
GOLDILOCKS AND THE CLASS ACTION

*Deborah R. Hensler**

After she'd eaten the three bears' breakfasts she decided she was feeling a little tired. So, she walked into the living room where she saw three chairs. Goldilocks sat in the first chair to rest her feet. "This chair is too big!" she exclaimed. So she sat in the second chair. "This chair is too big, too!" she whined. So she tried the last and smallest chair. "Ahhh, this chair is just right," she sighed. But just as she settled down into the chair to rest, it broke into pieces!¹

After almost two decades of multilateral attacks, private class actions are on the decline in the United States.² Mass tort class actions have virtually disappeared as a result of the U.S. Supreme Court decisions in *Amchem Products Inc. v. Windsor*³ and *Ortiz v. Fibreboard Corp.*,⁴ replaced by aggregated lawsuits resolved in multidistrict litigation (MDL).⁵ The Class Action Fairness Act of 2005⁶ (CAFA) has shifted formerly state court class actions into federal court where a steady stream of U.S. Supreme Court and other federal appellate decisions have undermined their viability.⁷ Although critics have targeted virtually all types of class actions, political opponents have focused on consumer class actions and other suits on behalf of class members with small-value claims — tellingly dubbed “negative value” class actions. Support for these class actions rests on the highly contested proposition that permitting entrepreneurial lawyers to act as “private attorneys general” is an effective means of enforcing market regulations.

Using private litigation to achieve public policy goals raises a fundamental question about the proper balance between public and private law in democratic societies. Today this issue is the subject of vigorous debate in the European Union, where advocates for private

* Judge John W. Ford Professor of Dispute Resolution, Stanford Law School.

¹ *The Story of Goldilocks and the Three Bears*, DLTK'S CRAFTS FOR KIDS, http://www.dltk-teach.com/rhymes/goldilocks_story.htm (last visited Nov. 28, 2012).

² Robert Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013).

³ 521 U.S. 591 (1997).

⁴ 527 U.S. 815 (1999).

⁵ See Deborah Hensler, *Has the Fat Lady Sung? The Future of Mass Toxic Torts*, 26 REV. LITIG. 883 (2007) (presenting data showing the use of MDL to resolve mass claims); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation if a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008); Charles Silver & Geoffrey Miller, *The Quasi-Class Action Method of Managing Multi-District Litigation: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

⁶ 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2006 & Supp. V 2011).

⁷ Klonoff, *supra* note 2, at 18–19.

enforcement of antitrust and consumer protection law have struggled against those who champion traditional European reliance on public enforcement and deride proposals for “American-style class actions.” Among the twenty-odd countries outside the United States that have adopted class actions, most have limited standing to represent a class to public officials or nonprofit organizations vetted or approved by the government. This limitation aims to minimize if not eliminate the potential for conflicts of interest that arise in individually represented class actions prosecuted by private, fee-seeking class counsel. Most of these jurisdictions forbid private attorneys from charging fees related to the amount of damages obtained.⁸ The emergence in the United States of a critique against *public* representative suits for monetary relief brought by state attorneys general, rather than by private attorneys, is ironic. It does not seem coincidental, however, that just when the battle in the United States against private class actions seems to have been won and just as American consumer protection advocates are turning their attention to public litigation,⁹ a new genre of attacks on state attorneys’ general suits is emerging, arguing that they are really class actions in disguise.¹⁰

In her article *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*,¹¹ Professor Margaret Lemos attempts to distinguish her critique from these political attacks on attorneys’ general suits. She presents a careful analysis of the agency costs associated with public representative litigation that in many instances turns the critique of private class actions on its head. Agency costs in state attorney general litigation, she argues, are even greater than the agency costs associated with Rule 23 class actions, particularly in the majority of states where attorneys general are elected. State attorneys general are likely motivated by a mix of public and private interests and these interests — unlike the interests of private entrepreneurial attorneys whose fee-seeking encourages them to fight “tooth and nail to extract the largest sanctions possible”¹² — may lead them to agree to

⁸ Deborah R. Hensler, *The Future of Mass Litigation: Global Class Actions and Third-Party Litigation Funding*, 79 GEO. WASH. L. REV. 306, 309 (2011).

⁹ Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012).

¹⁰ See generally, e.g., Alexander Lemann, Note, *Sheep In Wolves’ Clothing: Removing Parens Patriae Suits Under The Class Action Fairness Act*, 111 COLUM. L. REV. 121 (2011). The arguably successful state attorneys general litigation against the tobacco industry evoked considerable criticism of state attorney general actions. See e.g., Michael DeBow, *The State Tobacco Litigation and the Separation of Powers in State Governments: Repairing the Damage*, 31 SETON HALL L. REV. 563 (2001); Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and Parens Patriae Product Litigation*, 49 B.C. L. REV. 913, 914 (2008).

¹¹ Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486 (2012).

¹² *Id.* at 491.

settlements that are not in the interest of the class. The fact that state attorneys general work on salary, rather than charging contingency fees, exacerbates this risk. Because the interests of class members are likely to conflict with the interests of states' electorates at large, state attorneys general suits may not meet the constitutional due process requirement of adequate representation where the litigation seeks monetary relief for class members who are a subset of state citizens.

