



# Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation

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## TABLE OF CONTENTS

INTRODUCTION.....	2
I. COATTAIL CLASS ACTIONS .....	5
A. <i>The Microsoft Antitrust Litigation</i> .....	6
B. <i>The Tobacco Litigation</i> .....	9
II. OTHER DEVELOPMENTS MIXING PUBLIC AND PRIVATE LAWYERING IN MASS LITIGATION .....	16
A. <i>Private Lawyers in Public Cases</i> .....	17
B. <i>Public Lawyers in Private Plaintiffs' Shoes</i> .....	18
III. NOT ALL REPRESENTATIVE LITIGATION IS ALIKE.....	23
IV. IMPLICATIONS FOR GOVERNMENT ACTIONS.....	27
A. <i>The Public Good of Litigation Outcomes and Information</i> .....	27
B. <i>Public Compromise of Private Claims</i> .....	30
C. <i>Private Lawyers with Public Duties</i> .....	35
V. IMPLICATIONS FOR COATTAIL CLASS ACTIONS .....	40
A. <i>The Value of Coattail Class Actions</i> .....	40
B. <i>Attorneys' Fees</i> .....	43
CONCLUSION .....	46

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## INTRODUCTION

Ask anyone who follows legal news to name the two biggest litigation news stories in the United States at the start of the twenty-first century, and they will answer without blinking: Microsoft and tobacco. The Microsoft litigation, they will tell you, claims a place in the pantheon of antitrust landmarks that includes Standard Oil, Alcoa, and AT&T. The tobacco litigation is the most massive in a string of mass torts including asbestos, Dalkon Shield, and breast implants; it is arguably the most important public health matter ever litigated.

Microsoft and tobacco each fit so well and so interestingly in their own line of antitrust or product liability cases that it would be easy to miss what the two stories have in common. The Microsoft and tobacco litigations each involve allegations of wrongful conduct causing widespread harm, committed by actors so powerful they seemed immune to attack by private litigants. In each case, government lawsuits broke down the barriers to successful litigation, and private litigants, particularly those pursuing class actions, rode the government's coattails. This pattern is not limited to tobacco and Microsoft, nor is it new; in antitrust, securities, civil rights, and consumer fraud litigation, private plaintiffs have been riding government coattails for years.<sup>1</sup> But the pattern has emerged with new significance due to governments' growing aggressiveness in pursuing monetary recoupment actions against industries,<sup>2</sup> renewed vigor in enforcing antitrust<sup>3</sup> and consumer protection laws,<sup>4</sup> and the rise of class action lawyers as major players in

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<sup>1</sup> See John C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 222 (1983) [hereinafter Coffee, *Private Attorney General*] (noting that "a recurring pattern is evident under which the private attorney general simply piggybacks on the efforts of public agencies – such as the SEC, the FTC, and the Antitrust Division of the Department of Justice – in order to reap the gains from the investigative work undertaken by these agencies"). This phenomenon has been especially pronounced in antitrust litigation. See *id.* at 222 n.16 (citing examples). A prominent example outside the antitrust area, *Parklane Hosiery v. Shore*, 439 U.S. 322 (1979), involved the successful trial of a Securities and Exchange Commission enforcement action against Parklane Hosiery, followed by plaintiffs' assertion of issue preclusion in a shareholder class action.

<sup>2</sup> See Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 N.Y.U. L. REV. 354, 355 (2000) ("Citizens sue industries for tort injuries. That is familiar. Governments sue the same industries for costs suffered in ameliorating or preventing those injuries. That is unfamiliar.").

<sup>3</sup> See, e.g., Elisabeth Bumiller, *Readying the Slingshot for a Modern Goliath*, N.Y. TIMES, June 12, 1998, at B2 (describing re-emergence of antitrust enforcement in 1990s).

