THE PARENS PATRIA SETTLEMENT AUCTION

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ABSTRACT

State attorneys general often rely on private attorneys to pursue the public interest in a broad range of cases with frequent success. These "private attorneys general" afford flexibility to state law enforcement and help close the gap in resource disparities between state offices and the law firms resource-rich defendants may employ. But the use of private attorneys general also poses substantial agency costs. The hiring process occasionally begins with anecdotes of graft or corruption, and their representation often ends with inadequate settlements and undeterred defendants. Each of these undermines the benefits of the private attorney general model.

This article proposes a model to eliminate the root cause of these problems and align the interests of the private attorney with those of the public. The proposal is simple: once a settlement is reached in public aggregate litigation, the public’s claim should be put up for auction. If a third party bids an amount greater than the existing settlement, the proceeds of the auction go to the state, the winning bidder takes the place of the state and may pursue the defendant for a greater recovery.

The benefits of this proposal are twofold. For one, a looming auction removes the incentive for hasty and inadequate settlements because any inadequate settlement risks losing the representation and its associated payout to a higher bidder. Second, because an attorney’s share in a settlement is not guaranteed, an attorney’s incentive to secure appointment as a private attorney general through campaign contributions or other illicit means is dramatically reduced. The settlement auction therefore simultaneously encourages adequate deterrence and discourages public corruption.
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INTRODUCTION

State attorneys general regularly employ “private attorneys general” to pursue the public interest in mass *parens patriae* claims, with an array of high-profile successes. Yet serious faults surface when states turn to private attorneys to vindicate public rights. There are problems at the “front end” of the process—the selection of private attorneys is at times unaccountable and hidden from public view, sometimes resulting in favorable contracts for private attorneys who double as campaign donors. More daunting, there are problems at the “back-end” of the litigation—the current private attorney general model misaligns the incentives of private attorneys and the public they represent, presenting agency costs that are present throughout the representation and particularly at settlement.

The faults of this system have not gone unnoticed, though academic treatment of the issue has not solved the problem. Nevertheless, their concerns appear well-founded: the typical methods of compensating private attorneys in public aggregate litigation incentivize private attorneys general either to accept an inadequate settlement or to inflate the hours spent on the matter. In either event, the result is often inadequate deterrence of wrongdoers or overcharging of the public. Moreover, increasing scrutiny suggests that in some states, appointments tend to correlate with campaign donations. For all its promise, then, the use of private attorneys general in public aggregate litigation is falling short of its great potential.

These results are not inevitable. States can simultaneously align the incentives of private attorneys general with the public interest and minimize concerns over corruption through a simple mechanism: the *parens patriae* settlement auction. States already possess the tools necessary to implement this solution. If they do so, they will ensure the public enjoys the benefits of the private attorney general model without facing its most serious negative consequences.

The proposal is simple: state attorneys general should continue to employ private attorneys in public aggregate litigation when beneficial to do so. When the private attorney reaches a settlement, however, the settlement will be put up for auction. If a third party bids an amount greater than the existing settlement,* J.D., Notre Dame Law School, 2016; B.S., Grand Valley State University, 2011. Many thanks to Professor Jay Tidmarsh for his guidance on earlier drafts of this article, to Eric Dean Hageman for his helpful feedback, and to the editors of the Gonzaga Law Review for their edits. All errors are mine.

1. When this article refers to “public aggregate litigation” it refers to mass *parens patriae* claims that seek damages. It uses those terms interchangeably.
the proceeds of that bid are transferred to the state, and the public’s claims are transferred to the winning bidder. That bidder may then pursue the defendant to recover an amount greater than the settlement. The state’s private attorney who initially pursued the claim will be compensated on a quantum meruit basis for the work performed.

This proposal is aimed at settlements that dramatically undervalue the public’s injury. Due to the expected costs of participating in the settlement auction, third-party bidders will likely participate only when the initial settlement appears dramatically undervalued.

By auctioning the public’s legal claim following a settlement, the settlement auction fuses principal and agent. This merger minimizes the agency costs associated with the current private attorney general model. What is more, by removing the promise of hefty attorneys’ fees for even an inadequate settlement, the auction diminishes the incentive for campaign donors to seek favorable appointments; an inadequate settlement risks the claim being purchased at the auction, leaving the private attorney without a profit.

Various states pursue these results through piecemeal regulations on the hiring and compensation of private attorneys general. Those well-intentioned attempts fail to address the root problems associated with the private attorney general model. Worse yet, some of these regulations can rob the state’s top lawyer of much-needed flexibility when pursuing claims in the public interest. The *parens patriae* settlement auction—when combined with a well-designed fee structure—allows the public to reap the benefits of using private attorneys general, without handcuffing the state attorney general.

This article proceeds in four parts. Part I briefly discusses the private attorney general doctrine, its evolving use, and its benefits to the public. Part II examines the agency costs associated with aggregate litigation in general and the unique agency costs posed when private attorneys litigate on behalf of the public at large in mass *parens patriae* claims. It illustrates how those costs arise and thus how they can be controlled. Part III examines the various reforms states currently employ to minimize agency costs present in public aggregate litigation, as well as some academic proposals for controlling those costs. That part concludes that while those reforms may offer an improvement over the status quo, they ultimately treat a symptom, rather than the underlying disease. Part IV introduces the *parens patriae* auction and examines three alternative auction models for use in *parens patriae* litigation. It concludes that a well-designed settlement auction can best manage agency costs and ensure that a private attorney general’s incentives are aligned with the public interest. It concludes by examining a few questions of implementation.
Many have examined the pitfalls of private attorneys general; many more have discussed the problems of aggregate litigation. This article takes the analysis of both private attorneys general and aggregate litigation financing a step further by proposing a simple, market-based solution to the pitfalls of the private attorney general model in mass parens patriae actions.

I. PARENS PATRIAE AND PRIVATE ATTORNEYS GENERAL

A. The Parens Patriae Power

The parens patriae power is rooted in the common law “royal prerogative”—a royal responsibility to look after those unfit to look after themselves. The sovereign traditionally exercised this power as “the general guardian of all infants, idiots, and lunatics” and justified doing so by the inability of those individuals to protect their own interests.

From an early date “[i]n the United States[,] the parens patriae role was assumed by the states.” States applied the power in typical cases—administering trusts and ensuring the well-being of minors—for decades before expanding the


3. Alfred L. Snapp & Son, Inc., 458 U.S. at 600 (“The royal prerogative included the right or responsibility to take care of persons who ‘are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. Idiocy: or 3. Lunacy: to take proper care of themselves and their property.’” (quoting J. CHITTY, PREROGATIVES OF THE CROWN 155 (1820))); see also, e.g., Jay L. Himes, Symposium, State Parens Patriae Authority: The Evolution of the State Attorney General’s Authority, 2004 Inst. for L. & Econ. Pol’y 1–2 (“The individual’s inability to protect his or her own interests, was, historically, the central justification for recognizing the sovereign’s power to act on the individual’s behalf.”); Strausberg, supra note 2, at 2 (“[T]he King . . . acted in his capacity . . . as guardian in behalf of . . . those legally incompetent to act for themselves.”).

4. 3 WILLIAM BLACKSTONE, COMMENTARIES *47; Himes, supra note 3, at 2.

5. Strausberg, supra note 2, at 2 (citing Fountein v. Ravenel, 58 U.S. (17 How.) 369, 390 (1854) (“The state, as sovereign, is the parens patriae.”)).

6. See, e.g., id. (citing Trs. of the Phila. Baptist Ass’n v. Hart’s Ex’rs, 17 U.S. (4 Wheat) 1 (1819) (allowing state to proceed as parens patriae where no person nor organization was competent to represent educational trust)).

7. See, e.g., Badger v. Badger, 224 S.W. 41, 44 (Mo. Ct. App. 1920) (“[T]he state, standing in relation of parens patriae, may provide for the comfort and promote the well-being
power beyond its common law origins. Over time, states increasingly deployed the power as a general tool to ensure public safety and combat threats to their citizens’ economic well-being.

No longer cabined to protecting the insane and infirm, contemporary state attorneys general employ parens patriae suits to pursue public concerns of all stripes. Attorneys general regularly pursue suits regarding environmental
pollution, 10 climate change,11 and public health;12 they seek damages from actors ranging from handgun manufacturers13 to predatory lenders.14 No longer confined to infants, idiots, and lunatics, these contemporary mass parens patriae suits often resemble a damages class action—albeit one brought on behalf of the public at large rather than a broad set of private litigants.15

10. See, e.g., Maine v. M/V Tamano, 357 F. Supp. 1097, 1100 (D. Me. 1973) (holding that Maine had standing to sue as parens patriae for oil spilled in Casco Bay); New Hampshire v. Dover, 891 A.2d 524, 529 (N.H. 2006) (holding New Hampshire had parens patriae standing to bring suit “against the manufacturers, distributors, and suppliers of gasoline additives” because “[t]he control and elimination of water pollution is a subject clearly within the scope of the State’s constitutional police power” (quoting Shirley v. Comm’n, 124 A.2d 189 (N.H. 1956)) (alteration in original) (internal quotation marks omitted)). Despite expansive parens patriae power, state action in this area is still barred to the extent the issue is preempted by federal law. See Dep’t of Envtl. Protection v. Jersey Cent. Power & Light Co., 351 A.2d 337, 342 (N.J. 1976).

11. See, e.g., Massachusetts v. EPA, 549 U.S. 497, 518 (2007) (noting that it was “of considerable relevance that the party seeking review” was a sovereign state, which entitled it to “special solicitude” in the court’s standing analysis); Georgia v. Tenn. Copper Co., 206 U.S. 230, 236 (1907) (noting that when suing under a quasi-sovereign interest, “the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain”).


15. Margaret H. Lemos, Aggregate Litigation Goes Public: Representative Suits by State Attorneys General, 126 HARV. L. REV. 486, 487 (2012) [hereinafter Aggregate Litigation Goes Public]. But see LG Display Co., Ltd. v. Madigan, 665 F.3d 768 (7th Cir. 2011) (pointing out that the “parens patriae suit [before the court] is not a class action” and thus finding the court lacked jurisdiction to hear the appeal).

The focus of this article is mass parens patriae claims for damages, as those present the most vexing agency costs. As such, the article does not speak to parens patriae actions that seek injunctive or declaratory relief.

While the parens patriae power has expanded, states must typically demonstrate at least a “quasi-sovereign interest” in the litigation. See Okla. ex rel. Johnson v. Cook, 304 U.S. 387,
Accordingly, when this article refers to *parens patriae* actions, it speaks only to those large-scale actions affecting the rights and interests of the public at large. Because of this, the article also uses the phrase “public aggregate litigation” as interchangeable with the term “*parens patriae* actions.”

**B. The Private Attorney General**

The similarities between public aggregate litigation and private damages class actions are immediately apparent. Both actions, for example, seek “to deter wrongful conduct by one or more defendants[] and to focus on injuries to a large set of state citizens.”

The parties affected are also similar. Like the named plaintiff in a damages class action, the state in a mass *parens patriae* case “adjudicate[s] the rights of individuals who play no direct role in the conduct of the case.” Other similarities are less apparent: while both public and private aggregate litigation present substantial agency costs, those costs are more obvious (and thus more frequently discussed) in the private litigation context. Agency costs are often veiled in the public context because the attorney general is an elected official, creating an illusion of public monitoring that is not possible in practice.

*Parens patriae* suits increasingly share another trait in common with damages class actions: private plaintiffs’ attorneys. Under the private attorney general doctrine, state courts may grant attorneys’ fees to a private attorney “who vindicates a right that: (1) benefits a large number of people; (2) requires private enforcement; and (3) is of societal importance.” Some states permit this

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396 (1938) (holding that to maintain a suit as *parens patriae*, a state “must show a direct interest of its own and not merely seek recovery for the benefit of individuals who are the real parties in interest”); see also Strausberg, *supra* note 2, at 1 (quoting Louisiana v. Texas, 176 U.S. 1, 16 (1900)) (“[T]he Supreme Court . . . found that a state *parens patriae* suit was not maintainable ‘in the vindication of the grievances of particular individuals.’”); cf. Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Bares, 458 U.S. 592, 607 (1982). (“[A] State has a quasi-sovereign interest in the health and well-being—both physical and economic—of its residents in general.”).


practice by statute; others allow courts to award fees on their own; others (though comparatively fewer) reject the practice altogether.

However authorized, the private attorney general doctrine is no novel development. The United States Supreme Court first used the phrase “private attorney general” over sixty-two years ago in *FCC v. National Broadcasting Co.*, and even then the practice was well established. It would not be for another two decades that the term gained traction in legal scholarship, however.

Some credit John Coffee’s examination of the distinction “between the ideological plaintiffs’ attorney and the fees-driven plaintiffs’ attorney” with driving scholarship on the issue. As William Rubenstein observed, Coffee’s distinction resonated simply because it “makes good sense,” and even the uninitiated will sense the difference between “the NAACP attorney, paid a small salary for her intense efforts . . . [and] the plaintiffs’ attorney subsisting on the fees she can draw from her portfolio of class action lawsuits.”

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21. Id.; see also, e.g., CAL. CIV. PROC. CODE § 1021.5 (West 2017) (“[A] court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest [where certain requirements are met].”); MINN. STAT. § 8.31 (2017) (“[A]ny person injured by a violation of any of the laws referred to [in this section] may bring a civil action and recover damages, together with costs and disbursements, including costs of investigation and reasonable attorney’s fees, and receive other equitable relief as determined by the court.” (emphasis added)).

22. Wooster, supra note 20, at 523.

23. Id.

24. 319 U.S. 239, 265 n.1 (1943) (Douglas, J., dissenting); see also Rubenstein, supra note 19, at 2130 n.2 (citing Nat’l Broad. Co., 319 U.S. at 265 n.1).

