pfizer-109101700013_1.html. Because AHP was the named defendant in the fen-phen litigation, this essay will refer to the drug's manufacturer as AHP.

[39] Hoyle & Madeira, *supra* note 34, at 141.

[40] *Id.* (quoting L. Stuart Ditzen, *Mass-Litigation Lawyers: A Wolf Pack or Robin Hoods? A Deluge of Claims: Diet-Drug Case Illustrates the New Methods of Attack on American Businesses*, PHILA. INQUIRER (Nov. 21, 1999), http://articles.philly.com/1999-11-21/news/25493378_1_diet-pills-diet-drugs-diet-drug-users).

[41] *Id*.

Pennsylvania.[42] Judge Bechtle appointed Chesley to the Plaintiff's Management Committee (PMC), and named him as one of three co-chairs of the PMC.[43]

In November 1999, Chesley, as part of the PMC, reached a nationwide settlement with AHP.[44] The settlement established "The Matrix" for compensation amounts, using various factors including the plaintiff's age, the duration of drug use, and the severity of the plaintiff's valvular heart disease.[45] Approximately 50,000 plaintiffs opted out of the national settlement.[46]

But it was another fen-phen case that led to Chesley's downfall.[47] In 1998, William Gallion, Shirley Cunningham, and Melbourne Mills filed a putative class action against AHP in Boone County Circuit Court in Kentucky on behalf of about 400 former fen-phen users (*Guard v. American Home Products*, the *Guard* case).[48] The *Guard* case was certified as a class action in May 1999, but the potential class members did not receive any notice.[49]

In July 1999, Chesley filed his own fen-phen class action against AHP in Boone County Circuit Court.[50] Two weeks later, he filed a motion to consolidate his case with the *Guard* action.[51] At

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[42] *In re* Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig., 990 F. Supp. 834, 836 (J.P.M.L. 1998); Hoyle & Madeira, *supra* note 34, at 142; *see also In re Diet Drugs*, 582 F.3d at 530.

[43] Hoyle & Madeira, *supra* note 34, at 142.

[44] *In re Diet Drugs*, 582 F.3d at 530; *see also* Hoyle & Madeira, *supra* note 34, at 146. Chesley personally participated in the settlement negotiations with AHP. *See* Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 587 (Ky. 2013).

[45] Hoyle & Madeira, *supra* note 34, at 147.

[46] *In re* Diet Drugs (Phentermine/Fenfluramine/Dexfenfluramine) Prods. Liab. Litig., Nos. 1203, 99–20593, 2000 WL 1222042, at *60 (E.D. Pa. Aug. 28, 2000); Hoyle & Madeira, *supra* note 34, at 148.

[47] *See Chesley*, 393 S.W.3d at 586 (describing the inquiry into Chesley's conduct).

[48] *Id.* at 587; Report of Trial Commissioner, *supra* note 8, 3-4.

[49] United States v. Cunningham, 679 F.3d 355, 363 (6th Cir. 2012).

[50] Report of Trial Commissioner, *supra* note 8, at 5; *Chesley*, 393 S.W.3d at 587.

[51] Report of Trial Commissioner, *supra* note 8, at 5; *Chesley*, 393 S.W.3d at 587.

first, Gallion, Cunningham, and Mills strongly objected, but by fall, they relented and agreed to consolidation.[52]

The attorneys entered into an agreement that split fees and assigned roles to the various counsel involved in the case.[53] The agreement stated that "all parties to this agreement shall be identified as co-counsel in the class action styled *Guard v. American Home Products* in Boone Circuit Court in Kentucky."[54] Chesley agreed to act as "lead negotiator" in any efforts to settle the case, while "Gallion would serve as lead trial counsel" should the case proceed to trial.[55] Cunningham and Mills would recruit clients and maintain client contact information.[56] If Chesley succeeded in reaching a settlement, the agreement provided that he would receive a share–at first 27%, later reduced to 21%[57]–of the total attorneys' fees earned.[58]

The agreement further provided that "all clients shall be advised of this agreement."[59] Chesley did not inform any clients of the agreement, nor did he attempt to determine whether his co-counsel had informed the clients of the fee-splitting agreement.[60]

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[52] Report of Trial Commissioner, *supra* note 8, at 5-6; *Chesley*, 393 S.W.3d at 587.

[53] *Chesley*, 393 S.W.3d at 587.

[54] *Id.* at 588.

[55] *Id.* at 587-88.

[56] *Id.* at 587. Mills reportedly "drew in more than 300 of the fen-phen suit's plaintiffs." Andrew Wolfson, *Lawyer: Fen-phen Notes Destroyed: Ex-clients' Allege Payment Cover-up*, LOUISVILLE COURIER-J. (Jan. 21, 2007), http://www.courier-journal.com/article/20070121/NEWS01/701210441/Lawyer-Fen-phen-notes-destroyed.

[57] Under the original agreement, Chesley's fee was 27% of the total attorneys' fees earned. *Chesley*, 393 S.W.3d at 588. The original agreement, however, expired on December 31, 2000, and Chesley was not able to negotiate a settlement by the termination date. *Id.*; *accord* Report of Trial Commissioner, *supra* note 8, at 7. Chesley asked his co-counsel to renew the fee agreement in late 2000. *Chesley*, 393 S.W.3d at 588. Under the new agreement, Chesley's fee was reduced from 27% to 21%. *Id.*

[58] *Chesley*, 393 S.W.3d at 588. If the case did not settle, but plaintiffs won at trial, Chesley's fee would be 15% of the total attorneys' fees earned. Report of Trial Commissioner, *supra* note 8, at 7.

[59] *Chesley*, 393 S.W.3d at 588.

[60] *Id.*

In fact, none of the clients were informed of the fee-sharing arrangements.[61]

By now, "[a]ll of the *Guard* case plaintiffs [had] opted-out of the national settlement [in] the hope of achieving a [better deal]."[62] In May 2001, Chesley reached a settlement with AHP in the *Guard* case.[63] The total amount of the settlement was $200,450,000.[64] This lump sum only resolved the claims of the 431 plaintiffs who had fee contracts with Mills, Cunningham, and Gallion.[65] Distribution of the lump sum was left to plaintiffs' counsel,[66] although plaintiffs' counsel was required to provide AHP with a schedule listing each of the settling clients and the specific amount to be received by each client.[67]

The settlement was a "most-or-nothing" settlement.[68] AHP could terminate the settlement if less than 95% of the plaintiffs accepted the agreement by September 1, 2001.[69] In addition, the settlement required that most of the claimants with the worst injuries had to agree to settle.[70] Finally, all of the plaintiffs

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[61] *Id.*

[62] *Id.* at 587.

[63] Report of Trial Commissioner, *supra* note 8, at 8; *see also* United States v. Cunningham, 679 F.3d 355, 365 (6th Cir. 2012).

[64] *Chesley*, 393 S.W.3d at 592. Although the original settlement amount was $200 million, AHP paid an additional $450,000, to settle new claims, bringing the total settlement to $200,450,000. *Id.* at 588, 590; *Cunningham*, 679 F.3d at 366.

[65] *Cunningham*, 679 F.3d at 364; *Chesley*, 393 S.W.3d at 588. The plaintiffs in the separate action Chesley had filed in July ultimately were not included in the final settlement in the *Guard* case. Report of Trial Commissioner, *supra* note 8, at 5-6. Those plaintiffs became part of the national settlement. *Id.* at 6.

[66] *Chesley*, 393 S.W.3d at 589. The clients were never informed that the settlement was an aggregate lump sum of over $200 million. *Id.* at 590. Indeed, an internal email by Gallion stated: "We do not want to tell any clients that we are going to try to settle a bunch of cases for a lump sum and then divide up the money. That is only inviting trouble." *Cunningham*, 679 F.3d at 364.

[67] *Chesley*, 393 S.W.3d at 589.

[68] Howard M. Erichson, *The Trouble with All-or-Nothing Settlements*, 58 U. KAN. L. REV. 979, 988 (2010). *See also infra* text accompanying notes 294-307.

[69] *Cunningham*, 679 F.3d at 364.