<sup>4</sup> See, e.g., Dominic Bencivenga, *Chairman Pitofsky Seen as Tough Enforcer*, N.Y.L.J., Apr. 13, 1995, at 1 (reporting that new FTC chair will expand scrutiny in consumer protection areas of cable television, advertising and cyberspace); Stephen J. Squeri, *Government*

the economy.<sup>5</sup>

Some observers object to the easy ride that plaintiffs and their lawyers get by piggybacking on government actions. A *Wall Street Journal* editorial, for example, labeled class counsel in the Microsoft class actions "tort parasites,"<sup>6</sup> and *The Washington Post* called the lawyers "predatory" and the class actions "simple buzzardry."<sup>7</sup> These observers, I submit, have latched onto the wrong problem. There is nothing inherently troubling about private class actions that seek to benefit from successful government litigation. Properly managed, such class actions offer a relatively fair and efficient mechanism for extending the benefits of government legal work to provide redress to injured citizens. The fact that they follow government actions tends to make such class actions more fair and efficient, not less so. Rather than a wholesale attack on coattail class actions, it is more useful to examine what they can and cannot accomplish, and what implications the phenomenon carries for how lawyers and courts should handle both the class actions themselves and the government lawsuits they follow.

While government actions and class actions both can be described as representative litigation, the decision-makers in the two types of actions do not represent the same constituents. Class action lawyers are duty-bound to represent the interests of the particular class, whereas government lawyers represent the government entity, with special obligations toward the public good. Nor are government and class action lawyers driven by the same political and financial incentives. In thinking about the proper spheres of government actions and class actions in Microsoft, tobacco, and other litigation based on widespread harm to citizens, it is useful to consider the different forces driving the representatives.

Moreover, coattail class actions and related litigation developments create an interdependence between government and private actions that

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*Investigation and Enforcement: Antitrust Division and Federal Trade Commission*, in 2 37th ANNUAL ANTITRUST LAW INSTITUTE 539, 641 (William T. Lifland, et al., eds., 1996).

<sup>5</sup> See, e.g., Adam Cohen, *Are Lawyers Running America?*, TIME, July 17, 2000, at 22. Although the plaintiff's bar has long been willing to invest substantial resources to pursue promising claims, the size of their war chests has increased dramatically in the past decade, due in significant part to fees earned in asbestos and other mass tort cases. See *id.* at 25; Peter Pringle, *Cornered: Big Tobacco at the Bar of Justice* 25-26 (1998); Dan Zegart, *Civil Warriors: The Legal Siege on the Tobacco Industry* (2000); Claudia MacLachlan, *Plaintiffs' Bar Aims, Once More at Tobacco*, NAT'L L.J., Dec. 26, 1994, at A14.

<sup>6</sup> Judge Posner's Brief, WALL ST. J., Nov. 23, 1999, at A22.

<sup>7</sup> Editorial, *Actions Without Class*, WASH. POST, Dec. 2, 1999, at A38.

mixes the roles of public and private lawyers.<sup>8</sup> Not only are government entities pursuing lawsuits that invite and support private class actions, but some of those government lawsuits seek money damages for defendants' injurious conduct toward citizens. Private lawyers, meanwhile, not only use the fruits of government litigation to benefit their private clients, but some of those private lawyers are actually handling the government's cases, as government entities retained private litigators to pursue their claims against both Microsoft and the tobacco industry. Such mixing of lawyer roles need not be a bad thing, but it warrants attention from a sufficiently broad perspective.

This Article examines coattail class actions and related developments in Microsoft, tobacco, and other recent litigation involving widespread harm. It does not address whether the government entities and private plaintiffs have valid claims in the Microsoft and tobacco cases, nor does it consider whether the underlying substantive law itself is just or wise. For purposes of this discussion, my interest in these cases is not to enter the raging debate over the legal and factual issues in them,<sup>9</sup> but rather to look at whether their procedural structure of interdependent public and private actions offers a sensible model for the resolution of claims of widespread harm.

Part One looks at the Microsoft antitrust litigation and the tobacco litigation as illustrations of the relationship between government litigation and subsequent class actions. Part Two examines two related developments that mix public and private lawyer roles: the use of private litigators to prosecute government lawsuits, and the nature of recent government recoupment actions. Part Three considers the differences between government lawyers, who owe duties to government entities and face largely political incentives, and class action

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<sup>8</sup> In discussing the mixing of public and private roles, I do not mean to suggest that in the absence of these recent litigation developments, the public/private distinction would be crisp. As Jody Freeman has argued in an administrative law context, "There is neither a purely public nor a purely private realm. There is only interdependence." Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 565 (2000).