25. Ruubenstein, supra note 19, at 2134 & nn.26–28; see also John C. Coffee, *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 Md. L. REV. 215, 215–17 (1983) [hereinafter *Rescuing the Private Attorney General*] (noting that Judge Jerome Frank—who Coffee credits with coining the phrase “private attorney general”—“did not discover the infant private attorney general adrift in the bullrushes; the key institutions of the class action and contingent fee already were well established”).

26. Rubenstein, supra note 19, at 2135 (“What seems . . . surprising is the slow expansion of the private attorney general concept. The phrase appears but seven times in the legal literature of the 1940s, only another eleven times in the 1950s, and but seventy times during the entire 1960s. Finally, in the 1970s, use of the phrase skyrocketed: it appears 759 times in those ten years and its use increases steadily each decade to the present.” (internal citations omitted)).

27. Id. at 2136.

28. Id.

29. Id. at 2136–37.
fanned the flames of a growing body of scholarship on the use of private attorneys general throughout the late twentieth century.30

The growing relevance of private attorneys general is not merely academic. The 1990s saw private attorneys general deployed in parens patriae litigation against tobacco companies, where a majority of state attorneys general nationwide hired private counsel on a contingent-fee basis rather than pursue claims themselves.31 Reliance on private attorneys to vindicate the public interest against resource-rich defendants shows no sign of relenting today. Attorneys general around the country continue to employ private counsel in scores of parens patriae suits involving myriad subject matter.32

And who could blame them? State attorneys general face significant time and resource constraints.33 Staffing limitations can force an attorney general to pass up a resource-intensive investigation, and limited financial resources further dictate the matters an office can pursue.34 Together, these limitations demand attorneys general pursue cases selectively.

30. See, e.g., Jeremy A. Rabkin, The Secret Life of the Private Attorney General, 61 L. & CONTEMP. PROBS. 179, 180 (1998) (noting that the use of private attorneys general flourished in the 1970s and that “[a]fter its decade in the sun . . . the ‘private attorney general’ began to wilt”); Rubenstein, supra note 19, at 2136 (collecting references to the phrase “private attorney general” in case law and law reviews, and finding its use a total of 70 times in the 1960s, 759 times in the 1970s, 1554 times in the 1980s, 2523 times in the 1990s, and 1535 times in the first 5 years of the 21st century).


32. See generally supra notes 10–14 and accompanying text.

33. See Aggregate Litigation Goes Public, supra note 15, at 523 (“[O]ne might reasonably ask whether states have access to the resources necessary to vigorously prosecute an aggregate action against a powerful and highly motivated defendant.”). Lemos quotes Iowa Attorney General Tom Miller, stating that states can be “outgunned by large corporations.” Id. at 523 & n.154.

34. Ronald Chester, The Lawyer as Charitable Fiduciary: Public Trust or Private Gain?, 25 Pac. L.J. 1353, 1370 n.112 (1994) (“[State] attorneys general are likely to be highly selective in pursuing even basic . . . claims due to limited resources.”); Calvin Massey, State Standing After Massachusetts v. EPA, 34 ADMIN. & REG. L. NEWS 7, 8 (2009) (“[B]ecause state attorneys general have limited resources . . . only the most prominent or pressing of public interests will be asserted by states as litigants . . . .”); see also Mark Totten, Credit Reform and the States: The Vital Role of Attorneys General after Dodd-Frank, 99 IOWA L. REV. 115, 154 & n.270 (2013) (“Staffing of consumer protection divisions in the offices of the Attorney General varies widely and can range from one attorney with additional responsibilities in other areas to well over a dozen attorneys involved exclusively in consumer protection enforcement.” (quoting STATE ATTORNEYS GENERAL POWER AND RESPONSIBILITIES 238 (Emily Myers & Lynne Ross eds., 2d ed. 2007))).
The states’ limited resources contrast those of the law firms available to many defendants a state might sue. By hiring an outside firm on a contingency-fee basis, the state can pursue claims that might otherwise be foreclosed due to resource constraints. This has intuitive appeal in that it allows the state to vindicate the public interest where it otherwise could not. No wonder some observers see this model as “essentially a no-lose situation for government plaintiffs.”

Electoral pressures can also help explain the reliance on outside counsel to pursue parens patriae litigation. Most state attorneys general are elected officials, which, one expects, should sway them to prioritize claims that resonate with public. This expectation is met in practice: attorneys general often tout the dollar value of settlements and the amount of money returned to taxpayers.

35. See Aggregate Litigation Goes Public, supra note 15, at 524 (“States can rarely keep pace with such private-sector spending. That is why attorneys general sometimes hire private counsel to litigate state cases on a contingency basis.”).


38. See Aggregate Litigation Goes Public, supra note 15, at 520.

39. Id. at 498. “Attorneys general publicize their litigation successes, but it is difficult to find information on failures—investigations that come up empty, or cases that are dropped or dismissed.” Id. at 520–21.

settlements represent money returned to the public coffers or to aggrieved consumers. The significant limitations on human and financial resources, coupled with a need to satisfy the electorate, help explain the frequent reliance on private counsel to pursue parens patriae litigation.

II. AGENCY COSTS IN AGGREGATE LITIGATION

Despite the above-noted advantages, no form of aggregate litigation is without baggage. Litigating on behalf of any class, public or private, entails significant agency costs\(^41\)—that is, the costs a principal incurs to ensure his agent remains loyal and the costs incurred from agent disloyalty that is not worth preventing.\(^42\) Attorneys operate within this principal-agent framework.\(^43\) Thus as agency costs climb it eventually becomes “simpler to view attorneys as independent actors” rather than as agents to the client, “even though they remain ultimately accountable to their clients.”\(^44\) Agency costs in the attorney-client

\(^41\) See Myriam Gilles & Gary B. Friedman, Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers, 155 U. PA. L. REV. 103, 104 & n.3 (2006) (noting that the aggregate litigation agency costs suggested by Professor Coffee “have become canonical,” and further arguing that those insights are only “half right”); see also Lemos, supra note 15, at 513 (noting that “conflicts of interest are all but unavoidable in public aggregate litigation”).


Professor Coffee’s explanation of agency costs is significantly more nuanced than the explanation here, but it centers on the same underlying concept. See John C. Coffee, The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. CHI. L. REV. 877, 883 (1987) [hereinafter The Regulation of Entrepreneurial Litigation] (“[A]gency costs . . . consist of (1) the costs of monitoring the agent, (2) the costs the agent incurs to advertise or guarantee his fidelity (‘bonding’ costs), and (3) the residual costs of opportunistic behavior that is not cost-efficient to prevent.”).

\(^43\) See, e.g., Deborah A. DeMott, The Lawyer as Agent, 67 FORDHAM L. REV. 301, 301 (1998) (“[T]he lawyer-client relationship is a commonsensical illustration of agency. . . . [B]ut lawyers perform functions that distinguish them from other agents.”); Grace M. Giesel, Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship, 86 NEB. L. REV. 346, 348 (2007); Carol A. McCoy, An Attorney’s Implied Authority to Bind His Client’s Interests and Waive His Client’s Rights, 3 J. LEGAL PROF. 137, 137 (1978).

\(^44\) Understanding the Plaintiff’s Attorney, supra note 42, at 679–80 n.30.
relationship arise from various sources, and the relative costs associated with each source can vary dramatically. While some costs may be minimal, they should not be viewed as mere “weak links in the chain”; collectively these costs can “derail” aggregate litigation from achieving its ultimate goal.

As shown in Part I, private attorneys general are a common feature of mass parens patriae actions, and their use brings real benefits. It also brings serious agency costs. This part examines the agency costs in both public and private aggregate litigation and shows that agency costs are often highest when private attorneys general are employed in public aggregate litigation.

Certain agency costs are inherent to the attorney-client relationship. Take monitoring costs for example: an individual client must take steps, however minor, to ensure that his attorney pursues his interests. Luckily for most clients, monitoring costs in simple matters should be relatively low. Conflicts of interest present another source of agency costs that is perpetually lurking in the attorney-client relationship. Conflicts reduce the likelihood that an attorney will act faithfully in his client’s best interest. Clients and attorneys alike must take care to eliminate or minimize this source of agency costs to maximize the effectiveness of the representation.

These examples are admittedly reductive. They are meant only to demonstrate that the very nature of the attorney-client relationship carries varied and ever-present costs. Aggregate litigation, however, presents unique agency costs, and magnifies the costs inherent to the attorney-client relationship. Margaret Lemos offers an excellent overview of those costs in the sphere of aggregate litigation and particularly parens patriae claims. She identifies the

45. Jensen and Meckling offer a formulation of agency costs that demonstrates this potential variance. They posit that agency costs are the sum of “(1) the monitoring [costs] by the principal; (2) the bonding expenditures by the agent; and (3) the residual loss”—that is, the “dollar [value] of the reduction in welfare experienced by the principal” on account of the agent and client’s divergent interests. Jensen & Meckling, supra note 42, at 308.

46. Julie Rubin, Auctioning Class Actions: Turning the Tables on Plaintiffs’ Lawyers’ Abuse or Stripping the Plaintiff Wizards of Their Curtain, 52 BUS. LAW. 1441, 1446 (1997).

47. In fact, there are at least some agency costs inherent to any principal-agent relationship. See Jensen & Meckling, supra note 42, at 308 (“[I]t is generally impossible for the principal or the agent at zero cost to ensure that the agent will make optimal decisions from the principal’s viewpoint.”).

48. Ensuring attorney loyalty is a key purpose for monitoring. For a review of loyalty issues in the attorney-client relationship, see Eli Wald, Loyalty in Limbo: The Peculiar Case of Attorneys’ Loyalty to Clients, 40 ST. MARY’S L.J. 909, 966 (2009) (examining the competing definitions of attorney loyalty and finding that attorneys engage in a “‘limited agency,’ which requires serving constituencies other than clients and striking a balance between loyalty to clients and loyalties to the legal system and the public”).

49. See, e.g., When Smoke Gets in Your Eyes, supra note 31, at 243 (2001) (“Conflicts of interest are as inevitable as death and taxes.”).
lack of effective monitoring and control over attorneys, conflicts of interest, asymmetry of resources, and inadequate settlements as notable agency costs in aggregate litigation.\footnote{See Aggregate Litigation Goes Public, supra note 15, at 512–30; see also Howard M. Erichson, Aggregation as Disempowerment: Red Flags in Class Action Settlements, 92 NOTRE DAME L. REV. 859, 863 (2016) (“The interests of defendants and of class action lawyers line up in important ways that do not match the interests of the class members.”). But see Gilles & Friedman, supra note 41, at 104 (arguing that “the so-called ‘agency cost’ problem is mostly a mirage.”).} This section focuses on only the most significant sources of agency costs in the context of any form of aggregate litigation: (1) monitoring class counsel; (2) inadequate settlements; and (3) other conflicts of interest and risks for abuse.

A. Monitoring Costs

Some agency costs in aggregate litigation are obvious: class members, for example “usually have very little capacity to monitor their agents.”\footnote{John C. Coffee, Symposium, Rethinking the Class Action: A Policy Primer on Reform, 62 Ind. L.J. 625, 629 (1987) [hereinafter Rethinking the Class Action].} Monitoring can be a costly undertaking for even one client in a complex matter;\footnote{See Jensen & Meckling, supra note 42 (reviewing monitoring costs in agency relationships); see also Jonathan R. Macey & Geoffrey P. Miller, Reflections on Professional Responsibility in a Regulatory State, 63 GEO. WASH. L. REV. 1105, 1109 (1995) (“Of course . . . monitoring and bonding is not costless.”).} they can explode in the context of aggregate litigation, where class counsel may be geographically distant—out of state or across the country—and unlikely to heed the direction of even a nearby class member.

These monitoring costs increase when aggregated plaintiffs act rationally. Even where plaintiffs have the capacity to monitor counsel effectively, a rational plaintiff will nevertheless typically forego that monitoring. In traditional litigation, the client has ample incentive—and a genuine opportunity—to monitor his or her attorney. Chief among the incentives for an individual client to monitor is the stakes: a client might stand to gain or lose substantially from the outcome of litigation. After all, the individual litigant enjoys or bears the entirety of a judgment or settlement.\footnote{Lemos explains that while the attorney stands to benefit from successful litigation, “the client’s stake is higher—often significantly so.” See Aggregate Litigation Goes Public, supra note 15, at 518 & n.137 (“A rational plaintiff would not opt to sue unless she predicted a net gain from the litigation—that is, that the expected recovery would be higher than the expected costs, including attorneys’ fees.”).} These stakes give the client a powerful incentive to monitor his or her attorney. This is not the case in aggregate litigation, where aggregation may be premised on the fact that any single member of the plaintiff class has claims that are “comparatively small [relative to] the
entire enterprise.” These comparatively small stakes deter clients from keeping an eye on class counsel.

Even if the comparatively small stakes of aggregate litigation do not deter clients from monitoring counsel, the difficulty of coordination among class members likely will. As the size of a class balloons, so too will the difficulty in coordination among members. Often there are simply “too many members to coordinate monitoring efforts”, it thus becomes “meaningless to speak of the discipline of clients monitoring attorneys when ‘the clients’ number in the thousands.” Geographically diffuse classes create collective-action problems for aggregated litigants. These problems would be present even if individual members’ stakes were higher, but the typically low stakes faced by any single plaintiff offer little incentive to overcome geographic distance or other barriers to coordination.

Further dis-incentivizing effective monitoring is the relative powerlessness of any individual class member to direct aggregate litigation. In the traditional attorney-client relationship, the client wields a powerful tool: control of the employment relationship. The traditional client can direct his attorney to pursue a desired course of action or, in more dire circumstance, fire his attorney if unhappy with the representation. The same cannot be said of aggregate litigation, where “individual class members cannot make a credible threat to fire the

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54. Michael D. Sant’Ambrogio & Adam S. Zimmerman, The Agency Class Action, 112 Colum. L. Rev. 1992, 2040 (2012); see also Brunet, supra note 17, at 1929 (“The small stakes client is in no position to knowledgeably monitor the quality of the class attorney’s work. The client lacks both the incentive and the information to effectively monitor. This monitoring problem taints proposed settlements [and] proposed attorneys fees . . . .”); Aggregate Litigation Goes Public, supra note 15, at 519 (arguing that unlike individual litigation, “the attorney’s stake (usually fifteen to thirty percent of the overall class recovery) vastly outweighs the expected recovery of any individual class member, sharply reducing the client’s incentive to monitor her attorney” (internal footnotes omitted)); Christopher R. Leslie, The Significance of Silence: Collective Action Problems and Class Action Settlements, 59 Fla. L. Rev. 71, 81 (2007) (“[B]ecause some class action litigation is premised on the need to aggregate claims that are too small to litigate individually, no class member may have enough at stake to expend personal resources on monitoring the class counsel.”).