[70] *Id.*

accepting the settlement had to sign a release of all fen-phen related claims against AHP.[71]

The settlement provided nothing for the class members.[72] Rather, claims of any individuals who may have qualified for the class were to be dismissed without prejudice.[73] To accomplish this result, plaintiffs' counsel had to decertify the case as a class action.[74] Chesley did not sign the settlement agreement, but he did appear before the presiding judge, Judge Joseph Bamberger, to move to decertify the class and dismiss the *Guard* case.[75] At the hearing, Chesley "carefully explained to the judge that the settlement resolved only the claims of the client group (the 431); the claims of the members of the decertified class were dismissed without prejudice and they would have other avenues for redress, if they wanted to pursue them."[76] No notice of the settlement was given to the individual clients or to the class members.[77] Still, Judge Bamberger decertified the class and dismissed the *Guard* case on May 16, 2001.[78]

Other lawyers began the work of obtaining releases from the 95% by the September 1, 2001, deadline.[79] According to numerous clients, a staff member working for Gallion, Mills, or Cunningham contacted each plaintiff and falsely told the plaintiff that AHP had offered a specific amount to settle his or her claim.[80] For each plaintiff, the offered amount was substantially less than the itemized schedule provided to AHP as part of the settlement.[81] The clients were not informed of the aggregate settlement amount of $200 million,[82] and were not shown the settlement agreement,[83]

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[71] *Id.*
[72] *Id.* at 364-65; *Chesley*, 393 S.W.3d at 588.
[73] *Cunningham*, 679 F.3d at 365; *Chesley*, 393 S.W.3d at 588.
[74] *See Cunningham*, 679 F.3d at 365.
[75] *Chesley*, 393 S.W.3d at 588-89.
[76] *Id.* at 589.
[77] *Id.*; *Cunningham*, 679 F.3d at 365.
[78] *Chesley*, 393 S.W.3d at 589.
[79] *See id.*; *Cunningham*, 679 F.3d at 364.
[80] *Cunningham*, 679 F.3d at 365-66; *Chesley*, 393 S.W.3d at 589.
[81] *Chesley*, 393 S.W.3d at 589-90; *see Cunningham*, 679 F.3d at 366.
[82] *Chesley*, 393 S.W.3d at 590.
[83] *Id.*

even though some clients asked to see it.[84] For his part, Chesley did not participate in obtaining the releases from the clients.[85]

Ultimately, every client accepted his or her settlement offer.[86] Chesley advised David Helmers, an associate at the Gallion firm,[87] to hand-deliver the releases to AHP.[88] Following Chesley's advice, Helmers flew to New York City to tender the releases to AHP.[89] Upon receipt, AHP began depositing the settlement money into an escrow account in Cunningham's name.[90]

Each of the individual 431 clients had signed a retainer agreement that included a contingency fee of approximately one-third.[91] Thus, for the $200,450,000 settlement, the total attorneys' fees should have been $66,816,667.[92] Instead, the attorneys received approximately $106 million—53% of the total settlement.[93] Clients were paid just over $73 million, or just less

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[84] Report of Trial Commissioner, *supra* note 8, at 10.

[85] *Chesley*, 393 S.W.3d at 590. Although he did not participate in the first round of disbursements, he did have a role in a second round of disbursements in February 2002. *See id.* at 591. Specifically, after the commencement of an investigation by the Kentucky Bar Association, the attorneys disbursed additional monies to the clients, and Chesley's office provided a document for each client to sign upon receipt of these additional funds. *Id.* at 591-92.

[86] *Cunningham*, 679 F.3d at 366.

[87] *Chesley*, 393 S.W.3d at 586-87. Helmers subsequently left Gallion's firm to start his own firm, *id.* at 591 n.8, before being disbarred by the Supreme Court of Kentucky. Ky. Bar Ass'n v. Helmers, 353 S.W.3d 599, 599 (Ky. 2011).

[88] Report of Trial Commissioner, *supra* note 8, at 10.

[89] *Id.*

[90] *Chesley*, 393 S.W.3d at 590.

[91] *Id.* at 592. The various plaintiffs' attorneys charged slightly different fees, all around one-third. *Id.* at 592 n.9. Mills charged 30%, Cunningham charged 33%, and Gallion charged 33 1/3%. *Id.*

[92] *Id.* at 592.

[93] *See* United States v. Cunningham, 679 F.3d 355, 369 (6th Cir. 2012) (breaking down how much of the settlement was received by each attorney); Adam Liptak, *Fraud Inquiry Looks at Lawyers in Diet-Drug Case*, N.Y. TIMES (Mar. 24, 2007), http://www.nytimes.com/2007/03/24/us/24lawyers.html?page wanted=all&_r=0. The final amount received by the attorneys varies in different reports. *See id.*; Cunningham v. Ky. Bar Ass'n, 266 S.W.3d 808, 809 (Ky. 2008) (stating that the attorneys received around $104 million); Ky. Bar Ass'n v. Bamberger, 354 S.W.3d 576, 578 (Ky. 2011) (stating that the attorneys received over $126 million).

than 37% of the settlement amount.[94] What happened to that remaining 10%?

Back to Stan Chesley. Chesley's fee, remember, was 21% of the total attorneys' fees,[95] which would have been $14,031,500.[96] By November 2001, however, Chesley already had been paid $16,497,121.87.[97] In early 2002, questions about the *Guard* settlement began to arise.[98] Law partners of Gallion and Mills,[99] suspicious of how the settlement proceeds were being handled, filed complaints with the Kentucky Bar Association, as well as civil suits seeking an accounting of firm funds.[100]

On February 6, 2002, Gallion and Cunningham met with Chesley,[101] and the three of them arranged an ex parte, off-the-record meeting with Judge Bamberger.[102] At this meeting, Chesley persuaded Judge Bamberger to do two things.[103] First, Chesley persuaded Judge Bamberger to distribute any "residual funds" under the *cy pres* doctrine to a charitable organization.[104] Thus, the missing 10%–some $20 million[105]–went to this charitable trust, the Kentucky Fund for Healthy Living.[106] Second, Chesley also

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[94] *Cunningham*, 679 F.3d at 369.

[95] *See supra* text accompanying note 57.

[96] *Chesley*, 393 S.W.3d at 592.

[97] *Id.* at 590.

[98] *Id.*

[99] In addition to deceiving the clients, Gallion and Cunningham falsely told Mills that the case settled for $150 million, not $200 million. *Id.* at 588 n.4. The civil suit led Mills to discover that Gallion had lied to him about the settlement amount. *Id.* at 590.

[100] *Id.*

[101] The three attorneys were joined by Mark Modlin, "a professional 'jury consultant' and friend of the judge." *Chesley*, 393 S.W.3d at 590.

[102] *Id.*; *see also* Report of Trial Commissioner, *supra* note 8, at 11-12.

[103] *See Chesley*, 393 S.W.3d at 590-91.

[104] *Id.* at 590; *accord* United States v. Cunningham, 679 F.3d 355, 367 (6th Cir. 2012).

[105] The clients were told that "a very small amount" would be donated to charity, and many assumed it was only a few hundred dollars. *Cunningham*, 679 F.3d at 368. Gallion, however, told Judge Bamberger that the clients "were 'thrilled' " to donate $20 million to the trust fund. *Id.*

[106] *Id*. Judge Bamberger appointed Cunningham, Gallion, Mills, and Modlin as the initial directors of the Fund. Ky. Bar Ass'n v. Bamberger, 354 S.W.3d 576, 579 (Ky. 2011). Cunningham, Gallion, and Mills each received nearly $150,000 in fees from the Fund. *Cunningham*, 679 F.3d at 368. Judge

persuaded the judge to approve an attorneys' fee award of 49% of the gross settlement, using the factors for awarding attorneys' fees in a class action.[107] No one informed Judge Bamberger that the attorneys' fees were governed by contingency fee contracts.[108] Nor was any consideration given to the fact that the case had been decertified nine months prior to the meeting.[109] Judge Bamberger approved both the 49% fee as well as the creation of the trust.[110]

Two months later, Chesley received a check for $4 million, drawn on an account jointly owned by Gallion, Cunningham, and Mills.[111] Chesley later testified that he did not expect an additional fee, and "did not know why the check was issued or how the amount was calculated."[112] He made no inquiry regarding the payment, and "[h]is firm simply deposited the check."[113] In total, Chesley received over $20 million.[114]

Bamberger was also a director of the Fund, and received more than $50,000 in fees from the Fund. *Id.*; *see also Bamberger*, 354 S.W.3d at 579 & n.6 (finding Bamberger received just under $50,0000, and noting that he "returned his director's fees" after a judicial conduct investigation). The Fund never made any charitable distributions. *Bamberger*, 354 S.W.3d at 579.

[107] *Chesley*, 393 S.W.3d at 590-91. Unlike the Supreme Court of Kentucky, the United States Court of Appeals for the Sixth Circuit stated that Gallion presented the retroactive request for court approval of the attorneys' fees to Judge Bamberger. *Cunningham*, 679 F.3d at 367.