<sup>9</sup> On the tobacco cases, see, e.g., W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* (1992); Jon D. Hanson & Kyle D. Logue, *The Cost of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163 (1998); Symposium, *Torts and Tobacco*, 33 GA. L. REV. 693 (1999); Symposium, *Beyond Tobacco: Tort Issues in Light of the Cigarette Litigation*, 27 PEPP. L. REV. 685 (2000); Symposium, *Tobacco Regulation: The Convergence of Law, Medicine & Public Health*, 25 WM. MITCHELL L. REV. 373 (1999). On the Microsoft antitrust litigation, see, e.g., Ronald A. Cass & Keith N. Hylton, *Preserving Competition: Economic Analysis, Legal Standards and Microsoft*, 8 GEO. MASON L. REV. 1 (1999); R. Craig Romaine & Steven C. Salop, *Preserving Monopoly: Economic Analysis, Legal Standards and Microsoft*, 7 GEO. MASON L. REV. 617 (1999).

lawyers, who owe duties to the class and face largely fee-based incentives. With the idea that government lawsuits and private class actions serve different purposes even when targeted at the same conduct, I turn to several specific implications. Part Four looks at implications for government suits. I suggest that government lawyers should consider the issue preclusive value of adjudications, the public value of discovered information, and the impact of settlement agreements that compromise private litigants' remedies or procedural mechanisms. I also suggest that contingent fees are generally inappropriate for government retention of private litigators. Part Five turns to implications for coattail class actions themselves. I contend that while prior government litigation does not render a class action illegitimate, the government action does matter for the outcome of the coattail class action. Prior government litigation substantially increases the likelihood of successful prosecution of the class action, but in some cases it should reduce the likelihood or amount of punitive damages, as well as the amount of legal fees awarded to class counsel.

While much of what I discuss in this Article is equally true of individual lawsuits that piggyback on government litigation, I focus on class actions because as *representative* litigation they share an essential attribute of government actions, and thus present most starkly the question of who should represent the interests of injured citizens in litigation: government officials or class representatives and class counsel.

## I. COATTAIL CLASS ACTIONS

Coattail class actions are a common feature of mass litigation. By "coattail class action," I mean a class action that follows government litigation, seeking to benefit from the government's work. Although this definition is not limited to actions against especially strong defendants, the phenomenon's most impressive manifestations involve government litigation against seemingly invincible defendants such as Microsoft and the tobacco industry. The chance of successful private litigation rises dramatically when government litigation paves the way.<sup>10</sup>

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<sup>10</sup> Empirical evidence suggests that government proceedings greatly increase the likelihood of private litigation success. In a study of antitrust class actions in the Northern District of Illinois, Benjamin Du Val found "a striking correlation between plaintiffs' success and the existence of a government proceeding." Benjamin S. Du Val Jr., *The Class Action as an Antitrust Enforcement Device: The Chicago Experience (Part II)*, 1976 AM. BAR FOUND. RES. J. 1273, 1282. His findings were as follows: First, where there had been a related government proceeding, either successful or unsuccessful, private plaintiffs almost always met with some measure of success in a subsequent private action. Second, all of the

Coattail riding happens in various ways. At the outset, a government lawsuit or investigation may simply give lawyers or litigants the idea for the private suit, or spur to action those who had been considering such a suit, and may suggest ideas or language for the complaint. Government litigation may also generate documentary discovery or other information that private litigants use in their lawsuits. The government suit may result in a judgment with issue preclusive effect against the defendant in subsequent private litigation. Successful government litigation may facilitate private claims by altering public attitudes about the defendants' liability. In economic terms, the plaintiff's attorney, who in most cases is compensated only for success, rationally seeks to minimize both failure rates and search costs by free riding on the government's work.<sup>11</sup> The Microsoft and tobacco cases illustrate a variety of causal connections between government litigation and subsequent class actions.