Past critiques of private class actions have rested on shaky grounds. Scholars often compare actual class actions to an idealized version of individual litigation. The ultimately successful critique of mass tort class actions that culminated in the *Amchem* and *Ortiz* decisions was based on the belief that these class actions deprived tort claimants of their right to individualized process and outcomes, a belief that ignores the realities of aggregated non-class mass tort litigation, which offers little of either.¹³ Often as well, theory is accorded primacy over evidence and anecdotes substitute for systematic empirical research. The critique of small-value class actions rests on robust economic theory, which predicts that the divergence between class counsel's and class members' financial incentives will lead to collusive settlements between class counsel and defendants,¹⁴ but is supported mainly by anecdotes about a few class action settlements that clearly served class counsel and defendants more than class members. In my qualitative research on ten class actions selected without regard to their outcomes, I found that participants' judgments of the value of the litigation varied considerably. However, how representative these cases were is unknown. No one has been able to compile a representative database of class actions that would enable the sort of objective cost-benefit analysis that ought to be the basis for public policy reform.¹⁵

Lemos's analysis is similarly heavy on theory and light on empirics — indeed, her article does not contain any empirical data about the nature and frequency of the litigation that concerns her. How many state attorney general suits are there and what proportion seek individual monetary remedies (as contrasted with reimbursement for state expenses or contributions to state activities)? In suits in which state attorneys general pursue individual remedies, is the typical value of individual class members' claims large enough to make individual liti-

¹³ See Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1910 (2002).

¹⁴ The economic analysis of class actions is vast. See generally John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, 48 LAW & CONTEMP. PROBS. 5 (1985).

¹⁵ Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 5, 51 (2000).

gation practical, or could such claims only be pursued otherwise in much-castigated and increasingly endangered private class actions? Do empirical data support the proposition that state citizens' and class members' interests frequently diverge? How often do federal agencies and private class representatives join state attorney general actions? Are there differences in outcomes when state attorneys general act alone rather than with others?

Quantitative data on state attorney general litigation are difficult to locate, but not entirely absent.¹⁶ In lieu of quantitative analysis, qualitative case studies might shed light on some of the issues Lemos raises. How do state attorneys general decide what cases to pursue and how much to invest in them? What factors influence decisions to settle? What conflicts emerge when federal agencies or private parties join in the litigation or file parallel suits? Although such qualitative case studies would not substitute for quantitative analysis of statistically representative data on state attorney general lawsuits, they would give at least this reader more confidence that Lemos's concerns are well-grounded and apply to the universe of cases for which she is urging policy reform. Absent *any* systematic data, it is difficult to assess objectively the basis for Lemos's concerns, which argues for being considerably more cautious in putting forth policy recommendations.

Lemos's argument that *elected* officials are particularly likely to serve as unfaithful agents of class members' interests is also worthy of empirical analysis. In a passing footnote she suggests that SEC and FTC actions to secure monetary recoveries are less susceptible to agency problems than state attorney general actions because the former are not elected and are only "accountable to the people by virtue of their relationships with the President."¹⁷ Whether and how being directly accountable to the electorate shapes litigation decisions would be an excellent question to pursue through comparative analysis of elected and unelected state attorneys' general and unelected federal agency directors' litigation decisions in comparable circumstances.

Having raised the alarm about public representative litigation, Lemos struggles to find a workable solution to the problems she discerns. The theoretically attractive procedural solution, authorizing judges to conduct a case-by-case inquiry into an elected official's ability to represent faithfully the interest of class members is fraught with dangers, both practical and political. One of the critiques of private

¹⁶ The antitrust project of the National Association of Attorneys General is compiling a database that might support such analysis, albeit limited to antitrust. See NAAG STATE ANTITRUST LITIG. DATABASE, <http://app3.naag.org/antitrust/search/> (last visited Nov. 28, 2012).

¹⁷ Lemos, *supra* note 11, at 489 n.5. In addition, she notes that "few if any citizens think of the SEC or the FTC as their 'representatives,'" *id.*, an assertion that strikes me as oddly incongruent in this era of rage about government bailouts and failures to regulate financial institutions.

class actions is that judges too readily “rubber stamp” settlements and fee requests that they are required as a matter of law to review carefully; why we should presume that they would be any better at this task is unclear. In state courts in particular the notion of authorizing elected judges — whose campaigns may have been financed by the very corporations that are the defendants in these class actions — to inquire into elected officials’ intent and motivations in bringing suits strikes me as creating at least as great a potential conflict of interest as the conflict Lemos is concerned about. The recommendation that public litigation for monetary relief should have no preclusive effect for subsequent private litigation for compensation would likely doom settlement of many suits, as Lemos herself recognizes. The primary goal of defendants who settle class actions, as Lemos knows, is closure. No matter how hard defendants contest class actions, once defendants decide to settle they negotiate for as broad a class as possible so as to bind as many class members as possible, thereby minimizing if not eliminating the threat of future litigation over the same set of facts. Lemos’s suggestion that defendants in small-value claim class actions need not be concerned about the lack of preclusion because potential claimants generally would not be inclined to sue undercuts her larger argument that these claimants’ interests are not being properly represented by state attorneys general. Although this may not be Lemos’s intention, many readers are likely to conclude there is no remedy for the problems she enumerates, especially since the very features whose absence creates the problems she perceives with public representative litigation are the features that critics decry in private class actions.

Like the legal scholars who inveighed against mass tort class actions while ignoring the other realistic options that were available to tort claimants, Lemos’s critique of public representative litigation fails to consider the realistic options that are available for enforcing regulations. As in the Goldilocks story, neither the first chair, the private class action, nor the second chair, public representative litigation, is “just right” for achieving these goals. Lemos’s third chair, procedural reform of public representative litigation, is unlikely to serve any better than the third chair Goldilocks tried, which first appeared “just right” but “broke into pieces” when she sat in it. Goldilocks solves her problem by running into the bedroom. But in the real world of powerful market actors, regulatory capture, and legislatures beholden to private interests, there is no metaphorical bedroom to which we can run. We can make do with all of the furniture we have to enforce market regulations, attempting as best we can — with the best empirical evidence we can bring to bear — to shore up the strength and repair the flaws of both private and public litigation. Or, as others have long urged, we can abandon the project of using courts to achieve public policy goals and leave the marketplace to the bears.