[108] *Chesley*, 393 S.W.3d at 591; Report of Trial Commissioner, *supra* note 8, at 12.

[109] *See supra* text accompanying note 78.

[110] *Chesley*, 393 S.W.3d at 591.

[111] *Id.* at 592.

[112] *Id.*

[113] *Id.* Chesley stated that he had no reason to question the extra payment because "he could not 'believe that these good folks would have sent me more money than I was entitled to.' " Wolfson, *supra* note 56.

[114] *Chesley*, 393 S.W.3d at 592. Cunningham received over $21 million. United States v. Cunningham, 679 F.3d 355, 369 (6th Cir. 2012). Gallion received almost $31 million and Mills received close to $24 million. *Id.* How these lawyers spent this money is notable. According to one report, "Cunningham spent a million dollars to endow a chair in his own name at Florida A&M Law School." Ted Frank, *Fen-Phen Zen*, THE AMERICAN (Apr. 4, 2007), http://www.american.com/archive/2007/april-0407/fen-phen-zen. Cunningham and Gallion also bought a colt at auction in 2004. *Record-Setting Curlin Retires in Ceremony at Churchill Downs*, USA TODAY, http://usatoday 30.usatoday.com/sports/horses/2008-11-29-curlin-retires_N.htm (last updated

What happened to everyone involved in the *Guard* litigation?[115] To start, Gallion and Cunningham were convicted of federal wire fraud.[116] Gallion was sentenced to twenty-five years and Cunningham to twenty years; additionally, the court ordered both men to pay over $127 million in restitution.[117] Chesley,

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Nov. 30, 2008, 1:19 AM). That colt, Curlin, would be named the 2007 and 2008 Horse of the Year. *See* Bill Finley, *Curlin Repeats as Horse of the Year*, N.Y. TIMES (Jan. 26, 2009), http://www.nytimes.com/2009/01/27/sports/othersports/27racing.html?_r=0. At one point, a state judge found that the wronged clients were entitled to claim ownership of Curlin as restitution. *See* Brett Barrouquere, *Judge: Fen-Phen Plaintiffs Can Claim Share of Curlin, Winnings*, USA TODAY, http://usatoday30.usatoday.com/sports/horses/2007-11-02-curlin-fenphen_N.htm (last updated Nov. 7, 2007, 1:00 PM); Joe Drape, *Plaintiffs Awarded Share of Curlin's Sale*, N.Y. TIMES (Nov. 3, 2007), http://www.nytimes.com/2007/11/03/sports/othersports/03racing.html?_r=0. Curlin retired in 2008 to life as a stud. *Record-Setting Curlin Retires in Ceremony at Churchill Downs*, *supra*.

[115] In addition to the attorneys involved in the case, Judge Bamberger was disbarred for his conduct in the case, Ky. Bar Ass'n v. Bamberger, 354 S.W.3d 576, 579 n.6, 580 (Ky. 2011), and resigned from the bench in the face of an investigation by the Judicial Conduct Commission. Debra Cassens Weiss, *Former Judge Disbarred for Approving Fen-Phen Settlement Without Checking the Details*, A.B.A. J. (Oct. 28, 2011, 9:43 AM), http://www.abajournal.com/news/article/former_judge_disbarred_for_approving_fenphen_settlement_without_checking_t/; *Judge Resigns Amid Accusations He Profited from Fen-Phen Case*, WAVE 3 NEWS, http://www.wave3.com/global/story.asp?s=4558270 (last visited Aug. 13, 2013).

[116] *Cunningham*, 679 F.3d at 363, 386 (affirming convictions). Mills was found not guilty of wire fraud. *Id.* at 369. All three men were permanently disbarred by the Supreme Court of Kentucky. Ky. Bar Ass'n v. Mills, 318 S.W.3d 89, 93 (Ky. 2010); Cunninghman v. Ky. Bar Ass'n, 266 S.W.3d 808, 813 (Ky. 2008); Gallion v. Ky. Bar Ass'n, 266 S.W.3d 802, 807 (Ky. 2008). Likewise, David Helmers was disbarred. *See supra* notes 86-88 and accompanying text; Ky. Bar Ass'n v. Helmers, 353 S.W.3d 599, 603 (Ky. 2011).

[117] *Cunningham*, 679 F.3d at 370. In addition, several of the former *Guard* clients filed a civil suit against Gallion, Cunningham, Mills, Chesley, and the Kentucky Fund for Healthy Living. Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 593 (Ky. 2013). The clients initially won at the trial court level, and were awarded $42 million in damages, but the decision was reversed on appeal. Cunningham v. Abbott, Nos. 2007–CA–001971–MR, 2007–CA–001981–MR, 2007–CA–002173–MR, 2007–CA–2174–MR, at 16-17, 35-36 (Ky. Ct. App. Feb. 4, 2011). In February 2011, the Court of Appeals of Kentucky reversed the civil judgment Ford had obtained on behalf of her clients. *Id.* at 35-36. An

however, reportedly received immunity in exchange for his testimony against Gallion and Cunningham.[118] But, on March 21, 2013, Chesley was disbarred[119] by the Supreme Court of Kentucky for violating the ethical rules regarding fees,[120] aggregate settlements,[121] candor to a tribunal,[122] and supervisory liability.[123] In the face of reciprocal disciplinary proceedings in his home state of Ohio, Chesley voluntarily surrendered his Ohio license in April 2013, thus ending his legal career.[124]

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appeal of that decision is currently pending in the Supreme Court of Kentucky. *Chesley*, 393 S.W.3d at 593.

[118] *See* Peter Bronson, *Tiger Woods of Torts*, CINCINNATI.COM (June 19, 2008, 2:43 AM), http://news.cincinnati.com/apps/pbcs.dll/article?AID=/20080619/COL05/806190317/1009/EDIT&gcheck=1; Jon Newberry, *Kentucky Lawyer Blames Stan Chesley*, CINCINNATI BUS. COURIER (Dec. 3, 2010, 6:00 AM), http://www.bizjournals.com/cincinnati/print-edition/2010/12/03/kentucky-lawyer-blames-stan-chesley.html?page=all.

[119] *Chesley*, 393 S.W.3d at 584, 602. Although the Trial Commissioner recommended that Chesley pay $7,555,000 in restitution, the Supreme Court of Kentucky found that it lacked authority to impose restitution once it disbarred Chesley. *Id.* at 602.

[120] *See* MODEL RULES OF PROF'L CONDUCT R. 1.5 (2009); KY. SUP. CT. R. 3.130(1.5).

[121] *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(g) & cmt. 13 (2009); KY. SUP. CT. R. 3.130(1.8)(g) & cmt. 13.

[122] *See* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009); KY. SUP. CT. R. 3.130(3.3).

[123] *See* MODEL RULES OF PROF'L CONDUCT R. 5.1 (2009); KY. SUP. CT. R. 3.130(5.1).

[124] May, *Disbarred Local Lawyer*, *supra* note 6. Chesley also resigned from practicing before federal courts in Indiana and Michigan. *'Master of Disaster' Trial Attorney Stanley Chesley Retires from Ohio Practice*, THE COLUMBUS DISPATCH (April 18, 2013, 6:15 PM) http://www.dispatch.com/content/stories/local/2013/04/18/stanley-chesley-retires-as-attorney.html.

Despite his voluntary resignation, the United States District Court for the Eastern District of Michigan permanently disbarred Chesley on April 5, 2013. Jon Newberry, *Chesley, Disbarred by Michigan Court, Intends to Fight in Ohio*, CINCINNATI BUS. COURIER (Apr. 16, 2013, 12:19 PM), http://www.bizjournals.com/cincinnati/news/2013/04/16/chesley-disbarred-by-michigan-court.html.

The Supreme Court of the United States similarly suspended Chesley in June 2013. *Stan Chesley Suspended from US Supreme Court*, WCPO DIGITAL (June 17, 2013), http://www.wcpo.com/news/local-news/stan-chesley-suspended-from-us-supreme-court. But in a strange post-script, since his retirement, Chesley has been appointed to the Cincinnati Human Relations Commission. *Stan Chesley Appointed to Cincinnati Human Relations Commission*, WCPO DIGITAL (June

III. THREE LESSONS FOR ALL MASS TORT LAWYERS

One could, of course, attribute the unethical behavior in the *Guard* case simply to greed,[125] a vice that Plato identified as a root cause of immoral behavior over 2,000 years ago.[126] But, the *Guard* case, and specifically Chesley's story, provides broader lessons for all mass tort lawyers. First, the question of client identification in a non-class mass tort should not be difficult: The attorney has a client relationship with each and every plaintiff, even if that means hundreds of clients.[127] Second, attorneys in non-certified mass tort cases need to remember that the case is not a class action.[128] Therefore, rules regarding attorneys' fees in class actions and the use of *cy pres* doctrine do not apply.[129] Finally, Chesley's role in the *Guard* case provides a cautionary tale about the joint responsibility of co-counsel.[130]

A. Know Thy Client

A practicing attorney's world divides into categories of contacts: prospective clients,[131] current clients,[132] former clients,[133]

5, 2013), http://www.wcpo.com/dpp/news/local_news/stan-chesley-appointed-to-cincinnati-human-relations-commission.