#### A. *The Microsoft Antitrust Litigation*

The Microsoft antitrust litigation involves claims that software giant Microsoft Corporation illegally restrained competition by tying its Internet browser to its Windows operating system, among other things.<sup>12</sup> In May 1998, the U.S. Department of Justice and nineteen state attorneys general filed two antitrust actions against Microsoft in federal court.<sup>13</sup> After a bench trial, Judge Thomas Penfield Jackson issued findings of fact on November 5, 1999, making it very clear that he was prepared to rule that Microsoft had violated the antitrust laws.<sup>14</sup> On April 3, 2000, the court issued conclusions of law<sup>15</sup> and on June 7, 2000 the court entered final judgment ordering a breakup of the company and

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cases in which plaintiffs settled for \$500,000 or more came when there had been a related government proceeding. Third, private class actions rarely met with success in the absence of a related government proceeding. *See id.* Similarly, looking at litigation concerning insider trading, Professor Michael Dooley found few private actions that were not preceded by an SEC proceeding, and the plaintiffs in those cases had been "spectacularly unsuccessful." *See* Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 16 & n.82 (1980).

<sup>11</sup> *See* John C. Coffee Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 681 (1986) [hereinafter Coffee, *Plaintiff's Attorney*]. Professor Coffee points to private antitrust class actions piggybacking on government proceedings as the "classic illustration" of this pattern. *See id.*

<sup>12</sup> *See United States v. Microsoft Corp.*, 87 F. Supp. 2d 30 (D.D.C. 2000) (conclusions of law); *United States v. Microsoft Corp.*, 84 F. Supp. 2d 9 (D.D.C. 1999) (findings of fact).

<sup>13</sup> *See Microsoft*, 84 F. Supp. 2d 9.

<sup>14</sup> *See id.*

<sup>15</sup> *See Microsoft*, 87 F. Supp. 2d 30 (finding that Microsoft violated antitrust law).

restrictions on certain business practices.<sup>16</sup> Although the remedies remained in doubt until June, it was already clear in November that the court would find squarely against Microsoft on the question of liability.<sup>17</sup>

In the wake of Judge Jackson's findings of fact, private class actions against Microsoft dramatically picked up steam. Prior to November 1999, few class actions had been filed against Microsoft, and none of them had achieved much notice or significance.<sup>18</sup> Within weeks after the findings, many private antitrust class actions were filed against Microsoft.<sup>19</sup> By the time the court issued its conclusions of law in April 2000, over one hundred consumer class actions had been filed.<sup>20</sup> The conclusions of law provided "powerful new ammunition to lawyers pursuing class-action cases."<sup>21</sup> Indeed, within two months after the court entered final judgment in favor of the government, lawyers had filed over 140 private class actions against Microsoft.<sup>22</sup> In August 2000, a California state court certified two statewide consumer classes in the consolidated proceedings of twenty-eight Microsoft antitrust actions.<sup>23</sup>

The contrast is stark. Before November 1999, few lawyers were interested in pursuing consumer antitrust claims against Microsoft,

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<sup>16</sup> *United States v. Microsoft Corp.*, 97 F. Supp. 2d 59, 64-74 (D.D.C. 2000), *appeal denied*, 121 S. Ct. 25 (2000).

<sup>17</sup> See, e.g., Steve Lohr, *Microsoft Faces a Class Action on 'Monopoly'*, N.Y. TIMES, Nov. 22, 1999, at A1 ("Judge Jackson's findings agreed so strongly with the case presented by the Justice Department and 19 states that antitrust experts say his final verdict, expected early next year, will almost surely find that Microsoft is a monopoly that violated the law.").

<sup>18</sup> See Karen Donovan, *Mike's Friendly Microsoft Takeover*, NAT'L L.J., Feb. 14, 2000, at A1 (differentiating between lawyers who had been pursuing class actions against Microsoft since February 1999 and those involved in "the deluge of filings after the Nov. 5 ruling"); Dennis J. Opatrny, *Firms Tangle Over Microsoft Suits*, THE RECORDER (Jan. 21, 2000), at <http://www.law.com/news/A13932-2000Jan20.html>.