55. Leslie, supra note 54, at 81.

56. Judith Resnik, Litigating and Settling Class Actions: The Prerequisites of Entry and Exit, 30 U.C. Davis L. Rev. 835, 854 (1997); cf. Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2547 (2011). While Dukes overruled the Ninth Circuit’s decision to uphold class certification of a class of roughly 1.5 million members, the case demonstrates the potentially massive scale of contemporary class actions. Id.

attorney if they are displeased with his conduct. This lack of control further deters rational class members from monitoring counsel; even when a member of the class monitors counsel and finds his performance lacking, that individual member is likely powerless to take impactful action. Indeed, even a class’s representative plaintiffs fare little better. “[T]he institutional arrangements in the class action are such that for many questions the lawyer has no greater responsibility to the representative plaintiff than to any other member of the class.”

The aggregated plaintiffs in mass parens patriae litigation are not spared from these problems. They are, however, equally ill-equipped to deal with them. Like private class members, a member of the represented public lacks any serious, direct control over the attorney general: not only is the public class massive, the nature of the relationship between the public and the attorney general does not invite control from individual members of the public. Considering the broad discretion typically enjoyed by attorneys general in settling mass parens patriae claims, individuals arguably have even less power to direct the attorney general than class counsel in traditional class actions.

Members of the public also lack adequate incentives to monitor. Like the private class member, any one member of public aggregate litigation has relatively little at stake. Indeed, most members of the public will likely be

59. See id.
60. Kenneth W. Dam, Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest, 4 J. LEGAL STUD. 47, 58 (1975).
61. See Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1386 (2000) (noting in the private class-action context that “the very fact that the plaintiffs are numerous puts them at a disadvantage”); Aggregate Litigation Goes Public, supra note 15, at 519 (“If anything, [the] gloomy picture of client monitoring gets even darker when one moves to the public sphere.”). But see Brunet, supra note 17, at 1931 (arguing that “[a]t a visceral level, the agency cost problem is improved by a parens patriae action . . . [because] those who administer the state attorneys general office would be capable of monitoring those counsel assigned to the action”).
62. Cf., e.g., Goldmark v. McKenna, 259 P.3d 1095, 1102 (Wash. 2011) (noting state attorney general’s typical discretion in representing state agencies). For examples of state attorney general discretion in another area of the law, see generally Neal Devins & Saikrishna Bangalore Prakash, Fifty States, Fifty Attorneys General, and Fifty Approaches to Duty To Defend, 124 YALE L. J. 2100, 2105–10 (2015).
unaware any litigation is occurring in the first place. With little to gain or lose, an individual member of the public is unlikely to monitor the agent in the context of any single action.

Moreover, class members in public aggregate litigation face a collective-action problem of their own. When the state brings a claim as parens patriae, the “class” is almost uniquely massive. Individual members of the public affected by the litigation therefore lack the means to coordinate their actions to influence the state’s handling of the matter. In any event, the public wields only indirect control—through elections and political pressure—over the attorney general’s service.

At first glance, these indirect means of control might appear to mitigate these public monitoring costs. Electoral pressures should influence an attorney general’s decisions, but the notion that indirect public control will determine direction of litigation, is likely wishful thinking.64 Elections are unlikely to curb the public collective action problem for two reasons: first, elections occur at predetermined intervals. Any single unsatisfied member of the public lacks a credible threat of failing to reelect an attorney general when that election might not occur for another four years; such distant checks are unlikely to sway decisions regarding the conduct of one case among the hundreds a state attorney general pursues,65 from civil rights to general matters of consumer protection.66

64. See Resnik, supra note 56, at 854.

65. While four years is not an inordinately long term limit, one expects attorneys general with a significant portion of their term remaining to be less influenced by public reaction to a single decision. Compare The Federalist No. 63 (James Madison) (arguing that the Senate’s six-year terms offer “sufficient permanency to provide for . . . a defence to the people against their own temporary errors and delusions”), with The Federalist No. 52 (James Madison) (arguing that House members have “immediate dependence on, and an intimate sympathy with, the people” due to their two-year terms).

This phenomenon apparently applies to members of the judicial branch as well. See Jed Handelsman Shugerman, The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law, 98 Geo. L. J. 1349, 1352–53 (2010) (finding that “[t]he studies on term length conclude . . . that when judges have less time remaining on their terms, they become more responsive to public opinion” and noting that “[t]he political consequences of a decision near election time would be like ignoring a crocodile in your bathtub” (internal quotation marks omitted)).

66. These actions can be relatively pointed, see, e.g., A.G. Schneiderman Announces Agreement to Dismantle School to Prison Pipeline in Albany Schools, ATT’Y GEN. ERIC T. SCHNEIDERMAN (Dec. 16, 2015), https://ag.ny.gov/press-release/ag-schneiderman-announces-agreement-dismantle-school-prison-pipeline-albany-schools; Complaint at 2, W. Va. ex rel. McGraw v. Comcast Corp., No. 09-C-130H (W. Va. Cir. Ct. 2009) (filing suit against Comcast for alleged illegal tying arising from the company’s requirement that subscribers rent cable boxes from Comcast), or they may take the form of public service announcements, see, e.g.,
It is unlikely that any significant number of voters will cast a ballot based on the conduct of a single *parens patriae* case. As Lemos correctly notes, “[v]oting can hardly operate as a mechanism for ‘client’ control if citizens do not use their votes that way.” The second reason elections are unlikely to influence *parens patriae* conduct is simply a matter of scale. The interested or injured members of even the most massive public aggregate litigation are unlikely to comprise a significant proportion of the electorate. In light of this, “it is a mistake to assume that periodic elections can serve as proxies for client monitoring and control in the individual case.”

B. Inadequate Settlements and Self-Serving Behavior

Conflicts of interest pose agency costs in aggregate and traditional litigation alike. They are, however, especially daunting in aggregate litigation given the inherently misaligned incentives between class counsel and class members. Contingency-fee schemes create much of this incentive misalignment, often to the clients’ detriment. The class attorney typically plays “two, often conflicting, roles: [t]hey serve as both financiers and agents.” Thus while

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67. See *Aggregate Litigation Goes Public*, supra note 15, at 521 (observing that attorneys general pursue activities “from criminal law enforcement to legislative lobbying to constitutional litigation and beyond. . . . Citizens may base their votes, and their campaign contributions, on any of those myriad activities—or on other factors unrelated to job performance.”).

68. *Aggregate Litigation Goes Public*, supra note 15, at 521. But see Farmer, supra note 9, at 404–05 (acknowledging *parens patriae* actions lack some of the protections of Fed. R. Civ. P. 23 but asserting that “[t]his problem is mitigated because State Attorneys General are elected in most states, thus they are subject to the control of the very consumer-voters whom they represent in *parens patriae* actions”).

69. See Resnik, supra note 56, at 854.


71. See infra Section III(B)(1); see also Burch, supra note 63, at 1291 (noting that “contingent fees spawn nearly all the quintessential agency problems in aggregate litigation”); Katherine Ikeda, Note, *Silencing the Objectors*, 15 GEO. J. LEGAL ETHICS 177, 190 (2001) (“[C]lass counsel can use the cloak of a settlement class action to indulge in self-interested behavior and generate fees for themselves without any effective monitoring by class members who have not been apprised of the pendency of the action.” (internal quotation marks omitted)).

72. Burch, supra note 63, at 1275.
individual class members are interested in maximizing their recovery,\footnote{73}{See, e.g., Aggregate Litigation Goes Public, supra note 15, at 512 (discussing “class members’ interest in maximizing their recoveries” and how that interest diverges in important ways from counsel’s interest in maximizing fees).} class counsel has an interest in maximizing its fee.\footnote{74}{Id.; see also Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 45 (1991) (noting, for example, “where the attorney earns a percentage of the judgment, the attorney has an incentive to settle early at a relatively low figure in order to maximize her profit”).}

The concern with inadequate settlements and self-serving behavior is threefold. First, counsel has an incentive to settle early, even if that settlement will be inadequate. While a greater settlement will lead to greater total fees for counsel,\footnote{75}{See, e.g., Burch, supra note 63, at 1285 (explaining that the strongest predictor of attorney fees is the size of the award in aggregate litigation).} class counsel can maximize their return on investment by settling early. Counsel is therefore likely to “ settle . . . on terms that fully informed clients would not accept” to maximize the return on their time invested.\footnote{76}{Aggregate Litigation Goes Public, supra note 15, at 525 (citing Rethinking the Class Action, supra note 51, at 633).} This tale is so familiar that John Coffee dubbed it “[t]he classic agency cost problem”\footnote{77}{See The Regulation of Entrepreneurial Litigation, supra note 42, at 883; see also Burch, supra note 63, at 1293 (“If a defendant offers to settle a case for a nominal value soon after receiving a complaint, the plaintiff’s attorney might prefer to accept the offer because she would receive her fee and then be free to litigate other cases, even if further work on the case might yield a marginally higher value for her client.”).} and Judge Friendly noted in 1964 that “attorneys have every incentive to accept a settlement that runs into high six figures or more regardless of how strong the claims for much larger amounts may be . . . a juicy bird in the hand is worth more than the vision of a much larger one in the bush.”\footnote{78}{Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964), quoted in Hay & Rosenberg, supra note 61, at 1377 n.1.} Many see “an image of the plaintiffs’ attorney as a self-interested fee-maximizer[;]”\footnote{79}{Charlotte S. Alexander, Would an Opt In Requirement Fix the Class Action Settlement? Evidence from the Fair Labor Standards Act, 80 Miss. L.J. 443, 444 (2010).} academics have long observed “that the single most salient characteristic of class and derivative litigation is the existence of ‘entrepreneurial’ plaintiffs’ attorneys.”\footnote{80}{Macey & Miller, supra note 74, at 7.}

Second, there is reason for concern over collusive tactics at settlement. Plaintiffs’ firms—particularly repeat players—stand to benefit by streamlining the litigation process (and thus maximize return on investment). To do so, repeat players may consider both past and future interactions when negotiating a
settlement. Because conducting aggregate litigation is so expensive, attorneys may opt to streamline the process even at expense of adequate representation for plaintiffs. Elizabeth Chamblee Burch highlights this concern in the private context by pointing to asbestos litigation, which in one instance featured “a complaint, answer, joint motion for conditional class certification, and proposed settlement all being filed within a single day.”  

Efficient lawyering alone cannot account for such a pace.

Settlement tactics can even take a coercive turn, pitting aggregated plaintiffs against one another. For example, as Burch points out, the use of “most favored nation” clauses in litigation deters opt-outts from settlement and guarantees that later-settling members will not receive a better deal.  

Other tactics are more striking: Burch notes that in Johnson v. Nextel Communications, Inc., over five hundred plaintiffs retained a law firm to sue Nextel for employment discrimination; the firm instead entered a dispute resolution agreement that included two million dollars in payments to the firm, if it could convince its clients to abandon their claims and enter into a mediation or arbitration agreement. Under the agreement, the firm was also slated to receive an additional two million dollars in consulting fees from Nextel for two years following the settlement.

While a judge must review the settlement in a class action, that protection can be absent outside of Rule 23 cases and in state courts.

Third, both public and private aggregate litigation feature the potential misuse of settlement proceeds. Concerns over self-serving, inadequate settlements are largely mitigated in the traditional mass parens patriae context where no private attorney general is used. Government attorneys, after all, lack a profit motive and thus should be driven primarily by a desire to vindicate the public interest. An assistant attorney general who is paid a salary lacks the incentive private class attorneys face to settle early and maximize his profit, though he is constrained by time and other resource limitations.

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81. See Burch, supra note 63, at 1294 (citing Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 601 (1997)).

82. Id. at 1296; see generally Kathryn E. Spier, The Use of “Most Favored Nation” Clauses in Settlement of Litigation, 34 RAND J. ECON. 78 (2003) (discussing the benefits and drawbacks of most favored nation clauses).

83. Burch, supra note 63, at 1299 (citing Johnson v. Nextel Commc’ns., Inc., 660 F.3d 131, 134–35 (2d Cir. 2011)).

84. Id. (citing Johnson v. Nextel Commc’ns., Inc., 660 F.3d 131, 134–35 (2d Cir. 2011)).

85. Of course, assistant attorneys general face time and resource constraints of their own. See, e.g., Totten, supra note 34, at 154 n.270 (citing STATE ATTORNEYS GENERAL POWER AND RESPONSIBILITIES 238 (Emily Myers & Lynne Ross eds., 2d ed. 2007)).
Many expect the harmful costs associated with aggregate litigation to disappear when conducted by government attorneys. That expectation may not reflect the full reality of public aggregate litigation. Rather, self-serving behavior in parens patriae settlements can take a different shape. The prevalent use of cy pres settlements in parens patriae litigation illustrates this. With cy pres settlements, compensation is not directed to aggrieved members of the public. Rather, settlement funds are directed to a stand-in cause that represents the plaintiffs as near as possible; in practice, cy pres settlements typically end up in the hands of charities. Sometimes, however, they are directed to projects that the attorney general finds politically expedient. As Lemos notes, “while many settlements stir doubts about whether class members are receiving adequate

86. For example, courts presume that the government represents citizens adequately. Aggregate Litigation Goes Public, supra note 15, at 509 (quoting 6 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 24.03(4)(a)(iv)(A) (3d ed. 2007)); see also Alabama v. U.S. Army Corps of Eng’rs, 229 F.R.D. 669, 673 (N.D. Ala. 2005) (“When a state sues in parens patriae, the law presumes the state will seek to achieve the objectives of all its citizens, . . . [and there is] a presumption that the state adequately represents [a citizen’s] interests.”); St. Louis v. Thomas, 162 F.R.D. 583, 588 (D. Minn. 1995) (noting the parens patriae doctrine “presumes that the government will adequately represent the general public interests of its citizenry”); Douglas Cty. Sch. Dist. 0001 v. Johanns, 698 F.Supp.2d 668, 673 (Neb. 2005) (addressing “the presumption that the government . . . adequately represent[s] all of its citizens”).