[125] *See* Report of the Trial Commissioner, *supra* note 8, at 27; *see also* Erichson, *supra* note 68, at 983.

[126] *See* Piff, et al., *supra* note 9, at 4086 (stating that Plato considered greed to be the root of immorality).

[127] *See infra* Part II.A.

[128] *See infra* Part II.B.

[129] *See id.*

[130] *See infra* Part II.C.

[131] A prospective client is defined as "[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter." MODEL RULES OF PROF'L CONDUCT R. 1.18(a) (2009).

[132] Notably, the Model Rules of Professional Conduct do not define "client." Generally, an attorney-client relationship is formed upon express consent by both the lawyer and the client. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14(1)(a) (2000). An implied attorney-client relationship can also arise where the client reasonably relies on the lawyer to provide legal services, and the lawyer fails to deny the relationship. *Id.* § 14(1)(b).

[133] A client can discharge her attorney at any time for any reason. MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 4 (2009).

and non-clients.[134] This is so because attorneys owe different duties to each category.[135] To the prospective client, for example, an attorney owes only two duties: a duty of confidentiality and a limited conflicts of interest duty.[136] As a representative of a client, however, an attorney steps into a fiduciary role and assumes a host of ethical duties.[137] Accordingly, client identification is a critical first step in framing an attorney's ethical duties.

The question of client identification in the class action context, however, is less than settled.[138] Leaving the main question unresolved,[139] the American Law Institute, for example, has noted that "[c]lass actions may pose difficult questions of client identification."[140] On the one hand, the named class representative—not the absent class members—could be considered the sole client.[141] But, unlike an individual client,[142]

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[134] Non-clients include a broad range of individuals, ranging from opposing counsel to strangers, and the judiciary. *Compare* MODEL RULES OF PROF'L CONDUCT R. 3.4 (2009) (opposing counsel), *with* MODEL RULES OF PROF'L CONDUCT R. 4.3 (2009) (strangers), *and* MODEL RULES OF PROF'L CONDUCT R. 3.3 (2009) (judiciary).

[135] To clients, a lawyer owes duties of competence, confidentiality, and diligence, among others. MODEL RULES OF PROF'L CONDUCT R. 1.1, 1.3, 1.6 (2009). To non-clients, however, duties are more limited. *See* MODEL RULES OF PROF'L CONDUCT R. 4.1 (2009) (imposing duty of truthfulness in statements to non-clients).

[136] MODEL RULES OF PROF'L CONDUCT R. 1.18 (2009).

[137] *See generally* Sande Buhai, *Lawyers As Fiduciaries*, 53 ST. LOUIS U. L.J. 553, 554-55 (2009) (discussing the ramifications of entering a fiduciary role).

[138] *Id.*

[139] Professor Nancy J. Moore argues that in the more recent *Principles of the Law of Aggregate Litigation*, the ALI "inadvertently" took the position that all class members are individual clients of the lawyer. Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717, 723 (2011).

[140] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. f (2000). In the Restatement, the ALI equivocated on this central question: "For many purposes, the named class representatives are the clients of the lawyer for the class . . . . Yet class members who are not named representatives also have some characteristics of clients." *Id.*

[141] *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 25 (2009) (stating that absent class members "are ordinarily not considered to be clients of the

"class representatives cannot command class counsel to accept or reject a settlement proposal."[143]

Like class action litigation, aggregate mass tort litigation involves "layers of lawyers."[144] Here, for example, the clients who individually retained Gallion, Mills, and Cunningham became part of an aggregate group represented jointly by all three men, plus Chesley.[145] But, unlike class action litigation, the lines of client representation are not blurred in non-aggregate litigation. In non-class aggregate litigation, the attorney maintains an individual attorney-client relationship with each individual client, despite any consortium or alliances with co-counsel.[146] In the *Guard* case, for example, every client signed an individual retainer agreement with his or her respective counsel.[147]

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lawyer" for purposes of the concurrent conflicts of interest rule). *But see* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 99 cmt. l (2000) (stating that for purposes of the anti-contact rule, "the members of the class are considered clients of the lawyer for the class"). In a unique view, Professor Moore argues that the class should be considered an entity client even before class certification. Moore, *supra* note 139, at 1485.

[142] *Cf.* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) (discussing the scope of representation between a client and lawyer).

[143] FED. R. CIV. P. 23(g) advisory committee's note; *see also* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 3:82 (5th ed. 2011) (discussing the relationship between class counsel, class representatives and absent class members).

[144] Professor Judith Resnik aptly coined this phrase in her 2000 article, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2121 (2000).

[145] *See supra* text accompanying note 54. For an examination of the intricate attorney relationships in mass tort litigation, see Judith Resnik, et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 312-13 (1996).

[146] *Cf.* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 519 (2003) (arguing that mass tort lawyers owe a duty to the aggregate group as a whole, not to individual clients). Although Professor Erichson argues that mass tort lawyers should focus on the "collective interests" of the group, he posits an attorney-client relationship where the client knowingly has agreed to group representation and consented to the potential conflicts of interest inherent in the aggregate litigation context. *Id.* at 529.

[147] *See* Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 587 & n.3 (Ky. 2013).

Before the Supreme Court of Kentucky, Chesley argued that he was not hired by the individual clients, but rather was retained by their lawyers.[148] Although this argument is unclear, perhaps Chesley was trying to invoke the "accommodation client" doctrine.[149] Under this theory, an attorney becomes involved in a case "to accommodate a colleague or . . . another client."[150] In *Streit v. Covington & Crowe*,[151] for example, an attorney appeared at a summary judgment hearing merely as a "professional courtesy" for the attorneys of record.[152] Nonetheless, the California Court of Appeal found that the attorney had established an attorney-client relationship with the client.[153] The court reasoned that an attorney-client relationship can arise "from a simple association for a particular case."[154] The court further found no reason to distinguish between an association for an entire case and an association for a limited purpose: "That the association is limited to a single appearance is a distinction only of degree, not of kind. In any association, the lead attorney and the associated attorney must 'divide the duties concerning the conduct of the cause.' "[155] The court also noted that its conclusion was consistent with the presumption that an attorney who appears on behalf of a client is authorized to do so.[156] The court found it irrelevant that the attorney of record, not the client, compensated the associated attorney.[157] The appellate court concluded "the principal attorney and the associate attorney each owes the same duty of loyalty to the client."[158]

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[148] *Id.* at 595.

[149] ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT, Lawyer Client Relationship § 31:109, *available at* http://0-lawyersmanual.bna.com.libcat.widener.edu/mopw2/.

[150] *Id.*

[151] Streit v. Covington & Crowe, 98 Cal. Rptr. 2d 193 (Cal. Ct. App. 2000).

[152] *Id.* at 195.

[153] *Id.* at 195-96.

[154] *Id.* at 196 (quoting 1 B.E. WITKIN, CAL. PRO. § 71 (4th ed. 1996)).

[155] *Id.* at 196-97 (quoting Wells Fargo & Co. v. San Francisco, 152 P.2d 625, 628 (Cal. 1944)).

[156] *Id.* at 197.

[157] *Streit*, 98 Cal. Rptr. 2d at 197.

[158] *Id.* (quoting Pollack v. Lytle, 175 Cal. Rptr. 81, 87 (Cal. Ct. App. 1981)).