<sup>19</sup> See Donovan, *supra* note 18; Opatrny, *supra* note 18; see also Lohr, *supra* note 17 (reporting on "what could become a flood of major lawsuits springing from the Justice Department's antitrust action against the company"). Among those filing class actions against Microsoft after November 5, 1999 were Milberg Weiss Bershad Hynes & Lerach, a leading securities class action firm, Lieff Cabraser, a leading mass tort class action firm, and Stanley Chesley, another prominent mass tort lawyer. See Donovan, *supra* note 18.

<sup>20</sup> See Joel Brinkley & Steve Lohr, *Expedited Appeal Proposed by Judge in Microsoft Case*, N.Y. TIMES, Apr. 5, 2000, at A1, C2.

<sup>21</sup> Joel Brinkley, *U.S. Judge Says Microsoft Violated Antitrust Laws With Predatory Behavior*, N.Y. TIMES, Apr. 4, 2000, A1, C12 (quoting Stephen Houck, lead lawyer for states in their suit against Microsoft).

<sup>22</sup> See Richard Des Ruisseaux, *Local Microsoft Suit Dismissed*, THE COURIER-JOURNAL, July 26, 2000, at 1C; James Rowley, *Case Against Microsoft Dismissed in Kentucky*, SEATTLE TIMES, July 25, 2000, at E2.

<sup>23</sup> See Dennis J. Opatrny, *Judge Certifies Microsoft Classes*, THE RECORDER, Aug. 30, 2000, at <http://www.callaw.com/stories/edt0830h.shtml> (citing *Lingo v. Microsoft*, No. 301357 (Aug. 29, 2000)).

perhaps because it was not worth taking on a complex and uncertain case against a powerful defendant. As a matter of sheer size, nearly any private plaintiff would have felt outmatched by the software giant.<sup>24</sup> The Justice Department lawsuit completely changed the picture. No longer was the case so complex, because the government lawyers had sorted out the issues and put together the evidence, and Judge Jackson spelled out his factual findings.<sup>25</sup> "It makes a hell of a road map," one plaintiffs' lawyer said.<sup>26</sup> Or, to put it more bluntly, "Scan the ruling into a word processor, add some legal boilerplate, and presto: instant class action."<sup>27</sup> No longer were the claims so uncertain, because they had succeeded once, and issue preclusion might dictate the issue of liability without the need for new proof of antitrust violations.<sup>28</sup> By vanquishing the seemingly invincible defendant, the Department of Justice turned Microsoft into a much more appealing target for private class action lawyers.<sup>29</sup> Even if the judgment is reversed or modified on appeal,<sup>30</sup> the

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<sup>24</sup> The Justice Department's trial lawyer in the Microsoft case summed it up well: "Microsoft and the government were the perfect opponents. The government has some power, but Microsoft has at least as much. Anyone else facing either one of them would be overmatched." Joel Brinkley & Steve Lohr, *Retracing the Missteps in the Microsoft Defense*, N.Y. TIMES, June 9, 2000, at A1 (quoting attorney David Boies). Not only is the federal government bigger than private litigants, it has procedural advantages as well. See, e.g., 15 U.S.C. §§ 57b-1, 1312 (1994) (permitting "civil investigative demands" by Federal Trade Commission and Department of Justice in antitrust investigations).

<sup>25</sup> Indeed, some of the class action complaints referred explicitly to the Justice Department suit and to Judge Jackson's findings of fact. See, e.g., Complaint, *DeJulius v. Microsoft Corp.*, No. 1:99CV03148, 1999 U.S. Dist. LEXIS 19184, at \*1-2 (D.D.C. Nov. 29, 1999) ("1. Reference is made to the Court's Findings of Fact dated November 5, 1999 in *United States v. Microsoft* . . . . 2. Based in whole or in part on the Findings, plaintiff has good grounds to believe and does allege that defendant . . . charged supracompetitive prices [for operating systems].").

<sup>26</sup> David Segal, *New Legal Guns Train on Microsoft*, WASH. POST, Nov. 12, 1999, at E1 (quoting John Coale).

<sup>27</sup> Mike France, *Bashing Microsoft (Whatever That Is)*, BUS. WK., Jan. 31, 2000, at 6.

