
# The Use of Principles of Aggregate Litigation by Courts: The Early Returns

November 5, 2010 by Vance Wittie

The American Law Institute gave final approval to the *Principles of Aggregate Litigation* in May, 2009. Drafts of the *Principles* had been published for several years before final approval, and some courts have been aware of the substance of the ALI's views for some time. We have searched available opinions to determine the influence, if any, that the *Principles* have exerted on the law to this point.

Almost all citations to the *Principles* have been in federal court, predominantly in the First and Second Circuits. By far the most common subject for which the *Principles* have been cited is cy pres settlements. Some courts have approved settlements where the primary beneficiaries are not class members but third parties, such as charities. The rationale for such settlements is that they provide some punishment to the defendant (or disgorgement of ill-gotten gains) while avoiding difficult problems in identifying and compensating specific class members. The *Principles of Aggregate Litigation* is generally unenthusiastic about cy pres settlements and expresses a preference for distribution of settlement proceeds to class members as opposed to third parties, such as charities, unless such a distribution is not economically feasible. The Second Circuit relied upon a draft of the *Principles* in a leading case (see *Masters v. Wilhelmina Model Agency, Inc.* .pdf) and the *Principles'* position on this subject seems to have real traction in the federal courts.

The courts have not widely cited the *Principles of Aggregate Litigation* for other issues, although the Third Circuit has referred to factors listed in the *Principles* for determining when a single-issue class is appropriate (see *Hohider v. United Parcel Service, Inc.* .pdf).

Other issues for which the *Principles* have been cited include the varieties of aggregate litigation, the presumption against certification when a prior court has rejected certification, and the use of lodestar factors to cross-check attorneys' fees derived by the percentage method.

The most significant use of the *Principles* in state courts has been a decision by the Kansas Supreme Court adopting the definition of "aggregate settlement" found in the *Principles* and applying it to that state's disciplinary rules (see *Tilzer v. Davis, Bethune & Jones, L.L.C.* .pdf).