Like the associated attorney in *Streit*, Chesley appeared before Judge Bamberger on behalf of the plaintiffs.[159] Indeed, he appeared twice in court as counsel for the plaintiffs.[160] Moreover, the fee-division agreement expressly provided that "all parties to this agreement shall be identified as co-counsel in the class action styled *Guard v. American Home Products* in Boone Circuit Court in Kentucky."[161] And it was Chesley who originally requested consolidation with the *Guard* plaintiffs.[162] Finally, Chesley negotiated the settlement, not on his own behalf or on behalf of the other lawyers, but as a representative of the plaintiffs.[163] Indeed, the distance between Chesley and his clients echoes his work in the Bendectin litigation, where he "negotiated a proposed settlement on behalf of plaintiffs who had never heard of him, and without any prior grant of authority to do so."[164] Accordingly, Chesley had an attorney-client relationship with each of the 400-plus plaintiffs named in the *Guard* case.[165]

In short, the lesson to be learned is this: In non-class aggregate litigation, a plaintiffs' attorney has an attorney-client relationship with each and every individual client, and owes the full panoply of client duties to each of those individuals.[166]

B. A Class by Any Other Name is Not A Class

Chesley and the other attorneys in the *Guard* case fell into a common trap: treating their mass tort clients as if they were members of a class. Mere size does not transform a mass tort into a

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[159] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 589-90 (Ky. 2013) (noting that Chesley appeared on the motion to decertify and dismiss the class, and also at the ex parte meeting with Judge Bamberger regarding the attorneys' fees).

[160] *See id.*

[161] *Id.* at 588.

[162] *See supra* text accompanying notes 49-51.

[163] *See supra* text accompanying notes 62-70.

[164] Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 IOWA L. REV. 231, 251 (1997) (reviewing MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION (1996)).

[165] *Chesley*, 393 S.W.3d at 595.

[166] *See* Richard Zitrin, *Regulating the Behavior of Lawyers in Mass Individual Representations: A Call for Reform*, 3 ST. MARY'S J. ON LEGAL MAL. & ETHICS 86, 89 (2013).

class action.[167] To certify a damages class action under the Federal Rules of Civil Procedure, a court must find that "the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy."[168] Rule 23 also imposes specific procedural steps: class certification can only be determined by court order,[169] often after a hearing.[170] In short, the class certification process is carefully designed to protect the rights of absent class members.[171]

The *Guard* case was not settled as a class action.[172] Not only did the settlement provide nothing for the class members,[173] the settlement required that the claims of potential class members be dismissed without prejudice.[174] Chesley appeared before Judge Bamberger to decertify the class, and explained that "the settlement resolved only the claims of the client group (the 431)."[175] Indeed, Judge Bamberger decertified the class and dismissed the *Guard* case on May 16, 2001.[176]

Despite these clear facts, Chesley seemed to forget that the case was not a class action in two different respects.[177] First,

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[167] *See* FED. R. CIV. P. 23 (specifying other requirements for class certification); *see also* RUBENSTEIN, *supra* note 143, at § 1:1.

[168] FED. R. CIV. P. 23(b)(3). State law generally imposes similar requirements. ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 13:1 (4th ed. 2002) (noting that Federal Rule of Civil Procedure 23 is the "most prevalent model" for state class action rules).

[169] FED. R. CIV. P. 23(c)(1)(A).

[170] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1785 (3d ed. 2005) (stating that "in many cases a hearing is deemed appropriate and useful").

[171] RUBENSTEIN, *supra* note 143, at § 1:1.

[172] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 588-89 (Ky. 2013).

[173] *See* United States v. Cunningham, 679 F.3d 355, 364 (6th Cir. 2012); *see also Chesley*, 393 S.W.3d at 588 (noting that "approximately 143 individuals[] were not included in the financial settlement").

[174] *Cunningham*, 679 F.3d at 365; *Chesley*, 393 S.W.3d at 588.

[175] *Chesley*, 393 S.W.3d at 589.

[176] *Id.*

[177] Although initially certified as a class action, the case was settled as a non-class action. *See supra* text accompanying notes 72-78. Indeed, notice of

Chesley argued that class action standards should govern the reasonableness of his fee.[178] Second, Chesley further advocated for the use of *cy pres* doctrine in an aggregate settlement context.[179] Both arguments were misplaced in the non-class action context.

1. Fee Agreements

Before the Supreme Court of Kentucky, Chesley attempted to justify his $20 million fee under class action standards.[180] He argued that trial courts appropriately determine fees in a class action settlement,[181] and that his fee was consistent with the trial judge's fee order in the case.[182] He also claimed that the contingency fee contracts were irrelevant because the case was a class action.[183]

In the class action context, courts have express authority to review the amount of attorneys' fees.[184] Of course, in a class action, the vast majority of the plaintiffs–the absent class members–do not have fee agreements of any kind with class counsel.[185] This creates the 'free rider' problem: if each party were simply to bear its own attorneys' fees under the American rule,[186] the absent class members would benefit from the work of the individually retained attorneys, while only the named plaintiffs

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class certification was never provided to class members. *Cunningham*, 679 F.3d at 363.

[178] *See supra* notes 107-08 and accompanying text.

[179] *See supra* notes 104-06 and accompanying text.

[180] *Chesley*, 393 S.W.3d at 595.

[181] *Id.*

[182] *Id.*

[183] *Id.*

[184] *See* FED. R. CIV. P. 23(e), (h). For a fascinating empirical study on attorneys' fees in class action settlements, see Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. 248, 248 (2010).

[185] *See, e.g.*, Eisenberg & Miller, *supra* note 184, at 249 (noting that a "private agreement does not work in the case of class action . . . [because] there is no client capable of negotiating with the attorney . . . . [and] clients are disorganized and, prior to notice of certification, usually do not even know a lawsuit has been filed on their behalf").

[186] *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 245 (1975).

would incur costs.[187] Under the common fund doctrine,[188] the court has the equitable authority to order a fee award payable out of the recovery of the absent class members because those absent class members benefitted from the work of named class counsel.[189] That said, the existence of a contingency fee agreement is not irrelevant in a class action.[190] In any class action, a contingency fee agreement is likely in place between the few individual clients and the plaintiffs' attorneys,[191] and the attorneys are bound by that fee agreement when it comes to those clients.[192]

If the case had been settled as a class action, a judicial order approving attorneys' fees would not only have been proper, it would have been required.[193] Although courts employ various methods of calculating attorneys' fees in a class action,[194] a recent study found that the percentage of recovery method is the dominant approach.[195] Under this method, the court awards a percentage of the total settlement amount to the plaintiffs' counsel.[196]

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[187] *See In re* Nineteen Appeals Arising Out of the San Juan Dupont Plaza Hotel Fire Litig., 982 F.2d 603, 606 (1st Cir. 1992) (quoting Catullo v. Metzner, 834 F.2d 1075, 1083 (1st Cir. 1987)) [hereinafter *In re Dupont Plaza Hotel*].

[188] Under the common fund doctrine, " 'a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney's fee from the fund as a whole.' " US Airways, Inc. v. McCutchen, 113 S. Ct. 1537, 1545 (2013) (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)); *see also Van Gemert*, 444 U.S. at 478 ("[P]ersons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense. Jurisdiction over the fund involved in the litigation allows a court to prevent this inequity by assessing attorneys' fees against the entire fund, thus spreading fees proportionately among those benefited by the suit." (citation omitted)).

[189] *See In re Dupont Plaza Hotel*, 982 F.2d at 606, 607 n.5.

[190] *See* Resnik, et al., *supra* note 145, at 338 (citing Dunn v. H. K. Porter Co., 602 F.2d 1105, 1109-10 (3d Cir. 1979)).

[191] *See id.* at 300.

[192] *See, e.g.*, Melendres v. City of L.A., 119 Cal. Rptr. 713, 724 (Cal. Ct. App. 1975).

[193] *See* KY. R. CIV. P. 23.08.

[194] Courts have used various methods including a multi-factor approach, the lodestar method, and a percentage method. Eisenberg & Miller, *supra* note 184, at 266-67.

[195] *Id.* at 279.

[196] *Id.* at 267.

In the *Guard* case, Judge Bamberger used the percentage method, and approved a 49% attorneys' fee.[197] As the Supreme Court of Kentucky concluded, even absent the contingency fee contracts, the 49% fee was unreasonable.[198] In a recent study, Professors Theodore Eisenberg and Geoffrey Miller examined attorney fee awards in class action settlements and shareholder derivative litigation in state and federal courts from 1993 to 2002.[199] Eisenberg and Miller found that the median fee-to-recovery ratio was 23% to 25% of the class award.[200] Indeed, as Eisenberg and Miller point out, both the Ninth Circuit and Eleventh Circuit use a 25% fee as a benchmark in common fund cases.[201] Results were similar in state courts: "[T]he mean fee to class recovery ratio for state court cases was 0.20, lower than the overall mean ratio of 0.24."[202] Thus, under any measure, an award of 49% of the recovery cannot be justified as reasonable.[203]

All that said, this was not a class action settlement.[204] In the non-class aggregate context, judicial authority to supervise a private settlement has been sharply criticized.[205] Apart from review for reasonableness under the applicable ethical rules,[206] courts generally do not have the authority to review contractual terms of

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[197] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 591 (Ky. 2013).