88. See Farmer, supra note 9, at 364 (“Expansive [cy pres] applications do not attempt to distribute . . . [parens patriae] damages to the injured consumers. Instead, the whole fund is put to another court-approved use determined at the discretion of the state Attorney General.”); see also Aggregate Litigation Goes Public, supra note 15, at 529 n.185 (“Most of the monetary damage awards recovered in state antitrust parens patriae cases usually help fund charitable causes” (quoting Stephen Calkins, An Enforcement Official’s Reflection on Antitrust Class Actions, 39 ARIZ. L. REV. 413, 436–37 (1997) (second alteration in original))).

89. Cy pres settlements played a similar role in carrying out the intent of a trustee: As courts and commentators have often observed, the doctrine of cy pres developed in the law of trusts to handle the situation in which the trust could no longer perfectly fulfill the charitable wishes of the grantor. Rather than reverting the funds to the persons who held the residual interest in the grantor’s estate, courts sometimes modified the terms of the trust to allow the trustee to use trust funds to accomplish a purpose closely aligned with the grantor’s wishes.


90. See, e.g., Aggregate Litigation Goes Public, supra note 15, at 529 & n.187 (listing examples).
compensation, cy pres settlements erase any ambiguity: direct compensation will not even be attempted.” Simply put, state attorneys general can, and often do, use cy pres settlements to make “political hay” from the recovery.

There is no shortage of examples to illustrate this claim. While cy pres settlements offer a valuable tool for state enforcers, it must be acknowledged that cy pres can facilitate self-serving behavior on the part of state attorneys general. For example, then-Attorney General of Michigan Mike Cox faced criticism for allocating $500,000 of proceeds “from a settlement with Countrywide Financial for predatory lending in the market for subprime mortgages to two local parks, one of which had been ‘championed by a top Republican donor.’” Washington State Attorney General Bob Ferguson touted the state’s part in a $21.5 million settlement with Standard & Poor’s in 2015 arising from the ratings agency’s misleading securities ratings leading up to the 2008 financial crisis. While the settlement was aimed at S&P’s role in rating failed subprime mortgages, over half of Washington’s share of the settlement proceeds—$3 million—made its way to county bar associations, a tribal health center, and a dispute resolution center.

Equally important, even the well-focused use of cy pres distributions demonstrates that compensation of aggrieved plaintiffs simply is not the goal of the typical mass parens patriae action. Washington Attorney General Ferguson’s settlement with Mattel and Fisher Price in a suit arising from the distribution and sale of children’s toys containing excessive amounts of lead resulted in a cy pres

91. Id. at 529; see also Rubenstein, supra note 19, at 2165 n.128 (citing Farmer, supra note 9, at 399–403) (noting that “some settlements in small claims cases have accorded 100 percent of the settlement to the cy pres distribution, leaving class members not even an opportunity to claim their small compensation”); Tidmarsh, supra note 89, at 771 (noting that where the parties agree to distribute the settlement fund away from victims, “the argument for cy pres is deterrence, pure and simple,” and that when used in such a manner, “[t]he argument for victim compensation does not support cy pres relief”).

92. Aggregation Litigation Goes Public, supra note 15, at 529.


95. Cy Pres Awards and Grants, supra note 87.
settlement as well. There, the cy pres awards went to the Washington Toxics Coalition and the Washington State Department of Health. Sensible enough. Yet the individual aggrieved members of the public received no compensation from such an award.

This is not to paint state attorneys general as underhanded or to suggest that they act without the public interest in mind. Rather, this is all to say that even without employing a private attorney general, the mass parens patriae action presents substantial agency costs. When the state attorney general utilizes private counsel on a contingency fee basis, however, these agency costs are reintroduced.

C. Other Potential Abuses

There is another drawback altogether unique to the private attorney general doctrine. The familiar tale features plaintiffs’ lawyers who scour the news media and public records looking for potential cases in which a state or its consumers have been harmed, [and] approach attorneys general. The attorneys general hire the private firms to do the necessary work, with the understanding that the firms will front most of


98. See Rescuing the Private Attorney General, supra note 25, at 243. Coffee notes that “it is possible to explain why and how the incentives for a private attorney general have become perversely misguided.” Id. There is potential for collusion—the attorney and the defendant may agree to a settlement that benefits both the defendant and the attorney at the expense of the plaintiff class. See id. (noting that an exclusively self-interested attorney would “prefer a $500,000 settlement out of which a $300,000 award of attorneys’ fees would be paid, to a $1,000,000 recovery out of which only a $200,000 fee would be paid,” even though “[t]o the attorney’s clients, the second alternative is four times more profitable”). The risk of collusion is increased by non-monetary settlements, which “allow the parties to create a counterfeit currency with which to inflate the value of the settlement in order to justify a substantial fee award without the defendant incurring any counterbalancing loss.” Id. at 243–44. Examples in private litigation include defendants agreeing to revise corporate bylaws or increase disclosure in lieu of paying damages. Id. at 244 & nn.70–71. In any event, these examples show that a self-interested private attorney general has a different set of incentives from the traditional government lawyer.
the cost of the investigation and the litigation. The firms take a fee . . . and the state takes the rest of any money won from the defendants.99

The threat of this system is clear. The stakes are massive and the public is often unsuspecting or uninterested. Private attorneys general, meanwhile, stand to be compensated enormously, even where suits settle quickly and do not compensate aggrieved members of the public.100 This threat rears its head in two ways: First, and unlikely, is the potential for surreptitious bribes to state attorneys general in order to secure the right to represent the public.101 Second, and more troubling because it appears to occur more frequently and openly, campaign contributions to state attorneys general can result in an apparent quid-pro-quo to allow a private attorney to represent the public in a parens patriae action.102

There are countless real-life examples of the latter concern in public litigation. An out-of-state law firm’s contributions of nearly $100,000 to candidates for New York State Comptroller (and subsequent appointment as class counsel in two cases where New York was the lead plaintiff)103 might raise an eyebrow. A Houston law firm’s contribution of $125,000 to the Mississippi Attorney General following the firm’s suit against Eli Lilly on behalf of the state (which generated $3.7 million in fees),104 however, looks like more than a concern for the well-being of another state’s consumers. “Presumably, [the] desire to fund good government could have been satisfied closer to home.”105 The examples go on and on.106


100. Michael L. Rustad & Thomas H. Koenig, Reforming Public Interest Tort Law to Redress Public Health Epidemics, 14 J. HEALTH CARE L. & POL’Y 331, 349 (2011) (“Contingency fee trial lawyers may receive multi-billion dollar payoffs, even if the parens patriae actions quickly settle, resulting in an extortionate payout of tens of thousands of dollars per hour.”).

101. See When Smoke Gets in Your Eyes, supra note 31, at 243 (noting that “[t]he allegation that Texas Attorney General Dan Morales demanded a one million dollar bribe from the private counsel seeking to represent Texas in the SAG tobacco litigation”).

102. See id. at 243 n.7 (citing McCormick v. United States, 500 U.S. 257 (1991)).

103. Id. at 244 n.10 (citing Kevin McCoy, Campaign Contributions or Conflicts of Interest, USA TODAY, Sept. 11, 2001, at 13). This example is the now-famous Cendant case. See In re Cendant Corp. Litig., 264 F.3d 201, 223 (3d Cir. 2001).

104. Lipton, supra note 99.

105. When Smoke Gets in Your Eyes, supra note 31, at 244.

106. See, e.g., Frequent Filers: Repeat Plaintiffs in Shareholder Litigation, U.S. CHAMBER OF COM., INST. FOR LEGAL REFORM, 8–9 (Sept. 2013) (examining securities class actions in Mississippi and finding that the top-contributing firms to the state Attorney General’s campaign enjoyed substantially more success in appointments as lead counsel);
It should come as no surprise that some have labeled the current landscape in many states “pay-to-play.”

The private attorney general doctrine clearly is ripe for abuse. Beyond concerns of illicit campaign donations and inadequate settlements, a broad normative concern looms over the use of private attorneys general, at least to the extent that private attorneys are the actors that spur state regulatory action along. Martin Redish had difficulty imagining “a system in which all police work is performed not by governmental employees but by private contractors, hired by


Louisiana is not the only state facing this issue. See Eric Lipton, A Bipartisan Push to Limit Lobbyists’ Sway Over Attorneys General, N.Y. TIMES (Dec. 26, 2014), http://www.nytimes.com/2014/12/27/us/bipartisan-effort-to-restrain-lobbyists-influence-of-attorneys-general.html (detailing legislation introduced in Missouri and Washington, as well as attorney requests that the ABA “change its national code of conduct to prohibit attorneys general from discussing continuing investigations or other official matters while participating in fundraising events at resort destinations, as they often now do”).


107. See When Smoke Gets in Your Eyes, supra note 31, at 245 (noting that “paying to play” is . . . the norm” where decisions over hiring counsel are left under the “direct control of elected officials”).
the government, who are paid by the arrest: the more arrests, the more money they receive.”

Yet that at least partly describes the current system of private attorneys general in mass *parens patriae* claims. In at least some cases, private attorneys play a role in shaping government regulation with a profit interest in mind. One should be wary of such a regime.

III. ATTEMPTED AND PROPOSED STATE SOLUTIONS

While the pitfalls of the private attorney general doctrine are troubling, they are not inevitable. The root of most agency costs is simple: misaligned incentives between private attorneys general and the public they represent. To minimize agency costs, states must proactively align the incentives of private counsel and the public. This part examines the various regimes—both implemented and proposed—seeking to do just that. It shows that both the current regulatory regime and the previously proposed alternatives fail to address the root of the problem.

The current approaches can be separated into two general categories. The first category is state regulatory attempts, which broadly seek to ensure oversight of the hiring of private attorneys general. The restrictions typically take the form of statutes, but also include state case law that could be readily codified. The second category takes the form of attorney compensation formulas. Rather than focus on oversight, compensation formulas seek to address the root of the problem by aligning the incentives between private counsel and the public they represent. Unfortunately, as this part will show, they fail to do so.

This part examines the various regulatory regimes states employ throughout the country. While in some cases a good start, these attempts fail for two reasons. First, each of the current and proposed regulations inadequately aligns the incentives of private attorneys with those of the public and they are unduly cumbersome to state attorneys general. Second, these regulations slow the process or tie the hands of state attorneys general without aligning incentives. While any one of these regulations may be helpful to curb agency costs in public aggregate litigation, they all fall short of solving the problem.

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109. Cf. Lipton, supra note 99 (describing, among other things, one plaintiff lawyer’s lobbying of a state attorney general to sue a nursing home the attorney general “had never heard of and [the attorney] had never set foot in,” and noting the attorney “later presented [the attorney general] with a proposed lawsuit that did not cite any specific complaints about care,” but rather focused on “staffing levels gleaned from records suggesting that residents were being mistreated there”).
A. Regulatory Regimes

Most states regulate the use of private attorneys general in one way or another. This is unsurprising “[b]ecause neither client control nor formulas seem adequate to minimize agency costs, there is obviously a strong case for regulation to fill this void.”110 Twenty-nine states regulate the use of private attorneys general in one way or another.111 Some restrict the use of private attorneys through judicial decisions while others adopt statutory schemes.

1. Hiring Restrictions

The most common state regulations on the use of private attorneys general are hiring restrictions. Here, state legislatures limit the ability of the attorney general to hire private counsel or limit the use of contingency contracts in general with an eye toward increased oversight and accountability. These restrictions typically require some unit of state government other than the attorney general to approve any contract hiring a private attorney general. Two approaches dominate here: executive approval and legislative approval of the hire. Neither approach controls the most vexing agency costs inherent to the private attorney general model.

In states requiring executive approval, the attorney general typically must first determine that hiring a private attorney on a contingency fee basis will be cost-effective and in the public interest.112 The attorney general must then receive approval from the governor or another subdivision of the executive. The height of this second hurdle varies from state to state, from mere approval by the governor to legislative approval of the contract.

110. Rethinking the Class Action, supra note 51, at 631.

111. See Letter from Lisa A. Rickard, President, U.S. Chamber Institute for Legal Reform to Deborah A. Garza, Chairwoman & Andrew J. Heimert, Executive Director & General Counsel, Antitrust Modernization Commission (Mar. 20, 2007) (citing John Beisner et al., Bounty Hunters on the Prowl: The Troubling Alliance of State Attorneys General and Plaintiffs’ Lawyers 9 (2005)).

112. States that impose this requirement include Arkansas, Idaho, Kentucky, Maryland, Minnesota, Nevada, North Carolina, and Tennessee. See id.; see also IDAHO CODE §§ 67-1406, 1409 (2017) (requiring the attorney general “determines that it is necessary or appropriate in the public interest” before hiring private counsel); N.C. GEN. STAT. § 147-17 (2017) (“The Governor shall give his approval only if the Attorney General has advised him . . . that it is impracticable for the Attorney General to render the legal services.”).

