Adequacy and the Attorney General

Author : Jay Tidmarsh

Date : May 1, 2013

- Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 **Harv. L. Rev.** 486 (2012).
- Deborah R. Hensler, *Goldilocks and the Class Action*, 126 **Harv. L. Rev. F.** 56 (2012).

Maggie Lemos's valuable article tackles one of the hot issues in aggregate litigation: a government (typically acting through its attorney general) using *parens patriae* suits to vindicate the rights of its citizens. As I described in my last Jotwell post, access to justice in a mass society is the central civil-justice issue of our day. Individual litigation of mass-injury claims is a luxury that neither litigants nor the court system can typically afford. Class actions are shriveling as a realistic alternative in many instances. Non-class aggregate litigation is infected with its own problems, as the ALI's recent *Principles of the Law of Aggregation* shows. And contracts of adhesion increasingly shunt victims into individual arbitration processes that provide little realistic opportunity for relief — and no opportunity for judicial resolution.

Into this harsh landscape enters the *parens patriae* action, which has emerged as the newest academic darling with the potential to provide victims of mass injury a measure of justice. In these actions, the attorney general sues on behalf of those citizens allegedly injured by the defendants' conduct. Such a suit ensures a measure of deterrence. If the recovery occurs and the attorney general establishes a fund against which injured citizens can claim, the suit also results in a modicum of compensation. Because the suits are controlled by a public official, they also (in theory) come closer to achieving the optimal level of regulatory response, while avoiding the large fees, blackmail settlements, and other agency costs that so often give class-action and other aggregate litigation a bad name.

Sounds great, right? Not so fast. Turning the critiques of other forms of aggregate litigation around on *parens patriae* litigation, Lemos shows that the picture is not as rosy as it seems. With a strong command of the class-action and aggregate-litigation literature, she explores the various agency costs traditionally associated with private mass litigation, and then demonstrates that these problems (conflicts of interest, lack of client monitoring and control, asymmetric stakes and resources, and inadequate settlements) also infect cases brought by attorneys general. Attorneys general have their own political interests in prosecuting the claims; their offices are often underfunded; the citizens have little realistic control over litigation decisions; and inadequate settlements can therefore be expected.

Given the risk of imperfect representation, Lemos connects *parens patriae* litigation brought by attorneys general and class actions brought by class representatives. In particular, she argues that a *parens patriae* suit should have preclusive effect only when the attorney general is an adequate representative of her citizens. With Hansberry v. Lee and its progeny, the Supreme Court established adequate representation as the constitutional floor required to accord preclusive effect in class actions. By analogy, Lemos argues that giving preclusive effect to a *parens patriae* judgment or settlement is unconstitutional unless the attorney general meets the same due-process minimum. This fairly unassailable logic leads to one of two conclusions: either a class-action-style guarantee of adequate representation must be imported into the law of *parens patriae* litigation, or citizens must be free to pursue private litigation (whether individual, class-wide, or aggregate) without being bound by the result achieved by the attorney general on their behalf.

Lemos prefers the latter solution because it better accommodates the government's interest in suing to vindicate regulatory and political objectives with victims' distinct interests in pressing their own claims. She recognizes that this solution is not ideal, in part because it exposes defendants to "double dip" liability should they first pay some money to the attorney general and then pay more to the victims. But, as she notes correctly, double dipping is unlikely to be a significant problem for many of the small-stakes cases in which *parens patriae* actions are filed. And in any event, the court can avoid the issue by finding (in appropriate cases) that the attorney general is an adequate representative, and then allowing citizens who are disappointed with a proposed *parens patriae* settlement to opt out of the case.

For anyone wishing to engage the issues fully, Deborah Hensler's short online response also merits close reading. Hensler points out that "[u]sing private litigation to achieve public policy goals raises a fundamental question about the proper balance between public and private law in democratic societies." She raises the importance of empirical data and case studies, with which Lemos's more theoretical piece does not engage, in evaluating both proposals to change *parens patriae* practice and claims about the adequacy of an attorney general's representation. And Hensler suggests that any critique of the present state of *parens patriae* actions should account for the bleak reality that no method of delivering justice to large numbers of relatively powerless victims — whether a class action, a traditional *parens patriae* action, or a *parens patriae* action reformed along the lines that Lemos suggests — is, in the immortal words of Goldilocks, "just right." We must still do the best we can to cobble together some combination of concededly imperfect mechanisms to keep the metaphorical bears in check.

Lemos is correct to critique state and lower federal court decisions suggesting that *parens patriae* actions can bar separate claims by citizens without regard to the quality of the attorney general's representation. That case law must be crazy. Anyone who has read the line of cases from *Hansberry* through Martin v. Wilks, to *Taylor v. Sturgell*, knows that no court today could so hold and get away with it. *Parens patriae* actions do not have a binding effect on citizens whose attorney general does not adequately represent them. End of story. Because these *parens patriae* actions lack binding effect, attorneys general are not agents of their citizens. Therefore, Lemos's concern about the agency costs of *parens patriae* actions in which representation is inadequate strikes me as misplaced.

The real concern is double dipping. Because a *parens patriae* suit in which the representation is inadequate does *not* bind citizens in subsequent litigation, a defendant might in theory end up paying both the government and the victims for the same harm. That problem is not unique to *parens patriae* litigation; it also arises in other situations. For instance, a class member who fails to receive adequate compensation in one forum may bring suit in a foreign forum. To the extent that double dipping is an observed phenomenon (and here Hensler's call for empirical evidence is especially salient), it is far more controllable in the domestic than in the transnational context: *parens patriae* and private suits can be consolidated, or the amounts paid to a claimant in the *parens patriae* suit can be deducted from that claimant's award in the private litigation. That said, crafting simple and workable solutions to prevent double dipping is a challenge that merits attention as we cobble together a mélange of imperfect responses to mass injury.

A deeper question is the meaning of "adequacy of representation" in the *parens patriae* context. If individual litigation is a fond luxury, especially in small-claim consumer cases that have been the traditional grist for the *parens patriae* mill, we need to accept the reality that the delivery of justice to victims of mass injury inevitably requires some class-action, aggregate, or representative process(es). (The only alternative, as Hensler aptly puts it, is to "leave the marketplace to the bears.") In assembling individual claims into a larger group, however, conflicts among individuals in the group are inevitable. *Hansberry* famously held that a class representative could not adequately represent class members whose interests were in conflict. That "conflict of interest" trope has dominated our

discussion of inadequate representation ever since. It's time to change our thinking. We cannot simultaneously maintain both a "conflict of interest" view of inadequate representation and a belief that a class-wide or representative process can ever bind absent plaintiffs. Something has to give. If we care about the delivery of justice to victims whose economic reality is the impossibility of individual suit, we must come to a different understanding of adequate representation.

In *parens patriae* suits, therefore, the important question is not *whether* we can tolerate conflicts between the attorney general and the represented citizens, but *how great* the disparity in interest must be before the *parens patriae* suit loses its preclusive effect. The answer to that question is complicated, dependent in part on the other realistic options that victims have for enforcing their rights. Admitting that there are significant agency costs when attorneys general represent citizens is the starting point of the analysis, not the conclusion. Due process is often sensitive to context, and sometimes even a quarter of a loaf is better than none.

Cite as: Jay Tidmarsh, *Adequacy and the Attorney General*, JOTWELL (May 1, 2013) (reviewing Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 **Harv. L. Rev.** 486 (2012) and Deborah R. Hensler, *Goldilocks and the Class Action*, 126 **Harv. L. Rev. F.** 56 (2012)), https://courtslaw.jotwell.com/adequacy-and-the-attorney-general/.