[198] *Id.* at 596.

[199] Eisenberg & Miller, *supra* note 184, at 248.

[200] *See id.* at 258-60. By district court, the median percentages ranged from 20% to 29%, with the exception of the District of Massachusetts, which was at 15%. *Id.* at 258-59. Similarly, by circuit, "[t]he median and mean fee to recovery ratios were 0.24 and 0.25, respectively." *Id.* at 260.

[201] *Id.* at 259 (citing Torrisi v. Tucson Elec. Power Co., 8 F.3d 1370, 1376 (9th Cir. 1993); Camden I Condo. Ass'n v. Dunkle, 946 F.2d 768, 775 (11th Cir. 1991)).

[202] *Id.* at 261.

[203] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 596 (Ky. 2013).

[204] *Id.* at 595.

[205] *See, e.g.*, Jeremy T. Grabill, *Judicial Review of Private Mass Tort Settlements*, 42 SETON HALL L. REV. 123, 126 (2012) (arguing courts do not have authority to review non-class mass tort settlements); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 114 (2010) (critiquing the "quasi-class action" approach to aggregate cases).

[206] *See infra* text accompanying notes 273-76.

representation and compensation in non-class actions.[207] Still, the role of judges in non-class mass tort settlements has generated plenty of scholarship.[208] And many of these scholars argue that freedom of contract should control, with fees governed by attorney-client and fee splitting contracts as appropriate.[209]

Nevertheless, judges have inserted themselves, at times, into questions of payment in the mass tort context.[210] But, in the few rare cases where that has happened, the result has always been a judicially imposed *reduction* of the individual contingency fee.[211] In the *Vioxx* litigation,[212] for example, the court *sua sponte* reduced individual 40% contingency fee contracts to 32% of the settlement amount.[213] The court grounded its authority to revise the fee

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[207] *See, e.g.*, *In re* Polybutylene Plumbing Litig., 23 S.W.3d 428, 436 (Tex. Ct. App. 2000) (citing Thomas v. Anderson, 861 S.W.2d 58, 62 (Tex. Ct. App. 1993)).

[208] *See, e.g.*, Linda S. Mullenix, *Dubious Doctrines: The Quasi-Class Action*, 80 U. CIN. L. REV. 389, 416 (2011); Resnik, *supra* note 144, at 2120.

[209] *See, e.g.*, Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and Collectives of Clients*, 47 DEPAUL L. REV. 425, 442-43 (1998).

[210] *See In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606, 613 n.13 (E.D. La. 2008) (quoting Task Force on Contingent Fees of the Am. Bar Ass'ns Tort Trial & Ins. Practice Section, *Contingent Fees in Mass Tort Litigation*, 42 TORT TRIAL & INS. PRAC. L.J. 105, 125 (2006)) ("[S]everal courts 'have invoked their inherent authority to regulate lawyers to limit attorney fees in mass tort contexts. . . . not to correct for market failure but rather to protect clients from being charged unreasonable fees.' ").

[211] *See, e.g.*, *id.* at 618 (capping all contingent fees at 32% *sua sponte*). Many of the plaintiffs' attorneys involved in the case had contingency fee contracts of 40%. Edward F. Sherman, *Judicial Supervision of Attorney Fees in Aggregate Litigation: The American Vioxx Experience as Example for Other Countries*, 10 TUL. U. SCH. OF L. PUB. L. & LEGAL THEORY RES. PAPER SERIES, No. 09-07, at 11 (2009), *available at* http://ssrn.com/abstract=1407559; *see also* Hoffert v. Gen. Motors Corp., 656 F.2d 161, 162-63, 165 (5th Cir. 1981) (affirming the district court's reduction of plaintiff's counsel's contingency fee from 40% to 20%).

[212] *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549 (E.D. La. 2009); *In re* Vioxx Prods. Liab. Litig., 574 F. Supp. 2d 606 (E.D. La. 2008).

[213] *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d at 618. Upon reconsideration, the court allowed attorneys to apply for "special treatment" and seek an upward departure of the fee percentage. *In re Vioxx Prods. Liab. Litig.*, 650 F. Supp. 2d at 564.

agreements in its equitable powers,[214] its inherent supervisory authority,[215] and its "duty to exercise ethical supervision over the parties."[216] The court reasoned adjustment of the private fee contract was required "to protect the public's trust in the judicial process."[217] The court concluded that the non-class *Vioxx* litigation should be treated as a "quasi-class action" because of the large number of plaintiffs, the use of special masters during the case, and the size of the settlement fund.[218] The court then determined that a reasonable contingency fee would be no more than 32% of the total award.[219] In sharp contrast to the *Guard* case, the *Vioxx* court emphasized that its ruling acted "only as a ceiling," so that any plaintiff with a lower percentage contingency fee would receive the lower rate.[220]

Other courts similarly have invoked their equitable and inherent powers in order to reduce a private contract's contingency fee.[221] Indeed, Judge Jack Weinstein is credited with originating this trend with his decision in *In re Zyprexa Products Liability Litigation*.[222] *Zyprexa* involved a mass pharmaceutical case consolidated for pre-trial purposes under the federal Multidistrict Litigation statute.[223] The parties reached a partial settlement

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[214] *In re Vioxx Prods. Liab. Litig.*, 574 F. Supp. 2d at 611-12.

[215] *Id.* at 612-14. The court also found authority under the express terms of the settlement agreement. *Id.* at 614.

[216] *Id.* at 612.

[217] *Id.* at 613.

[218] *Id.* at 612.

[219] *Id.* at 617.

[220] *In re Vioxx Prods. Liab. Litig*., 574 F.Supp. 2d at 617 n.15.

[221] *See, e.g.*, *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *19 (D. Minn. Mar. 7, 2008); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488, 492, 496-97 (E.D.N.Y. 2006).

[222] *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 489; *see also* Morris A. Ratner, *Achieving Procedural Goals Through Indirection: The Use of Ethics Doctrine to Justify Contingency Fee Caps in MDL Aggregate Settlements*, 26 GEO. J. LEGAL ETHICS 59, 74 (2013).

[223] *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 490; *see also* 28 U.S.C. § 1407 (2006). Other courts have relied expressly on the MDL statute for authority to cap contingency fees in consolidated cases. *E.g.*, *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, 2008 WL 682174, at *17.

covering around 8,000 individual plaintiffs.[224] Although the case was not a class action, Judge Weinstein nevertheless capped all legal fees at 35% of the plaintiffs' recovery,[225] "considerably less than the 40% or more" requested by plaintiffs' counsel.[226] Erroneously conflating mass torts and class actions, the court reasoned that the settlement was "properly characterized as a quasi-class action subject to . . . [the] equitable powers of the court" based, in part, on the large number of plaintiffs covered by the settlement.[227] The court further reasoned that the individual plaintiffs were unable to exercise any effective control over the attorneys' fees due to their illness and lack of "power or knowledge to negotiate fair fees."[228] Apart from its general equitable powers, the court further found authority to review the contingency fees in its "well-established authority to exercise ethical supervision of the bar."[229] The court rejected any duty to examine each individual fee contract because "a client's willingness to abide by his original fee contract 'is relevant but not controlling, for the object of the court's concern is not only a particular party but the conformance of the legal profession to its own high standards of fairness.' "[230] Reducing the contingency downward, Judge Weinstein noted that "[t]his order is likely to save tens of millions of dollars for the clients."[231]

Likewise, in *In re Guidant Corp. Implantable Defibrillators Products Liability Litigation*,[232] the court capped individual contingency fee contracts to a maximum of 20%.[233] The *Guidant* court reasoned that "although the fee arrangements may have been fair when the individual litigations were commenced . . . many of

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[224] *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 490.

[225] *Id.* at 491.

[226] *Id.* at 496.

[227] *Id.* at 491.

[228] *Id.*

[229] *Id.* at 492.

[230] *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d at 493 (quoting Farmington Dowel Prod. Co. v. Forster Mfg. Co., 421 F.2d 61, 90 n.62 (1st Cir. 1970)).

[231] *Id.* at 496.

[232] *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., No. 05-1708 (DWF/AJB), 2008 WL 682174 (D. Minn. Mar. 7, 2008).