Some state statutes focus specifically on the approval of contingency-fee payments. See, e.g., TEX. GOV’T CODE ANN. § 2254.103(d)(3) (West 2015) (requiring the attorney general to submit to the Legislative Budget Board a finding that “the legal services cannot reasonably be obtained from attorneys in private practice under a contract providing only for the payment of hourly fees”). For a discussion of contingency-fee payments, see infra Section III(B)(1).
governor\textsuperscript{113} to an executive order,\textsuperscript{114} to requiring an executive board to approve the hiring.\textsuperscript{115}

Other states require legislative approval of private counsel hires for \textit{parens patriae} suits.\textsuperscript{116} Like executive approval, legislative participation adds a hurdle to hiring private counsel under the unsavory circumstances noted in Part II by introducing a more diffuse layer of political accountability to the process. States again vary in implementing legislative approval for private attorney contracts. Some states grant a legislative committee the opportunity to review the proposed hire, giving the legislature notice of the attorney general’s intentions.\textsuperscript{117} Others

\begin{quote}
See, e.g., Ark. Code Ann. § 25-16-702(b)(2) (2016) (“If, in the opinion of the Attorney General, it shall at any time be necessary to employ special counsel to prosecute any suit brought on behalf of the state or to defend a suit brought against any official, board, commission, or agency of the state, the Attorney General, with the approval of the Governor, may employ special counsel.”). Some states in this category have attempted to heighten these requirements. A bill died in the Arkansas legislature in 2013, which bill would have introduced extensive new oversight procedures, including a requirement that the attorney general file a written determination that hiring private counsel would be “both cost effective and in the public interest.” Ark. S. Journal, 98th Gen. Assemb., Reg. Sess. 3186 (2013). The bill would have also established a statutory cap on attorney fees that varied depending on the total recovery. Id. at 3186.

See, e.g., Ky. Rev. Stat. Ann. § 12.201(1) (LexisNexis 2017) (requiring the “approval of the governor” and, in contingency-fee contracts, requiring that the governor’s approval “be duly entered by executive order”).


See Beisner et al., supra note 111, at 9 (noting that Alabama, Arkansas, Florida, Kansas, Louisiana Mississippi, Texas, Vermont, and Wisconsin require some form of legislative approval over the hire of a private attorney general).

Admittedly, the use of a single committee rather than the full legislature to approve the hiring of a private attorney may seem insufficient. Consider, however, the deliberative pace of a full legislature. Whether a state should so restrain its attorney general from hiring private counsel by barring the attorney general from moving quickly is normatively questionable, however. After all, the private attorney general model stands to bring potentially significant benefits to the public. See supra notes 33–36 and accompanying text.

At least one state requires the approval of the governor and demands that the attorney general “first seek[] prior review by the Legislative Council” before hiring private counsel. Ark. Code Ann. § 25-16-702(b)(2). The Arkansas Legislative Council is a bicameral legislative committee comprised of twenty members from the Arkansas House of
allow a single legislative committee to propose changes to any hiring contract and subject the contract to public hearing and approval by the committee. Contingency-fee contracts in those states are thus void without that committee’s approval. A third group of states requires the attorney general to make a finding of necessity before hiring a private attorney general and provides a legislative committee with information to verify that claim. This offers greater potential hiring oversight than other regimes.

However, requiring legislative or executive approval poses some problems of its own. Vesting a single committee with the power to hold up private hires for parens patriae cases is ill advised; state legislatures are often beset with the same polarization between parties that is seen on the national level, paving the


Before entering into a contingent fee contract for legal services in which the estimated amount that may be recovered exceeds $100,000, a state governmental entity that proposes to enter into the contract in its own name or in the name of the state must also notify the Legislative Budget Board that the entity proposes to enter into the contract, send the board copies of the proposed contract, and send the board information demonstrating that the conditions required by [the statute] exist. If the state governmental entity finds . . . that the state governmental entity does not have appropriated funds available to pay the estimated amounts required under a contract for the legal services providing only for the payment of hourly fees, the state governmental entity may not enter into the proposed contract in its own name or in the name of the state unless the Legislative Budget Board finds that the state governmental entity’s finding with regard to available appropriated funds is correct.

Id.

120. Compare TEX. GOV’T CODE ANN. § 2254.103(d)(3) (West 2016) (requiring verification of need with the Legislative Budget Bureau), with ARK. CODE ANN. § 25-16-702 (West 2016) (requiring only that the attorney general arrives at the conclusion that the contract is necessary).

Alternatively, some states prohibit the attorney general from pursuing parens patriae actions without prior legislative approval. See Wisconsin v. Oak Creek, 605 N.W.2d 526, 533 (Wis. 2000) (“[T]he attorney general is devoid of the inherent power to initiate and prosecute litigation intended to protect or promote the interests of the state or its citizens and cannot act for the state as parens patriae.” (quoting In re Estate of Sharp, 217 N.W. 2d 258 (1974))). That remedy is too strong for the problems discussed in this article.

way for gridlock to hamper the ability of attorneys general utilize private firms even where it is truly warranted. A single committee dominated by one party might see it advantageous to make “political hay” of their own by cutting off the ability of another party’s attorney general to utilize private firms. Meanwhile, none of these restrictions align the incentives of the newly hired private attorney with those of the public. Increased oversight may deter graft on the “front end”—i.e., the hiring process, but these restrictions fail to control agency costs in any meaningful sense at the “back end”—i.e., during the litigation and particularly at settlement.

Similarly, while executive approval requirements add an additional layer of political accountability to the decision to hire private counsel for public aggregate litigation, they fail to address the root problem. Executive approval requirements curb front-end problems like the risk of an attorney general awarding a contract inappropriately to a significant campaign donor.\textsuperscript{122} They do nothing, however, to align the incentives of the attorney with the interests of the public once the litigation begins. In executive- and legislative-approval states, the private attorney general still has an incentive to settle early, leaving the attorney well-paid and the defendant undeterred.

2. Funding Restrictions

States also limit the use of private attorneys general through funding restrictions. These restrictions are typically structural: in states that direct public litigation awards to the state’s general funds, any expenditure from those funds—including the payment of a contingency fee to a private attorney—is treated as an appropriation requiring legislative approval.\textsuperscript{123} This again gives the legislature

\begin{itemize}
\item Requiring approval of the governor—who enjoys comparatively less political “upside” from the hire—should reduce potential abuses when hiring private counsel to pursue \textit{parens patriae} claims. Of course, the governor and the attorney general are members of the same executive branch, and some state attorneys general serve at the pleasure of the governor. See DAVID ORENTLICHER, TWO PRESIDENTS ARE BETTER THAN ONE: THE CASE FOR A BIPARTISAN EXECUTIVE BRANCH 80 (2013) (noting that the “state governments . . . typically split executive authority among multiple elected officials, including governors [and] attorneys general”).
\item See Meredith v. Ieyoub, 700 So. 2d 478, 481 (La. 1997) (“[T]he legislature has control over the finances of the state . . . [and] no other branch of government . . . may exercise the legislative function.” (quoting La. Ass’n of Educators v. Edwards, 521 So. 2d 390, 394 (La. 1988))); \textit{id.} at 482 (“Paying outside attorneys to prosecute legal claims on behalf of the state is a financial matter. As our prior jurisprudence indicates, the power over finances must
control over the use of the private attorney general, an undesirable result.\(^\text{124}\) Legislatures move slowly by design and are (hopefully) diligent and methodical when dealing with the state’s budget. This system therefore risks forcing the attorney general to forego worthy mass \textit{parens patriae} claims. It could also deter private counsel from participating for fear that payment could be bound up in state politics.

A more common approach is to cap the hourly rate a private attorney may earn through the litigation. This approach shows promise as a cost-control measure in theory.\(^\text{125}\) Rate caps, however, carry their own drawbacks. If an attorney’s hourly earnings are capped at a given rate—say $1,000 per hour—the attorney has an incentive to delay settlement and inflate the hours billed on a matter, even where the public interest trends toward a settlement. Ideally, detailed reporting requirements and genuine oversight from the state government can deter billing inflation.\(^\text{126}\) On the whole, rate caps are an incomplete solution for three reasons: First, if the concern is over the state attorney general inappropriately hiring private counsel to pursue a mass \textit{parens patriae} claim, it is little solace that the same attorney general is the party responsible for monitoring hours billed. Second, rate caps are simply inefficient. If not coupled with detailed reporting requirements, they encourage hour inflation and thus fail to align the incentives of the private attorney with the interests of the public. Finally, rate caps do not address the problem of collusive settlements.

3. Contribution Restrictions

Some proposed solutions to the problems posed by the private attorney general model are decidedly more straightforward. Nine states bar attorneys from making political contributions to “secure government engagement.”\(^\text{127}\) Two other states expressly adopt the ABA’s Model Rule of Professional Responsibility 7.6.\(^\text{128}\) The model rule is simple in its design. It states: “A lawyer or law firm shall not accept a government legal engagement or an appointment be expressly granted by the constitution to another branch of government or else that power remains with the Legislature.”).

\(^\text{124}\) See supra note 117 (discussing the measured and deliberative process of legislatures).
\(^\text{125}\) See Beisner et al., supra note 111, at 9.
\(^\text{126}\) See \textsc{Colo. Rev. Stat. Ann.} § 13-17-304(1)(a)(III) (West 2015). Colorado caps a private attorney general’s potential hourly earnings at $1,000 per hour when working under a contingency arrangement. When coupled with detailed reporting requirements, this may curb some self-serving behavior.
\(^\text{127}\) These states are: Delaware, Idaho, New York, New Jersey, New York, Ohio, South Carolina, Utah, and West Virginia. See Beisner et al., supra note 111, at 9.
\(^\text{128}\) Id. \& n.17.
by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.”129 Adopting this rule would be a good first step toward eliminating the appearance of impropriety in private attorney general contracts.

With that said, the model rule alone has the same failings as the previous regulations noted—it does little to manage the agency costs inherent to the private attorney general system. It will do nothing to prevent “sell out” settlements or many of those other agency costs addressed in this article.130 While helpful, this restriction would be more effective if coupled with the auction model described in Part IV below.

129. MODEL RULES OF PROF’L CONDUCT r. 7.6 (AM. BAR ASS’N 2013).
130. See also supra notes 75–84 and accompanying text. States would also do well to avoid tunnel vision on regulations that hinder the ability of the state attorney general to contract with private counsel to vindicate the public interest. A rigid statutory regime risks handcuffing the attorney general, hindering him from acting through a private attorney general when it would truly be in the public interest.

One way to balance these competing interests is to remove the hiring of the private attorney general from the state attorney general. Some states take a cursory step in this direction by requiring that the state board of examiners selects the private attorney or law firm after the attorney general makes a finding that such a hiring is necessary. In those states, the attorney general is one of three members of the board of examiners, and in at least some of those states the board’s determinations are not reviewable by courts.

States might consider giving this approach some teeth by taking the state attorney general out of the selection process. While the attorney general is surely best equipped to determine whether private counsel is necessary, there are plenty of other actors capable of evaluating and hiring the law firm for the job. By modifying the approach, states might reduce the incentive of private firms to lobby the attorney general to bring a suit against a given defendant, because a private firm will have no guarantee of being hired even where the attorney general finds need for a private attorney.

There are a number of options when it comes to tasking a person or body with the ultimate hiring of private counsel—the hiring decision could be given to the governor, a legislative panel, or a panel of bureaucrats from an executive agency. Of course, this proposal carries drawbacks of its own: by tasking another person or body with the duty of hiring private counsel, the proposal reduces the attorney general’s incentive to closely monitor counsel. It also ignores that the state’s top lawyer likely has useful insight into who the optimal private attorney would be.

The restrictions on the use of private attorneys general in parens patriae cases listed in this section ultimately fall short in various ways. A state would do well to couple these approaches, which largely focus on the hiring of the attorney, with one of the compensation formulas described below, as those formulas focus on aligning the interests of the attorney and the public once the hiring is complete. As the next section will illustrate, however, even that approach, when used alone, fails to fully align the incentives between private attorneys and the public.
B. Payment Formulas

The most popular method of aligning the interests of class counsel and plaintiffs in aggregate litigation is by way of compensation formulas. By tailoring the method of compensation, the thinking goes, counsel’s and client’s incentives will align, substantially reducing agency costs.

This section examines three potential payment models used or discussed in aggregate litigation and considers their application to mass parens patriae claims. Each model aims to solve the very problems already addressed. Each falls short. The first payment scheme is the percentage-of-the-recovery model, the traditional compensation regime in aggregate litigation. The second model examined is the lodestar model. The lodestar model refines the percentage-of-the-recovery system by multiplying the hours an attorney spends on a matter by a predetermined multiplier that seeks to represent the difficulty of the work performed. The third model is a hybrid approach, which adopts characteristics from each of the first two models. This approach, devised by Kevin Clermont, might be termed the “contingent hourly-percentage fee” approach. It acknowledges the disadvantages of both the percentage-of-the-recovery and lodestar models, and works to minimize each of those problems. While the hybrid approach is a promising alternative, it alone cannot fully manage the agency costs inherent to the private attorney general model.

Each model partly aligns the attorneys incentives with the public interest in certain areas of the representation. Yet in doing so each model drives a wedge between those interests in other areas of the representation. Each model therefore fails to fully aligning incentives between the private attorney general and the public. Moreover, each needlessly complicates attorney compensation.

1. Percentage-of-the-Recovery

Under a pure percentage-of-the-recovery formula, class counsel receives a predetermined percentage of the settlement, regardless of the amount of time spent on the matter or the merits of the case.\textsuperscript{131} This method typically “resembles the ordinary contingency fee”\textsuperscript{132} and is attractive for several reasons: its ease of calculation (and administration in the public context) is a major benefit.\textsuperscript{133}

\begin{thebibliography}{9}
\bibitem{131} See Macey & Miller, supra note 74, at 59.
\bibitem{132} Id.
\bibitem{133} Cf. id. ("First and perhaps most importantly, [the percentage-of-the-recovery method] is easy to calculate: simply take the total award . . . multiply it by the applicable percentage, and award that amount to the attorney.").
\end{thebibliography}
equally appealing, the model theoretically incentivizes the attorney to maximize the award and thus his own recovery.134

Alongside these promises, however, are vexing problems. Despite appearing to align incentives, a fixed-percentage model can often have the opposite result. The attorney who dedicates less time to reach a settlement earns more, on an hourly basis, than one who spends more time on the matter, all other things being equal.135 An attorney therefore has reason to settle quickly to collect her fee and maximize her hourly earnings.136 After all, “a juicy bird in the hand is worth more than the vision of a much larger one in the bush.”137

In the mass parens patriae context, this can cause serious problems. While compensation is rarely a concern,138 deterrence is crucial. The private attorney general who settles for an inadequate amount to maximize the efficiency of his recovery leaves the defendant undeterred.139 The effects of this under-deterrence cannot be neatly cabined to the present defendant; other potential wrongdoers may internalize these results and see that they can simply pay a minimal parens patriae settlement to carry on with harmful behavior. Some may come to view public settlements as a “fee” or a cost of doing business.140 Hasty and inadequate settlements therefore should not be dismissed as a mere inconvenience—they undermine a core purpose of the litigation.