<sup>28</sup> In particular, Judge Jackson's finding that Microsoft chose to charge the revenue-maximizing price of \$89 for the Windows98 upgrade after having considered a price of \$49, was viewed as "an invitation to a class-action lawsuit." Lohr, *supra* note 17, at A1 (quoting former Justice Department antitrust official Robert Litan).

<sup>29</sup> As *The New York Times* reported after the court's conclusions of law, "With Judge Jackson having ruled on Monday that Microsoft was a 'predatory' monopolist that repeatedly violated antitrust laws, private plaintiffs have a far less daunting challenge . . . ." Joel Brinkley & Steve Lohr, *Expedited Appeal Proposed by Judge in Microsoft Case*, N.Y. TIMES, Apr. 5, 2000, at A1, C2. One of the class action lawyers was quoted as saying, "We're very pleased with the way the government case came out. . . . This is very good news for the consumer class-action cases." *Id.* (quoting Leonard B. Simon of Milberg Weiss firm).

<sup>30</sup> As of this writing, the Supreme Court had denied a direct appeal under 15 U.S.C. § 29(b) and remanded the matter for appeal to the Court of Appeals for the District of



government action nonetheless will have triggered the class actions, and provided experience upon which the class action lawyers can build.

### B. The Tobacco Litigation

The tobacco litigation presents a more complex procedural picture, yet it shares with Microsoft the feature of coattail class actions. Prior to the mid-1990's, private tobacco plaintiffs consistently lost to the overpowering defense of the tobacco industry.<sup>31</sup> It appeared that the momentum had shifted when the *Castano v. American Tobacco* nationwide class action, by far the strongest shot private litigation had ever taken at tobacco, was filed in March 1994 and certified in early 1995.<sup>32</sup> The *Castano* effort stalled, however, when the class was decertified the following year by the Fifth Circuit.<sup>33</sup>

As the *Castano* class action was making its way through the trial and appellate courts, and as the lawyers shifted their efforts from the nationwide class action to statewide class actions in various state and federal courts,<sup>34</sup> a number of state attorneys general began pursuing recoupment claims for tobacco-related illness payments. Mississippi filed the first of the state suits in May 1994, and over the next three years most of the other states followed.<sup>35</sup>

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Columbia Circuit. See *Microsoft Corp. v. United States*, 121 S. Ct. 25 (2000).

<sup>31</sup> Peter Pringle described the tobacco companies' record through 1992 as follows: "Eight hundred and thirteen claims filed against the industry, twenty-three tried in court, two lost, both overturned on appeal. Not a penny paid in damages." PRINGLE, *supra* note 5, at 7. A lawyer for R.J. Reynolds in the 1980's wrote an internal memo describing the company's successful litigation strategy to encourage voluntary dismissals by plaintiffs:

The aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his.

*Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993) (quoting 1988 memorandum by attorney J. Michael Jordan).

<sup>32</sup> *Castano v. American Tobacco Co.*, 160 F.R.D. 544 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (5th Cir. 1996).

<sup>33</sup> *Castano*, 84 F.3d 734.

<sup>34</sup> See, e.g., *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998); *Chamberlain v. American Tobacco Co.*, 70 F. Supp. 2d 788 (N.D. Ohio 1999); *Clay v. American Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Scott v. American Tobacco Co.*, 725 So. 2d 10 (La. App. 1998); *Richardson v. Philip Morris, Inc.*, 752 A.2d 200 (Md. 2000).

<sup>35</sup> See The Tobacco Control Resource Center, *The Multistate Master Settlement Agreement and the Future of State and Local Tobacco Control: An Analysis of Selected Topics and Provisions of the Multistate Master Settlement Agreement of November 23, 1998*, at

State lawsuits had at least two advantages over the private actions that had been failing for decades. First, the state governments as a group did not face the overwhelming resource imbalance that typified the earlier wave of private tobacco litigation. According to Mississippi attorney general Michael Moore, "What we did was we built as big an army with as much resources as the tobacco industry had, and we got to that point which I think was probably around twenty or twenty-five states. That's when we . . . began to hear from the tobacco industries somewhere around January or February that they were interested in working something out."<sup>36</sup>