[233] *Id.* at *19.

the fee arrangements are likely not fair now because of the common benefit work and economies of scale."[234] The court pointed out that with 10% for costs and 15% for the common benefit fund, even 30% for attorneys' fees would mean that nearly 40% of the settlement would go towards attorneys' fees and costs.[235] Finding that this scenario resulted in an excessive fee award, the court reduced the individual contingency fees to 20%.[236]

In the *Guard* case, by contrast, Judge Bamberger used his authority not to save the clients money, but rather to increase the clients' expenses by 16%.[237] Judge Bamberger's order revised a privately negotiated contingency fee upward from 33 1/3% to 49%.[238] No matter how one views judicial authority in non-class mass tort settlements,[239] that authority does not include the power to unilaterally impose un-negotiated and un-consented costs on the plaintiffs.

2. *Cy Pres* Doctrine

Another example of how the *Guard* case was mistaken for a class action was in the use of *cy pres* doctrine.[240] The doctrine of *cy pres* dates back to Roman law, but was only recently incorporated into class action law.[241] *Cy pres* originated in the law of trusts, where it was used to find a 'next best' use for a charitable trust whose purpose had become impossible to effectuate.[242]

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[234] *Id.*

[235] *Id.* at *19 n.30.

[236] *Id.* at *19.

[237] *See supra* note 107 and accompanying text (discussing how Chesley was able to convince Judge Bamberger to increase the fee arrangement from 33% to 49%, a 16% increase).

[238] *See id.*; *see also supra* note 91 and accompanying text.

[239] *See supra* note 206 (discussing various views on judicial authority in non-class mass tort settlements).

[240] *See* Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 590 (Ky. 2013). To be sure, the Supreme Court of Kentucky did not address the substantive question of whether the use of *cy pres* is appropriate in a non-class action. *Id.* at 598.

[241] *E.g.*, Martin H. Redish, et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 624-25 (2010).

[242] *Id.* at 625.

Consider the following example: A testator creates a charitable trust for a school for orphans in New York City, but no such school exists.[243] Absent application of *cy pres*, the trust would fail.[244] Applying *cy pres*, the court would look for evidence of the testator's intent.[245] If the testator's intent was only for the specific purpose that is now impossible–a school for orphans in New York City–the trust must fail.[246] If the testator had a general charitable intent, the court will look for a substitute gift that fits "as near as possible"[247] with the original intent.[248] If the testator's intent was to benefit orphans, the court might give the funds to an orphanage in nearby Brooklyn.[249] If, however, the testator's intent was to benefit students in New York City, the court might give the funds to a school located in New York City, though one that does not serve orphans. The goal is to determine the next best use for the funds.[250]

Nearly every state has adopted *cy pres* in its trust law by statute.[251] Under the Uniform Trust Code, the doctrine applies only where the trust's charitable purpose has become "unlawful, impracticable, impossible to achieve or wasteful." [252] Mere inconvenience or difficulty in carrying out the purpose is insufficient.[253]

By strained analogy,[254] *cy pres* was extended to modern class action litigation in the 1970s and early 1980s.[255] In the typical

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[243] *See id.*

[244] *See* Stewart R. Shepherd, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 452 (1972).

[245] *Id.*

[246] *Id.*

[247] The phrase, *cy pres*, is derived from the French expression "cy pres comme possible," which means "as near as possible." Redish, et al., *supra* note 241, at 624.

[248] Shepherd, *supra* note 244, at 452.

[249] *See* Redish, et al., *supra* note 241, at 625.

[250] *See id.* at 620.

[251] *Id.* at 628. A few states likewise have codified *cy pres* doctrine in the class action context. *See, e.g.*, MASS. CIV. P. R. 23(e); S.D. CODIFIED LAWS §16-2-57 (2008).

[252] UNIF. TRUST CODE § 413(a) (2012).

[253] Redish, et al., *supra* note 241, at 629.

[254] *See id.* at 624. As Professor Redish notes, "the trusts and class actions contexts are the equivalent of apples and oranges." *Id.*

[255] *Id.*

damages class action, inaction leads to inclusion in the class.[256] Identities of absent class members are often unknown, and perhaps unknowable, which leads to a distribution problem: If the absent class members do not claim damages, the result will be a pool of unclaimed funds.[257] Various alternatives exist: (1) the unclaimed money could revert to the defendant; (2) the unclaimed funds could escheat to the state as unclaimed property; (3) the pro-rata share of each claimant could be increased; or (4) *cy pres* could be used to fashion a next best remedy.[258] Analogizing to *cy pres* doctrine, where the identity of the payees is impossible to determine, the court could distribute the funds to a charity that would indirectly benefit the absent class members.[259] Modern use of *cy pres* relief in class actions, however, reflects little attempt to find an indirect means of compensating class members;[260] instead, the focus seems to be on disgorging the defendant's ill-gotten gains and achieving some charitable end.[261]

Whatever the merits of the class action use of *cy pres*,[262] it has no place in non-class mass tort litigation. Two separate rationales underlie modern class action *cy pres*: (1) an attempt to indirectly compensate absent class members; and (2) an attempt to disgorge the defendant's wrongful gains.[263] Neither rationale justifies the use of *cy pres* in non-class mass torts. First, there are no unknown plaintiffs in a non-class mass tort; each plaintiff had to file an individual suit and likely has retained individual counsel. Therefore, unlike a class action, in a non-class aggregate mass tort action, there should not be any remainder funds. All of the plaintiffs are identified and known. Accordingly, all funds should be distributed. The error in the *Guard* case was the existence of

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[256] *See* FED. R. CIV. P. 23(b)(3).

[257] *See* Redish, et al., *supra* note 241, at 631.

[258] *Id.* at 619.

[259] *See id.* at 662-63; *see also* Geoffrey C. Hazard, Jr., *The Cy Pres Remedy: Procedure or Substance?*, 45 U.S.F. L. REV. 597, 598 (2011).

[260] Redish, et al., *supra* note 241, at 635-38.

[261] *Id.* at 634. Some scholars support the disgorgement rationale of class action *cy pres*. *E.g.*, Hazard, *supra* note 259, at 601.

[262] *See* Redish, et al., *supra* note 241, at 631, 663 (rejecting the use of *cy pres* on constitutional grounds and arguing instead that the class should not be certified where damage distribution problems are present).

[263] *See supra* text accompanying notes 258-62.

any 'unclaimed' funds; rather than approving a *cy pres* trust for the Kentucky Fund for Healthy Living, the court should have inquired into why any funds remained undistributed. Second, the 'full disgorgement' rationale does not support *cy pres* in the non-class context: The defendant has fully disgorged any ill-gotten gains in the non-class mass tort by paying the settlement. Indeed, in the *Guard* case, the $20 million that went to the Kentucky Fund for Healthy Living was already tendered by the defendant; *cy pres* was not necessary to achieve full disgorgement. Simply stated, *cy pres* doctrine should not be applied in non-class mass tort litigation.

C. You Are Your Brother's Keeper

Finally, Chesley's story illustrates the ethical landmines in cases where lawyers associate as co-counsel. Chesley argued that he was not responsible for any ethical violations in the settlement distribution because the lawyers had divided the work to be done, and he was not involved in the distribution to the plaintiffs.[264] In a fee-sharing context, the ethical rules require attorneys to divide fees either in proportion to the work performed or to assume joint responsibility.[265] In the *Guard* case, the attorneys chose joint responsibility; the fee-splitting agreement specifically provided that all of the lawyers involved would be "identified as co-counsel" in the case.[266] By choosing joint responsibility, lawyers become vicariously liable "before disciplinary authorities for the others' acts."[267] In short, as co-counsel, you are your brother's keeper.[268] On that ground, the Supreme Court of Kentucky held Chesley vicariously liable for violations of the ethical rules regarding fees and violations of the aggregate settlement rule.[269]

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[264] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 597 (Ky. 2013).

[265] MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(1) (2009).

[266] *Chesley*, 393 S.W.3d at 588.

[267] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 cmt. d (2000); *see also id.* § 58 (discussing that partners are vicariously liable for acts by other partners).

[268] *See Genesis* 4:9.

[269] *Chesley*, 393 S.W.3d at 596-98.

1. Fee Splitting with Co-Counsel

When a lawyer associates with co-counsel and splits fees with another lawyer, the total fee must be reasonable.[270] Chesley argued that his $20 million fee was reasonable because "his personal take from the case was merely 10% of the total amount recovered."[271] This argument, however, ignores the plain language of Rule 1.5.[272] Moreover, on policy grounds, allowing counsel to separately analyze the reasonableness of their fees would lead to excessive fees in the aggregate. Indeed, the Supreme Court of Kentucky found that the total aggregate fee, as well as Chesley's share of the fee, were both unreasonable.[273]

In addition, Rule 1.5(e) clearly states that clients must be informed[274] of any fee-sharing arrangement and give consent.[275] In the *Guard* action, no client was notified of the fee-sharing agreement, nor of Chesley's participation as co-counsel.[276] This was an easy mistake to avoid. As the court noted, failure to comply with Rule 1.5(e)'s requirements "casts doubt upon the validity of the agreement from its inception."[277] The Restatement notes that any fee-sharing agreement that violates the ethical rules "cannot be

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[270] MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(3) (2009).