Other criticisms of the percentage-of-the-recovery model are rooted in broader market observations. Notably, the model often provides for “returns

134. See, e.g., In re M.D.C. Holdings Sec. Litig., 1990 WL 454747, at *8 (S.D. Cal. Aug. 30, 1990) (“Compensation of class counsel in common fund cases on a percentage of the recovery method makes eminently good sense. . . . [I]t provides plaintiffs’ counsel with a strong incentive to effectuate the maximum possible recovery in the shortest amount of time.”).
135. See Macey & Miller, supra note 74, at 25.
136. Id.
138. See supra text accompanying note 92.
139. See generally A. Mitchell Polinsky & Steven Shavell, The Optimal Use of Fines and Imprisonment, 24 J. PUB. ECON. 89, 94 (1984) (considering how to effectuate the appropriate level of deterrence); see also Thomas C. Galligan, The Risks of and Reactions to Underdeterrence in Torts, 70 Mo. L. REV. 691, 691 (2005) (“To the extent tort law does not force people to take account of all their activities’ accident costs, tort law inefficiently underdeters.”); Andrew F. Popper, In Defense of Deterrence, 75 ALB. L. REV. 181, 181 (2012) (noting that “[d]eterrence is a real and present virtue of the tort system”).
140. The distinction between “fines” and “fees” is worth noting. “Fines register moral disapproval, whereas fees are simply prices that imply no moral judgment. When we impose a fine for littering, we’re saying that littering is wrong.” Michael J. Sandel, What Money Can’t Buy: The Moral Limits of Markets 65–67, 88–91 (2012) (examining the fine–fee distinction, the social stigmas attached to the former, and the different behaviors fines and fees elicit from actors).
beyond what the attorney would expect to earn in an efficiently functioning market.”141 This inefficiency results in an overall “welfare loss” to society.142 Another drawback of the model is its role in lowering the number of cases that would otherwise be brought if the market functioned efficiently.143

2. The Lodestar Model

Another common approach to compensation is known as the lodestar model.144 The lodestar model “allows attorneys to recover according to the number of hours they spend on a case.”145 To calculate an attorney’s award under this approach, “the hours reasonably expended by the lawyer are multiplied by the lawyer’s reasonable hourly fee to calculate a lodestar. The lodestar is then adjusted by a multiplier to account for a variety of factors, including, most significantly, the risk of the litigation.”146 In other words, the court determines a multiplier based on the attorney’s experience, the expected difficulty of the

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141. See Macey & Miller, supra note 74, at 59; see also Report of the Third Circuit Task Force: Court Awarded Attorneys Fees, 108 F.R.D. 237, 242 (1986) (noting that “the percentage-of-recovery system sometimes result[s] in strikingly large fee awards in a number of cases” and further that “[p]ress reaction to these awards generated pressure to shift away from the percentage-of-recovery approach”).

142. See Macey & Miller, supra note 74, at 59–60 (explaining that “attorneys will take only cases for which the ex ante returns are equal to or greater than the opportunity costs of their time, and there is no market adjustment of the applicable compensation percentage to equilibrate supply and demand . . . [resulting in] an element of welfare loss to society under the percentage system.”).

143. As Macey and Miller explain:
The standard economic model of litigation predicts that plaintiffs will bring suit whenever their expected return from the litigation exceeds their expected costs. In traditional litigation settings, it would be rational for plaintiffs to sue even when, for example, their expected attorney fees represent a very high percentage of their expected recovery. The percentage method thus cuts off a large number of cases that the plaintiff would rationally prosecute in standard settings. For example, assume that in a jurisdiction with a 25-percent-of-the-recovery rule a given litigation is expected to generate a fund of $1,000,000 with costs to the plaintiffs’ attorney of bringing the litigation of $500,000. This litigation would not be brought because the attorney expects fees of only $25,000. If, on the other hand, the plaintiff were an individual . . . the litigation would be brought because it would generate an expected profit to the plaintiff of $500,000.

Id. at 60.


145. See Macey & Miller, supra note 74, at 4.

146. Id. at 22.
matter, and other relevant factors.\textsuperscript{147} That number is then multiplied by number of hours worked to determine the attorney’s total compensation.

The lodestar refines the pure percentage-of-the-recovery model. It reduces the incentive to settle early by accounting for the hours spent on the matter by the attorney.\textsuperscript{148} By calculating the lawyer’s reasonable hourly fee and then adjusting it, as necessary, based on “the contingent nature of success” and “the quality of [the] attorney’s work,”\textsuperscript{149} the Lodestar formula appears to be a promising method for aligning the private attorney’s incentives with the public interest.

The lodestar model has its shortcomings, however. For example, because the lodestar accounts for hours worked, it incentivizes attorneys to inflate the number of hours spent on a matter.\textsuperscript{150} Some therefore worry the lodestar overcorrects for the errors of the percentage-of-the-recovery approach—by encouraging attorneys to inflate the number of hours billed, the lodestar model incentives the private attorney to delay striking a settlement agreement.\textsuperscript{151} The lodestar model also fails to deter collusive behavior between the private attorney general and defense counsel. “By severing the fee award from the settlement’s size,” Coffee notes, the lodestar “facilitates the ability of defendants and the plaintiff’s attorneys to arrange collusive settlements that exchange a low recovery for a high fee award.”\textsuperscript{152} The lodestar therefore does nothing to solve the “back-end” problem of underdeterrence noted above. The lodestar, like the percentage-of-the-recovery model, fails to assuage concerns about misaligned incentives between the public and their counsel in the private attorney general context.

\begin{enumerate}
\item See, e.g., Lindy Bros., 487 F.2d at 168–69 (discussing permissible adjustments to the basic lodestar calculation).
\item See Understanding the Plaintiff’s Attorney, supra note 42, at 691 (noting with disagreement the argument that acknowledging hourly rates minimizes “cheap settlements”).
\item Lindy Bros., 487 F.2d at 168.
\item See Understanding the Plaintiff’s Attorney, supra note 42, at 691; see Macey & Miller, supra note 74, at 22; Rubin, supra note 46, at 1445 (claiming the lodestar model “encourages lawyers to spend hours doing much of nothing”). Indeed, despite creating the lodestar method, the Third Circuit’s own task force noted that the model’s “preoccupation with attorneys’ time and market rates encourages the expenditure of excessive or unnecessary hours.” See Court Awarded Attorney Fees, 108 F.R.D. 237, 262 (1986); see also Jill E. Fisch, Lawyers on the Auction Block: Evaluating the Selection of Class Counsel by Auction, 102 COLUM. L. REV. 650, 660 (2002) (“In addition, the lodestar method is administratively unwieldy, requiring courts to scrutinize counsel’s billing records.”).
\item See Macey & Miller, supra note 74, at 4.
\item Understanding the Plaintiff’s Attorney, supra note 42, at 691.
\end{enumerate}
3. A Hybrid Approach

A third payment model tacks a central course by combining percentage-of-the-recovery and hourly compensation. Kevin Clermont first introduced this “contingent hourly percentage fee” approach, acknowledging that both the percentage-of-the-recovery model and lodestar model were “plagued with substantial disadvantages,” which clients (the public, in our case) were forced to bear.\(^\text{153}\) Simply put, this model “calls for the payment, on a contingent basis, of an amount computed by adding one component tied to hours worked and another component linked to amount recovered.”\(^\text{154}\) The model therefore compensates the attorney as a laborer by ensuring the attorney recovers his hourly rate; it also compensates the attorney as a risk taker by awarding a percentage of any recovery exceeding the total hourly fees charged by the attorney.\(^\text{155}\)

This approach aligns the interests of the attorney and client in a way that neither the percentage-of-the-recovery fee nor the lodestar formula can. Under Clermont’s model, “[t]he point at which an additional dollar paid in fees will yield less than another dollar in benefit to the client . . . matches the point at which an additional hour spent on the case will also result in less profit for the lawyer.”\(^\text{156}\) A lawyer must forego other matters to arrive at a settlement agreement; doing so when faced with inevitably diminishing returns means less profit for the attorney.\(^\text{157}\) The lawyer’s and the public’s interest are therefore better aligned than in either the pure percentage-of-the-recovery model or the lodestar formula, at least as it relates to the time spent on the matter.

Clermont proposed his model with traditional litigation in mind, but its benefits are not so limited. The concerns addressed by the model are equally present in the context of the private attorney general doctrine, but whether the model can manage the agency costs presented by private attorneys general is less

\(^\text{153}\) Kevin M. Clermont & John D. Currivan, Improving on the Contingent Fee, 63 Cornell L. Rev. 529, 530 (1978). While Professor Clermont and Mr. Currivan applied their model to traditional, single-client litigation, others have since noted that its benefits could be applied to private class litigation as well. See Tidmarsh, supra note 89, at 787–88 (explaining that with certain “friendly amendments,” the Clermont–Currivan model could be effectively applied to private aggregate litigation).

\(^\text{154}\) See Clermont & Currivan, supra note 153, at 530.

\(^\text{155}\) Id. at 547. Clermont & Currivan represent their model as \(wh + x(s – wh)\), where \(w\) is the attorney’s hourly rate and \(h\) is the number of hours worked by the attorney. In this model, \(x\) represents the predetermined percentage of the recovery and \(s\) represents the settlement itself. Id. The first component of the equation, \(wh\), intuitively compensates the attorney for the hours worked on the matter. The second component, \(x(s – wh)\), simultaneously grants the attorney a percentage of the recovery (and prevents double recovery for hours worked). Id.

\(^\text{156}\) See Tidmarsh, supra note 89, at 787.

\(^\text{157}\) See id.
clear. As Clermont himself noted, “[t]he hourly component of the proposed fee continues the danger of bill-padding,” a problem also posed by the lodestar approach.158 This shortcoming did not trouble Clermont, because the potential for abuse is inherent to any model159: “[t]he choice is between the proposed fee, under which dishonest lawyers can take advantage of their clients, and the present fee systems, under which honest lawyers also are inclined to act contrary to their clients’ interests.”160 By combining percentage-of-the-recovery with hourly compensation, Clermont’s approach comes closer to aligning the incentives of the private attorney with those of the public.161

Nevertheless, any one payment model is an incomplete solution to agency costs in the private attorney general model. None addresses the front-end problems like inappropriate contributions from private attorneys to the attorney general to secure the representation in the first place. Back-end problems persist as well. Some payment models encourage undesirable attorney behavior such as bill padding or hasty and inadequate settlements; they also leave open the possibility for collusive settlement terms that do not aid the represented public.

IV. ALIGNING INCENTIVES THROUGH AUCTIONS

Without more, the current methods of managing agency costs in public aggregate litigation are inadequate. Auctions offer the simplest path forward, with simple yet striking benefits. By subjecting the parens patriae litigation process to market forces, the threat of corruption in the hiring process is eliminated. The auction also fuses principal and agent, all but eliminating the most pernicious agency costs from the parens patriae equation. Finally, adequate deterrence can be ensured by thoughtful auction design.

Auctions also offer several second-order benefits. The first such benefit is administrative flexibility.162 Auctions offer various means to compensate the
private attorney, and thus do not tie the hands of the attorney general as many statutory regulations might.\textsuperscript{163} Second, a well-designed auction moves the asset to the party who values it most.\textsuperscript{164} Finally, auctions help establish value in the \textit{parens patriae} context, where the seller-state lacks an accurate estimate of potential buyers’ (private plaintiffs firms or litigation financiers) valuation of the asset, and buyers similarly lack accurate estimates of one another’s valuations.\textsuperscript{165}

States could auction three different assets in a typical \textit{parens patriae} case: (1) the right to represent the public; (2) the claim itself in the first instance; or (3) the settlement following litigation. The auction for the right to serve as lead counsel in aggregate litigation has been used in practice—with either success or failure, depending on whose account one trusts.\textsuperscript{166} The auction of the claim itself remains an academic proposal;\textsuperscript{167} the same may be said of the settlement auction.

This part examines each of these auctions and ultimately recommends that states adopt the settlement auction because, under the circumstances of \textit{parens patriae} litigation, a settlement auction will most effectively minimize agency costs and align the incentives of the private attorney with those of the public.

designed, including, for example, for mobile-phone licenses, electricity, and pollution permits.”).\textsuperscript{163} See supra Section III(A) (discussing state regulations on the hire of private attorneys general).


See \textit{Easley & Kleinenberg}, supra note 162, at 251 (noting that auctions are generally used where those parameters are met); cf. Roger B. Myerson, \textit{Optimal Auction Design}, 6 Mathematics of Operations Res. 58, 60 (1981) (“There are two general reasons why one bidder’s value estimates may be unknown to the seller and the other bidders. First, the bidder’s personal preferences might be unknown to the other agents . . . Second, the bidder might have some special information about the intrinsic quality of the object . . . ”).\textsuperscript{165} See \textit{In re Auction House Antitrust Litig.}, 197 F.R.D. 71, 82 (2000) (noting that “several factors are present that permit an auction to nearly approximate an efficient market.”). \textit{But see} Fisch, supra note 150, at 652 (arguing that the claimed benefits of auctions “have not been subject to careful scrutiny. Indeed, auction advocates have made several fundamental and erroneous assumptions about the operation of lead counsel auctions and have overlooked substantial methodological problems with their design and implementation.”).\textsuperscript{166} See Macey & Miller, supra note 74, at 105; Rubin, supra note 46, at 1446.