Second, the government lawsuits sidestepped to some extent the personal responsibility defense that had worked so successfully for the tobacco industry against smoker plaintiffs. Private plaintiffs had found it difficult to overcome the defendants' argument based on freedom of choice and smokers' implicit blameworthiness.<sup>37</sup> Although as a matter of legal doctrine it is debatable whether government recoupment lawsuits can entirely ignore this argument,<sup>38</sup> as a practical matter the government actions appeared to circumvent the defense. Government lawsuits would offer jurors the perceived win-win opportunity to punish the tobacco companies without rewarding individual smokers.<sup>39</sup>

As a result of these advantages, the state lawsuits drove the tobacco companies to the negotiating table. Although a 1997 global settlement

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<http://www.tobacco.neu.edu/msa/index.html> (last visited Nov. 9, 2000).

<sup>36</sup> Panel Discussion, *The Tobacco Settlement: Practical Implications and the Future of the Tort Law*, 67 MISS. L.J. 847, 870 (1998) [hereinafter Mississippi Panel Discussion]. To some extent, the playing field was leveled by the size and power of the state governments, as compared with private plaintiffs, although the powerful consortium of plaintiffs' attorneys in the *Castano* class action was a notable exception to the David and Goliath posture that characterized earlier tobacco litigation. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. (forthcoming Nov. 2000) (manuscript at 10-11, on file with author) [hereinafter Erichson, *Informal Aggregation*] (discussing collaborative effort by *Castano* group).

<sup>37</sup> See PRINGLE, *supra* note 5, at 5; ZEGART, *supra* note 5, at 92-93.

<sup>38</sup> See Dagan & White, *supra* note 2, at 373-76 & n.90 (arguing that states' only viable claim was subrogation, which leaves intact defenses that could be asserted against individual smokers).

<sup>39</sup> See Richard A. Daynard & Graham E. Kelder, *The Many Virtues of Tobacco Litigation*, TRIAL, Nov. 1998, at 34, 36 (calling medical cost reimbursement actions an "equalizer in the current wave of tobacco litigation" because plaintiff third-party payor is not smoker); Mississippi Panel Discussion, *supra* note 36, at 871 (quoting attorney Richard Scruggs describing his legal strategy in Mississippi's suit as not suing "on behalf of individual smokers where we would be stuck to subrogation to the defenses who were against the smoker."); Cohen, *supra* note 5, at 25 ("Scruggs and Moore decided to try to get around these 'personal responsibility' defenses by suing on behalf of states, not individuals.").

proposal<sup>40</sup> ultimately fell apart in a political drama,<sup>41</sup> the tobacco defendants continued to negotiate with the attorneys general. In 1998, the states registered a huge success. After Mississippi, Florida, Texas, and Minnesota reached settlements with the defendants totaling over \$36 billion,<sup>42</sup> the remaining forty-six states signed a November 1998 settlement involving approximately \$206 billion in payments by tobacco defendants over the first twenty-five years, plus additional amounts thereafter.<sup>43</sup> In addition to monetary payments, the settlement included substantial reforms, such as prohibitions on youth-oriented marketing techniques.<sup>44</sup>

As the state lawsuits accumulated, proceeded, and settled, they not only generated momentum but also established an enormous arsenal of information and arguments to use against tobacco defendants. Private plaintiffs' attorneys could access a wealth of information and capitalize on the government's discovery. Minnesota established a publicly accessible document depository containing over 35 million pages discovered in its lawsuit.<sup>45</sup> Many of the documents are available on the Internet, along with a catalog of the materials.<sup>46</sup> Also available on the

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<sup>40</sup> *Proposed Tobacco Industry Settlement* (June 20, 1997), <http://stic.neu.edu/settlement/6-20-settle.htm>.

<sup>41</sup> See Howard M. Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L.J. 1983, 2020-22 (1999). For a discussion of the 1997 settlement proposal's restrictions on private litigation, see *infra* notes 146-153 and accompanying text.