[271] *Chesley*, 393 S.W.3d at 594.

[272] *See* MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(3) (2009) (requiring that a fee division be in proportion to the services performed, the client agree to the arrangement, and that the total fee be reasonable).

[273] *Chesley*, 393 S.W.3d at 596.

[274] Following the ABA Model Rules of Professional Conduct, most jurisdictions require disclosure of only the lawyers involved in the fee-sharing agreement. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 reporter's note cmt. e (2000). Following the ABA Code of Professional Conduct, however, a few jurisdictions require disclosure that the fee will be split. *Id.* And, a few jurisdictions require disclosure of the exact fee division. *Id*.

[275] MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(2) (2009). The Model Rules require that the client give informed consent in writing. *Id.* Although not all state ethical rules require the client's written consent to a fee-sharing arrangement, *see, e.g.*, PA. RULES OF PROF'L CONDUCT R. 1.5(e), I highly recommend consent in writing for both the lawyer and client's protection.

[276] *Chesley*, 393 S.W.3d at 597.

[277] *Id.*

enforced against the client," and "may lead to partial or total forfeiture of the lawyers' fee claim."[278]

2. Aggregate Settlements

In the *Guard* case, the Supreme Court of Kentucky held Chesley liable for the other lawyers' ethical mistakes in handling the aggregate settlement.[279] Under Rule 1.8(g), "[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of . . . the clients . . . unless each client gives informed consent, in a writing signed by the client."[280] Although some scholars have argued that clients should be allowed to *ex ante* consent to an aggregate settlement,[281] others contend that the informed consent requirement incentivizes plaintiffs' counsel to negotiate an adequate total settlement amount and further allocate the individual amounts in a horizontally fair manner.[282]

Further, the extent of the disclosure required under Rule 1.8 is contested.[283] The rule requires disclosure of "the existence and nature of all the claims . . . and of the participation of each person in the settlement."[284] Courts and scholars disagree on whether the rule requires disclosure of the identities of each client participating in the settlement as well as the amount each client is receiving.[285] What is *not* controversial, however, is the idea that each client

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[278] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 cmt. i (2000).

[279] *See Chesley*, 393 S.W.3d at 597.

[280] MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009).

[281] Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 768-69 (1997). The American Law Institute advances a similar rule that would allow plaintiffs to consent in advance to being bound by a majority vote in favor of an aggregate settlement. PRINCIPLES OF THE LAW OF AGGREGATE LITIG. § 3.17(b) (Am. Law Inst. 2010).

[282] Erichson, *supra* note 146, at 571-72.

[283] *See* Nancy J. Moore, *Ethical Issues in Mass Tort Plaintiffs' Representation: Beyond the Aggregate Settlement Rule*, 81 FORDHAM L. REV. 3233, 3260-61 (2013).

[284] MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2009).

[285] *See* Moore, *supra* note 283, at 3260. Arguably, each client's share of the settlement is covered by the duty of confidentiality, and cannot be disclosed to other clients. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2009).

should be informed of: "(1) the total amount of the aggregate settlement[;]" (2) the amount the individual client is receiving; (3) the amount of attorneys' fees and costs; and (4) how these sums were calculated.[286] Indeed, disclosure of this information is required by other rules, such as Rule 1.5's requirements for contingency fee contracts,[287] and the client's authority to accept or reject settlement under Rule 1.2.[288] Here, of course, none of the clients were informed of the aggregate settlement at all, and instead, were falsely told that AHP had made a specific offer to settle his or her individual claim.[289] The Supreme Court of Kentucky noted that if Chesley had exercised his duty under the ethical rules to ensure that the clients had received proper notice of the settlement, he might "have been able to prevent the violations that were later uncovered."[290]

IV. CONCLUSION

Is the aggregate settlement to blame for the ethical failures in the *Guard* case? Professor Howard Erichson has argued that "[t]he ethical problems with mass settlements are systemic and linked to defendants' demands for fully inclusive deals."[291] As support, Professor Erichson points to the *Guard* case.[292] He argues that the

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[286] *See* Moore, *supra* note 283, at 3260.

[287] MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2009) (requiring the lawyer to "provide the client with a written statement stating the outcome of the matter and, . . . showing the remittance to the client and the method of its determination"). Indeed, the Supreme Court of Kentucky found that Chesley violated Rule 1.5(c) by failing to provide the clients with a written remittance. Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 596 (Ky. 2013). The court rejected his argument that "he reasonably relied upon his co-counsel to comply with this Rule[,]" finding that he had "an independent duty to see that the clients received the required notice." *Id.*

[288] MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009).

[289] *Chesley*, 393 S.W.3d at 589, 597.

[290] *Id.* at 597.

[291] Erichson, *supra* note 68, at 980.

[292] *Id.* at 983-89. The Kentucky case, however, differs in the extreme from the other examples cited by Professor Erichson. These other examples cited by Erichson include the Napoli fen-phen settlement, the Locks fen-phen settlement, the Leeds Morelli settlements, the Vioxx settlement, and the Phillips Chemical

problem rests in the requirement that all plaintiffs participate in the settlement.[293] The solution, he believes, is a "most-or-nothing" settlement that requires less than 100% participation because it eliminates the pressure on plaintiffs' counsel to obtain releases from every client.[294] Even though the *Guard* case required only 95% participation, Erichson considered the deal an all-or-nothing settlement;[295] and attributes the ethical lapses in the case to this requirement.[296] Unlike Professor Erichson, I do not read the *Guard* settlement as an 'all-or-nothing' settlement; the language clearly required releases from only 95% of the plaintiffs.[297] Assuming the *Guard* case was a most-or-nothing settlement of the kind Erichson advocates as a solution to ethical violations in aggregate settlements, then what went wrong?

In my view, the problem lies in the lump sum payment by the defendant.[298] The same risk of lawyer self-interest illustrated by the *Guard* case[299] would be present in a situation where the defendant tendered $100 million to the plaintiffs' counsel, but only required 50% of the claimants to participate. It is true that the "all-or-nothing" participation requirement creates conflict of interest issues and allocation problems.[300] But it was not a conflict of interest problem that led to Stanley Chesley's disbarment.[301]

Plant settlement. *Id.* at 989, 993, 995, 1000, 1004. None of these other cases involved the systematic theft and concealment present in the *Guard* case.

[293] *Id.* at 983.

[294] *Id.* at 1023-24.

[295] *Id.* at 985-89.

[296] *Id.* at 989.

[297] United States v. Cunningham, 679 F.3d 355, 364 (6th Cir. 2012) (noting that "AHP had a right to terminate the settlement agreement as to all claimants unless 95 percent of the claimants accepted the agreement by September 1, 2001").

[298] To be sure, as Professor Erichson points out, the "all-or-nothing" requirement creates numerous conflict of interest, informed consent, and allocation problems. Erichson, *supra* note 68, at 1007-22. My point is simply that the ethical errors in the *Guard* case should not be attributed exclusively to the participation requirement.

[299] *See* Report of the Trial Commissioner, *supra* note 8, at 25 (describing Chesley's involvement in the *Guard* case as "one of self-interest and self-preservation").

[300] Erichson, *supra* note 68, at 1007, 1010.

[301] *See supra* text accompanying notes 118-23.

Rather, the Supreme Court of Kentucky found that Chesley "knowingly participated in a scheme to skim millions of dollars in excess attorney's fees from unknowing clients."[302] The underlying problem in the *Guard* case was not a violation of technical professional responsibility norms that apply only to lawyers, but, rather, a violation of moral norms that apply to all human beings.[303] To that end, I do not propose a solution;[304] but, rather raise the issue as a cause for concern and area for further study.

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[302] Ky. Bar Ass'n v. Chesley, 393 S.W.3d 584, 599 (Ky. 2013).

[303] *Cf.* Erichson, *supra* note 68, at 983 (noting that "[a]ny large pot of money can create temptation").

[304] *Cf.* Richard A. Posner, *The Deprofessionalism of Legal Teaching and Scholarship*, 91 MICH. L. REV. 1921, 1924 (1993) ("I can think of few things more futile than . . . teach[ing] people to be good.").