See Tidmarsh, supra note 164, at 231.
A. The Representation Auction

The representation, or lead counsel auction, dates to 1990, where it debuted as a sealed bid auction in In re Oracle Securities Litigation. As Jill Fisch explains:

The court [in Oracle] ordered prospective counsel to submit bids reflecting the compensation they sought, as a percentage of the total recovery, for the services of conducting the litigation on behalf of the plaintiff class. The court also requested information on the bidders’ qualifications. The court then selected a winning bid, appointed the winning bidder as lead counsel, and announced that counsel’s compensation would be determined in accordance with its bid.

Though not widely adopted, several courts have emulated the Oracle model in recent years.

Proponents of the representation auction argue that injecting market competition into the process of selecting counsel ushers in lower fees and more effective representation. Even assuming these benefits can be realized, the model has some notable shortcomings. For one, participating bidders must also propose their method of compensation. This is a problem—it ultimately

170. Fisch, supra note 150, at 664 (citations omitted).
172. See Fisch, supra note 150, at 652.
173. See id. (“[L]ead counsel auctions do not address agency problems or the difficulties inherent in drafting an appropriate contract for legal services in a class action; auctions are unlikely to produce reasonable fee awards; and auctions reduce counsel’s accountability.”).
raises the issues inherent to the percentage-of-the-recovery and the lodestar models discussed above.\textsuperscript{174} Furthermore, because evaluating the bids computed with different methodologies will be a cumbersome and difficult—if not impossible—task, the representation auction fails to bring administrative efficiency as other auctions may.\textsuperscript{175} This could lead courts to improperly value bids and fail to award the representation to the true lowest bidder.\textsuperscript{176} Such a result hardly achieves an auction’s goals.

Examining the bids in a typical case highlights this pitfall. Bids often vary dramatically in both their structure and total proposed fee.\textsuperscript{177} Some degree of variance is to be expected (indeed, hoped for) in a competitive model. Where the lead counsel auction has been deployed in private aggregate litigation, however, the observed variance in bids is so striking as to suggest that its source is not competition, but “uncertainty about the auction process or informational disparities among bidders.”\textsuperscript{178} As one court grappling with this issue observed,

the fee proposals of the candidates [for lead counsel] varied from as low as eight percent to over twenty-five percent. No other candidate provided substantially more strength and experience compared to the eight percent candidate. . . . The difference between the eight percent and the twenty-five percent translated to more than five million dollars to the investment class.\textsuperscript{179}

Given these differences, courts and attorneys alike have difficulty valuing bids for the right to serve as lead counsel. Depending on the compensation formula counsel proposes, this method still risks inadequately aligning their incentives with the public. These auctions ultimately fail to “address agency problems or the difficulties inherent in drafting an appropriate contract for legal services in a class action; [they] are unlikely to produce reasonable fee awards;

\textsuperscript{174} See supra Section III(B).

\textsuperscript{175} See Fisch, supra note 150, at 676–77 (noting that the court in In re Cendant rejected a bid seeking between one and two percent of the recovery as being unrealistically low; that bid would have resulted in a fee of $60.4 million—”7.5 times the lodestar figure provided by [the ultimate] lead counsel” in that case (citing Declaration of Elliott J. Weise at 19, In re Cendant Corp. Sec. Litig., 109 F. Supp. 2d 285 (D.N.J. 2000) (No. 98-1664))).

\textsuperscript{176} Id. at 666–67.

\textsuperscript{177} See id. at 669 & n.116 (noting bids vary significantly in their structure and that firms in the same litigation have submitted bids ranging from a one percent fee to a forty-five percent fee).

\textsuperscript{178} Id. at 669.

and [they] reduce counsel’s accountability.”¹⁸⁰ As a result, states should consider auctioning a different asset related to the litigation.

**B. The Claim Auction**

A second auction model is promising in the private attorney general context. Under this model, an initial lawsuit is filed, which a court may then certify for auction.¹⁸¹ After notice of the claim is published, the court puts the claim itself up for bid and establishes a reserve price “to prevent an excessively low sale price.”¹⁸² The highest bidder ultimately “succeed[s] to the rights of the plaintiffs.”¹⁸³ That bidder is then free to pursue the action however it sees fit—including allowing the claim to lapse. Important to this model, the bidder need not be a law firm or individual. In fact, the winning bidder could be the defendant itself.¹⁸⁴

Some have presented this model as a panacea to the misaligned incentives of private aggregate litigation.¹⁸⁵ By purchasing the claim itself, the private attorney becomes “at once both advocate and claim holder,”¹⁸⁶ aligning the interests of counsel and aggregated plaintiffs, reducing the need for scrutiny over settlements as a result.¹⁸⁷ There can be no more effective way to eliminate agency costs than to make the same actor at once principal and agent.

Beyond aligning incentives between the private attorney and the public, the claims auction reduces the incentive for private attorneys to lobby the state

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¹⁸⁰ Fisch, supra note 150, at 652.

¹⁸¹ See Macey & Miller, supra note 74, at 106 (noting that a judge’s determination in a private case should hinge on various factors, not all of which are applicable in the mass parens patriae setting). The factors Macey and Miller list include the number of potential claimants, the number of lawsuits filed, whether the claims are sufficiently definite to warrant an auction, and whether other factors suggest individualized litigation would be preferable. Id.

¹⁸² Id. at 107.

¹⁸³ Id. at 108.

¹⁸⁴ Id. at 107–08. In such a case the defendant would simply let the claim lapse. Macey and Miller propose that defendants may request the court to dismiss the case with prejudice as a condition of a winning bid from the defendant. Id. at 108.

¹⁸⁵ See, e.g., Rubin, supra note 46, at 1446 (“The class action auction eradicates present class action problems by selling the claim to the highest bidder.”).

¹⁸⁶ Id.

¹⁸⁷ See id. (“There will be no need for the judge to scrutinize closely a settlement because . . . there is no longer a risk that the lawyer has sacrificed the interests of the class.”); see also Macey & Miller, supra note 74, at 108 (noting that the auction approach “may overcome the agency costs that plague class and derivative litigation”); id. at 6 (under a claims auction approach “[t]here would be no need for any rules on . . . adequacy of representation or for judicial scrutiny of settlements and fee awards”).
attorney general in hopes of securing a lucrative contract. Because the ultimate claim is subject to competitive bidding, the state attorney general is unable to direct a contract to a private attorney of her choice. Even if a private attorney’s desired enforcement policy is adopted, the private attorney will not share in the claim unless he wins the auction, reducing the incentive to attempt that direction in the first place.

In the parens patriae context, a claims auction might take the following form. First, the state attorney general initiates an investigation and suit as she would in any other parens patriae claim. If, after further investigation, the attorney general determines that private counsel is needed to vigorously prosecute the case, he may request that the court auction the state’s claim to the highest bidder. Notice of the auction would then be published, allowing potential bidders to develop bids for the claim. To ensure adequate deterrence, the attorney general or the court must set a reserve price, below which no bids will be accepted. The court will then accept bids for the right to succeed the state as the claimant. The party with the highest bid succeeds to the state’s claim, and may pursue the action as he or she wishes. The attorney general

188. This model does not suggest that the attorney general should be required to auction every parens patriae claim. Rather, the attorney general would simply have the option to do so in cases where the state lacks the resources to vigorously prosecute the defendant.

189. This is a divergence from Macey and Miller’s proposed claims auction, where a reserve price may be set at the judge’s discretion. See Macey & Miller, supra note 74, at 107.

190. Sealed bids should be used in this context to prevent collusion between bidders and the defendant or among multiple bidders. For an overview of the most common types of auctions, see Yaad Rotem & Omer Dekel, The Bankruptcy Auction as a Game—Designing an Optimal Class Auction in Bankruptcy, 32 REV. LITIG. 323, 354–56 (2013) (discussing the sealed bid auction, the English auction, the Dutch auction, and the second-price auction, among other hybrid approaches). The English auction features an auctioneer beginning from a low price with bidders continually raising the price. Id. at 355. The Dutch auction, meanwhile, begins from a price above market level; an auctioneer continually drops the price until a bidder stops him, paying whatever price the auctioneer stopped at. Id. at 356. Finally, the second-price auction features sealed bids with the highest bidder winning the auction; the price paid by the bidder, however, is the second highest among the sealed bids. Id.

For an overview of the benefits and drawbacks of each type of auction in the settlement auction context, see Tidmarsh, supra note 164, at 248–50 (citing Michael H. Rothkopf et al., Why Are Vickrey Auctions Rare?, 98 J. POL. ECON. 94, 102 (1990)) (arguing that because of the low number of likely bidders an English auction is unlikely to be effective, and that second-price auctions are also a risk for collusive behavior).

191. In both this model and the model proposed by Macey and Miller, bids must be in cash or cash equivalent. Macey & Miller, supra note 74, at 107. This resolves the problem of requiring a judge to evaluate and compare bids that utilize different compensation schemes.

192. Two scenarios are likely here. First, the winning bidder is an entrepreneurial law firm or third party that will hire a firm of its own; that firm may then pursue the claim in hopes
may then use the funds from the winning bid to compensate victims or, more likely, to benefit charitable organizations in a cy pres settlement or contribute to the state coffers.\footnote{193}{See supra text accompanying notes 91–92.}

For all its promise, there are serious stumbling blocks to implementing the claims auction in the parens patriae context. Randall Thomas and Robert Hansen highlight these hurdles to implementation well.\footnote{194}{See generally Thomas & Hansen, supra note 57, at 424–26.} The pair bolsters this claim with three arguments, two of which are particularly relevant here.\footnote{195}{Id. at 424.} First, there is a problem of information scarcity: bidders have limited information about the claim at this stage in the litigation. Like lead counsel auctions in the private litigation context,\footnote{196}{Id. at 424–25.} this is expected to lead to uncertainty and thus inaccurate bidding in a mass parens patriae case.\footnote{197}{Some may justifiably raise concerns of inadequate compensation in this system. Even with a reserve price, injured members of the public might not receive adequate compensation from the winning bid when that price is greater than the cost of deterrence but lower than the cost of compensation. The auction model admittedly does not address this problem. That should not bar its use: as evidenced by the frequent use of cy pres settlements, adequate compensation simply is not the goal of the typical mass parens patriae suit. Because compensation takes a backseat to deterrence in these actions, the fact that an auction does not guarantee adequate compensation should not bar its use.\footnote{198}{Thomas and Hansen raise another point regarding bidding by defendants in the claims auction: allowing defendants to bid will compound information disparities, as defendants will have “significant informational advantages over other bidders” given their ability to conduct an internal investigation. Thomas & Hansen, supra note 57, at 425. An effective parens patriae claim auction might address this problem in a few ways. First, the claims auction could require that the state attorney general conduct an initial investigation and provide information to potential bidders—this may be necessary to entice private attorneys to engage in the risk of an auction in the first place. See infra text accompanying notes 198–200. Because the claims auction would not be a foregone conclusion in a parens patriae suit (but rather a possibility for claims that are prohibitively expensive for the state to prosecute), the attorney general presumably will have investigated the claim before the auction takes place. Alternatively, the auction could simply bar the defendant from bidding. That option, however, would deprive the public the benefits of a streamlined settlement noted above.\footnote{199}{See Fisch, supra note 150, at 669 (describing the dramatic variety in bids for the right to represent the plaintiff class in In re Cendant). “[T]he range and variation in the resulting bids seem more likely to result from uncertainty about the auction process or informational disparities among bidders than from market-based competition.” Id.} The pair bolsters this claim with three arguments, two of which are particularly relevant here. First, there is a problem of information scarcity: bidders have limited information about the claim at this stage in the litigation. Like lead counsel auctions in the private litigation context, this is expected to lead to uncertainty and thus inaccurate bidding in a mass parens patriae case. But concerns over inaccurate bids—particularly underbidding leading to under-deterrence—might be addressed with a reserve price; bids below that price will

of earning a settlement or judgment in excess of its bid. The second scenario features the defendant winning the bid. In that case, the defendant will then simply let the claim lapse.
simply be rejected. Indeed, bid variance is arguably less troubling in the claim auction, where a reserve price can ensure adequate deterrence and courts will not be saddled with comparing bids calculated through different formulae as in an auction for the right to represent the class.199

The second problem is information asymmetry between prospective counsel and the defendant. The claims auction asks bidders to risk potentially staggering sums of money with little information about the claim itself. Early in the litigation, little may be known about the ultimate value of the claim; this lack of information available to prospective bidders will deter participation in the first place.200 While entrepreneurial firms are willing to take risks, even the most risk-tolerant will not be inclined to attempt to divine a claim’s value with no information. If prospective bidders are unable to value the claim, they will simply abstain from the auction. While the claims auction offers some major improvements over the representation auction—namely eliminating some of the most pernicious agency costs associated with the private attorney general model—it falls short of being a useful solution in this context. Because of information scarcity and information asymmetry at this stage in the litigation, the claims auction is unlikely to be a practical solution to the problems the private attorney general model.

C. The Settlement Auction

States can avoid the shortcomings of the models discussed above by auctioning the settlement itself. Previously proposed by Jay Tidmarsh with an eye toward private class actions, this model shifts the auction back in the litigation process.201 Under this proposal for private class actions, once “the

199. Unlike the representation auction, which occurs at the outset of litigation and requires prospective attorneys to propose a compensation formula, here states could require that bids be made in cash or an equivalent. See, e.g., Macey & Miller, supra note 74, at 107.

200. Other generalized concerns are present as well. Some will be troubled that major firms or financiers with sufficient resources to bid for parens patriae claims will battle other similarly wealthy organizations for the right to pursue a defendant in place of the state. The concern is that by commoditizing parens patriae claims, the public could become mere onlookers in the defense of their rights. These concerns are arguably present in the current system—that they may still remain should not bar use of the auction model.

201. Tidmarsh proposes the settlement auction as a cure to agency costs in traditional, private class actions. See Tidmarsh, supra note 164, at 227. Others have proposed a hybrid of the settlement auction and the representation auction, essentially shifting the representation auction back in time until after a settlement agreement is struck. See Geoffrey P. Miller, Competing Bids in Class Action Settlements, 31 Hofstra L. Rev. 633, 633 (2003). This proposal takes a step toward improving the lead counsel auction but does not go far enough for the parens patriae context. Unlike the settlement auction proposed here, Miller’s model fails to fuse principal and agent—a major benefit of the parens patriae settlement auction.
parties in a class action arrive at a settlement, the court should put the settlement up for auction.”

If someone bids an amount greater than the current settlement, the proceeds of the winning bid are distributed to the state. The winning bidder then pursues the defendant, seeking a greater settlement or judgment in order to recoup the expenditures associated with the bid. This simple change to previous auction models assuages many concerns associated with the claim auction.

1. Form and Benefits

The *parens patriae* settlement auction might take the following form: once the state attorney general determines a private attorney is needed to pursue a claim, he may hire the private attorney as permitted by state law. That private attorney pursues the *parens patriae* claim as usual, to the point of settlement. Once a settlement is reached, the state court puts the settlement up for auction. In the ensuing auction, the value of the existing settlement acts as the reserve price. The court then selects the highest bid from among those submitted. The funds from the winning bid are transferred to the state, which it may retain or distribute as it sees fit, pursuant to any other state laws. The winning bidder is then free to pursue the public’s claim, while the unsuccessful private attorney is paid on a quantum meruit basis. Any amount the winning bidder ultimately recovers in excess of its bid and expenses is profit.

In many ways, then, the *parens patriae* settlement auction resembles the claims auction. But shifting the auction back in time brings crucial advantages. First, and most notably for the purposes of the *parens patriae* suit, the shift in

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203. *Id.* As with the proposed claim auction, the state may retain or distribute the funds as it sees fit, likely resulting in a [*cy pres*] distribution. *See supra* Section IV(B).

204. *See supra* Section IV(B).

205. *See also supra* Section III(A). Because this system removes the perverse incentives of the private attorney general model, states should grant attorneys general greater flexibility in hiring private attorneys.

206. Unlike the claims auction, the settlement auction does not rely on the state attorney general to request the court hold the auction. Rather, the auction occurs automatically, removing the incentive for would-be private attorneys general from attempting to secure employment with the state.

207. *See Tidmarsh, supra* note 164, at 248 (explaining that a court should set the minimum bid “with an eye toward likely future expenditures on both sides in order to make sure that continued litigation is indeed in society’s best interest”). As an alternative reserve price, states might use a predetermined percentage *above* the existing settlement.

208. *See id.* at 231 (explaining, in the context of private class litigation, that “[o]wnership of the class’s claims shifts to the winning bidder, who has an incentive to monitor counsel” effectively).
time mitigates the information scarcity and asymmetry present in the claims auction. Because the settlement auction occurs after a settlement is reached, prospective bidders can better gauge the value of the claim. This should encourage greater participation in the auction, increasing the likelihood that the auction reaches a price sufficient to deter the defendant adequately.

Second, as with the claim auction, by shifting the underlying interest in the claim from the public to the winning bidder (likely a single organization or organized group), the settlement auction effectively eliminates the monitoring costs associated with mass parens patriae litigation. The unification of “class” and counsel resolves the collective action problems the public faces when looking to control their agent in a typical case employing a private attorney general. Where the winning bidder is an entrepreneurial law firm, the roles of principal and agent are fused; where the winning bidder is an organization other than a law firm, it will have the incentive and resources necessary to monitor its attorney in pursuing the claim in ways the public does not. As a corollary to the merger of principal and agent, courts will be spared the difficult task of scrutinizing settlements, something they are forced to do in existing private class action auctions.

209. Because the existing settlement has been agreed upon in this auction model, the parties will have developed substantially more information about the claim—and defense—than was present in the claims auction.

210. Cf. Tidmarsh, supra note 164, at 250 (arguing that “[a] great advantage of the settlement auction is that, in most cases, class counsel has already conducted pre-auction discovery. . . . settlement class actions are almost always negotiated against a backdrop of similar lawsuits that have generated evidence and arguments on the merits. If necessary, a court may order class or defense counsel to provide such information to interested bidders”). With the growing use of “big data” analytics, it is not unthinkable that prospective bidders or financiers could use big data to project the value of settlements. See Mark K. Osbeck, Using Data Analytics Tools to Supplement Traditional Research and Analysis in Forecasting Case Outcomes 4 (Univ. Mich. Law Sch. Pub. Law and Legal Theory Research Paper Series, Paper No. 446, 2015) (noting that “the most significant challenge to using data analytics [to project the value of a settlement] is the difficulty of obtaining access to the necessary raw data, given that only some of the information is publicly available”). Subjecting mass parens patriae settlements to public bids should increase public availability of settlement information. Id. at 5.

211. For an overview of likely bidders in a settlement auction, see Tidmarsh, supra note 164, at 257–62 (explaining that potential bidders may include law firms, private equity firms, consumer advocacy groups, the defendant’s competitors, or the defendant itself).

212. See generally Tidmarsh, supra note 164.

213. See Macey & Miller, supra note 74, at 108–09 & n.327 (explaining that “[s]everal commentators have noted the benefits, in terms of reducing agency costs, of selling claims to the attorney or some other party”).

214. See generally supra notes 177–80 and accompanying text (detailing bid variance in representation auctions).
The settlement auction also deters inadequate settlements. It does so by removing the incentive for the private attorney general to accept an inadequate settlement. After all, to do so is to risk losing out to a higher bidder. The private attorney thus has a stronger incentive to vigorously represent the public. Other benefits flow from this as well: by discouraging hasty settlements, the initial settlement will be a more accurate gauge of the claim’s value, increasing the likelihood that prospective bidders will enter the auction. Moreover, the auction process will serve as a barometer for the settlement’s adequacy. Where third parties sense that the initial settlement is inadequate, they can be expected to bid for the settlement to pursue the claim on their own and enjoy the gains. Where no outside bidders appear, concerns over inadequate settlements are diminished because the settlement appears adequate to the market.215

As a further benefit, the settlement auction diminishes the incentive for private direction over public enforcement. When settlements are auctioned there is no longer a guarantee that the private attorney general will reap a windfall from an early settlement, thus the incentive to lobby for an enforcement action is reduced dramatically.

While the settlement auction is not faultless, concerns should fade when the auction is applied to the private attorneys general in mass parens patriae cases. Fears of inadequate compensation—that “class members are likely to receive less than the fair market value of their claims”216—are largely inapposite in the parens patriae context because compensation already takes a secondary (at best) role to deterrence in these cases.217 Concerns over inadequate compensation are further reduced when one considers that the auction can only increase the settlement or, at worst, leave it unchanged.218

2. Initial Questions of Implementation

The settlement auction admittedly raises some important questions of implementation. At least four are worth addressing here.219 First, can a private

215. Tidmarsh, supra note 164, at 262–63 (“Whether a market emerges settlement auctions will provide a real-world test of the value of class settlements.”).
216. Id. at 262.
217. See supra text accompanying notes 91–92.
218. Recall that the existing settlement price will act as a reserve price. See supra note 207.
219. There is also a question of the optimal auction format. Cf. Rotem & Dekel, supra note 190, at 353. “Theoretically, there is a wide range of possible auction formats.” Id. at 354–55. For a concise overview of the benefits and drawbacks of each type of auction in the settlement auction context, see Tidmarsh, supra note 164, at 248–50 (citing Michael H. Rothkopf et al., Why Are Vickery Auctions Rare?, 98 J. POL. ECON. 94, 102 (1990)) and also supra note 190.
party own state claims? Second, who should be permitted to participate in the settlement auction? Third, how should the state compensate participating private attorneys general? And fourth, how will the settlement auction affect the behavior of defendants and private attorneys in the initial settlement? Different situations may demand different answers to these questions, but a few basic principles should be followed.

First, states may sell their legal claims as part of the settlement auction. While champerty and maintenance may give one brief pause, those doctrines should not bar the settlement auction for two reasons. First, those common-law doctrines are not as forceful as they once were.\(^{220}\) (Indeed the common contingent fee agreement is champertous, but that is one of its less-controversial characteristics.\(^{221}\) Second, states may simply exempt this action from those doctrines. Indeed, some states have already opted for this approach.\(^{222}\) States could therefore opt to permit assignment of their own claims without fear of inviting a deluge of champertous litigation. This could already be happening in practice.\(^{223}\)

Next is the question of participants in the settlement auction. As a basic rule, defendants should not be permitted to bid in the settlement auction. Unlike the claim auction, allowing the defendant to participate in the auction does not benefit the public by streamlining the process. In the settlement auction, the defendant already “bid” when it agreed to settle the case.\(^{224}\) Allowing a defendant to “repurchase” the existing settlement undermines the settlement auction’s purpose of ensuring adequate deterrence while minimizing agency costs.\(^{225}\) Because defendant participation does not advance the goals of the settlement auction, defendants should not play a role in the auction itself.

A third question is the optimal compensation of participating private attorneys. As an initial point, even the unsuccessful private attorney, whose


\(^{221}\) Id. at 1546.

\(^{222}\) For a concise survey of the methods states adopt regarding champerty, see generally id. at 1547–55. As Dobner points out, not every state bars champerty. New Jersey, for example, “explicitly makes all lawsuits arising out of contracts assignable.” Id. at 1549 (citing N.J. STAT. ANN. § 2A:25-1 (West 1985)).

\(^{223}\) Consider also that some states could already be said to assign at least parts of their legal claims in actions by *qui tam* relators. Cf. Vt. Agency of Nat. Res. v. U.S. *ex rel.* Stevens, 529 U.S. 765, 773 (2000) (finding, in the context of the federal False Claims Act, that *qui tam* relators have standing based on an implicit “partial assignment” of the government’s claims).

\(^{224}\) Tidmarsh, *supra* note 164, at 257–58. For a more detailed discussion of all potential bidders to a settlement auction in the private context, see *id.* at 257–62.

\(^{225}\) *See id.* at 258. If a defendant may bid for the settlement, it suggests that the private attorney general failed, from the public’s perspective, to come to a satisfactory settlement.
settlement is auctioned away, must be compensated. It will be prohibitively difficult to find attorneys to participate if they risk working for no compensation. And even the attorney who negotiates an inadequate settlement provides some value—by conducting discovery and developing the case, the attorney brings information about the true value of the claim to the fore. 226 This helps create the market for the settlement auction in the first place. 227

Accepting that even the “unsuccessful” attorney deserves compensation, states must decide on an appropriate compensation model. Any method must take care to prevent private attorneys from becoming mere rent seekers, happily accepting an inadequate settlement before seeing that settlement auctioned away. The most straightforward safeguard against this is to compensate unsuccessful private attorneys “on a quantum meruit basis for work that benefitted the [public] or bidders.” 228 Thus, as Tidmarsh proposes, an hourly market rate, deducted for the time that the winning bidder must spend on the matter, should determine compensation to the unsuccessful attorney. 229 This structure—alongside the auction itself—removes the incentive for the private attorney general to negotiate a clearly substandard settlement. 230

Attorneys who strike a successful settlement, meanwhile, should be compensated per the Currievan model discussed above. As noted, that model best aligns the incentives between the private attorney and the public, avoiding bill-padding and “sweetheart” settlements. Coupled with the settlement auction—which removes the incentive to award contracts to campaign donors, lobbying for enforcement actions, and rushed or inadequate settlements—this payment method promises to maximize the efficacy of private attorneys general in parens patriae claims.

Finally, the settlement auction will affect the behavior of the initial parties to the suit in their settlement discussions. Given the costs of participating in the auction, this model is envisioned for those situations where the settlement struck clearly undervalues the injury to the public. The likely result of this proposal is to inflate the value of initial settlements in mass parens patriae claims. Defendants will lose the incentive to strike an inadequate settlement as doing so may invite auction participants. While the immediate cost of settlement will increase, defendants who settle for an amount more reflective of the public’s actual damages will deter third parties from incurring the costs of participating in the settlement auction.

226. See supra note 200 and accompanying text.
227. See supra Section IV(B).
228. Tidmarsh, supra note 164, at 265.
229. Id. at 265–66.
230. See id.
This upward pressure on settlements will also encourage private plaintiffs’ attorneys to participate in mass *parens patriae* litigation in the first place. Though the settlement auction creates substantial risk to the private attorney first selected to pursue the claim—risk that settlement proceeds may be purchased away from them—a settlement for anything but a clearly inadequate amount should deter third parties from incurring the costs associated with the settlement auction.

Other questions of implementation loom large but are better suited for independent treatment. Most notable is the question of bidders’ financing in the settlement auction. While litigation financing has received increased attention in recent years, greater consideration should be given to alternative financing of public claims in order to facilitate an effective *parens patriae* settlement auction market.

**Conclusion**

The private attorney general doctrine provides real benefits to state attorneys general and the public at large. Their use affords states the ability to pursue resource rich defendants and the flexibility to do so with frequency. But these benefits go hand-in-hand with opportunities for self-serving attorneys to litigate in a manner that does not advance the public interest.

Existing state regulatory regimes are well-intentioned but fall short in two important ways. First, they often fall short of aligning incentives between private attorneys and the public. Second, they risk handcuffing the attorney general’s flexibility in mass *parens patriae* matters, without bringing major benefits to the public.

By adopting an auction of the *parens patriae* settlement, major sources of agency costs will be eliminated. While other types of auctions show initial promise for eliminating agency costs by fusing principal and agent from the outset, they also carry fatal stumbling blocks. The settlement auction solves these problems. By shifting the auction back in the litigation process, bidders will have greater information about the asset and be more likely to participate. By subjecting the settlement to the market, the auction removes the incentive for untoward contracts as well as inadequate settlements. In light of this, states should adopt the settlement auction in conjunction with compensation formula safeguards to effectively reduce the agency costs associated with the private attorney general model in *parens patriae* suits.