<sup>42</sup> Mississippi's \$3.5 billion settlement and Florida's \$11.3 billion settlement were reached in 1997. Texas's \$15.3 billion settlement and Minnesota's \$6.6 billion settlement were reached in 1998. The Minnesota settlement, unlike the others, occurred at the conclusion of trial. See Symposium, *The Tobacco Litigation and Attorneys' Fees*, 67 FORDHAM L. REV. 2827, 2851 (1999) [hereinafter Fordham Symposium] (discussing timing of Minnesota's settlement).

<sup>43</sup> See Multistate Master Settlement Agreement at [http://www.tobacco.neu.edu/extra/multistate\\_settlement.htm](http://www.tobacco.neu.edu/extra/multistate_settlement.htm), sec. IX(c)(1) (listing base payments pursuant to settlement).

<sup>44</sup> See *id.*, sec. III(a)-(b).

<sup>45</sup> See Mark Gottlieb, *Finding the Smoking Guns in Tobacco Litigation*, TRIAL, Nov. 1999, at 22. Minnesota's attorney general Hubert H. "Skip" Humphrey III boasted about the documents discovered by Minnesota: "It was no secret to anybody that Minnesota, of all the litigating states, had built the strongest foundation for a tobacco trial. We were forcing what was to become the largest production of documents in history." Hubert H. Humphrey III, *The Decision to Reject the June, 1997 National Settlement Proposal and Proceed to Trial*, 25 WM. MITCHELL L. REV. 397, 399 (1999). He emphasized that "[g]etting the documents was not easy." *Id.* at 397. See also John Schwartz & Sandra Torry, *Tobacco Industry Faces 'Smoking Howitzers' in Minnesota Suit*, WASH. POST, Jan. 17, 1998, at A9 ("Minnesota Attorney General Hubert H. Humphrey III says his warehouse of 33 million pages of internal industry documents doesn't just contain smoking guns, but 'smoking Howitzers.'").

<sup>46</sup> See Gottlieb, *supra* note 45, at 22. The index can be found at [http://tobacco.neu.edu/mn\\_trial/index.html](http://tobacco.neu.edu/mn_trial/index.html). Many of the documents are available at

Internet are trial exhibits from the Washington state litigation,<sup>47</sup> pleadings and rulings from various state cases,<sup>48</sup> and many other items of use to tobacco plaintiffs' lawyers.<sup>49</sup>

In addition to the documents and other information unearthed by government actions, the government lawsuits helped to foster a change in attitudes about tobacco liability. The public became accustomed to the idea of tobacco liability, thus facilitating private lawsuits and empowering jurors not only to find against the industry,<sup>50</sup> but to find against it for dollar amounts in the billions.<sup>51</sup>

New attitudes even found their way into corporate boardrooms. Liggett chief executive Bennett LeBow, apparently influenced by several developments including the swell of state lawsuits, decided to break ranks with the other tobacco companies.<sup>52</sup> Liggett turned internal documents over to the states, and LeBow began testifying on behalf of tobacco plaintiffs.<sup>53</sup>

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<http://stic.neu.edu/commercecommit/alternate.html>.

<sup>47</sup> See The Attorney General of Washington, *Trial Exhibits*, at <http://www.wa.gov/ago/tobacco/exhibits.htm> (last visited Nov. 19, 2000).

<sup>48</sup> See The State Tobacco Information Center, *Attorneys General Bringing Tobacco Industry to Justice*, at <http://stic.neu.edu> (last visited Nov. 19, 2000).

<sup>49</sup> See Gottlieb, *supra* note 45 (listing and describing of useful Internet sites for tobacco plaintiffs' lawyers).

<sup>50</sup> See Joan Biskupic, *Jurors Vent Outrage at Industry*, WASH. POST, Aug. 30, 1999, at A1 ("All these cases have a snowball effect," [Professor Robert] Rabin added, "as potential jurors read . . . about an industry that appears to have been involved in some coverup and then gets nailed. They feel empowered to act likewise.").

<sup>51</sup> See W. Kip Viscusi, *A Postmortem on the Cigarette Settlement*, 29 CUMB. L. REV. 523, 544 (1999) [hereinafter Viscusi, *Postmortem*] ("One potential ramification of the [state tobacco] settlement is that now juries are beginning to think in terms of billions rather than millions as a realistic dollar figure for a tort liability outcome.").

<sup>52</sup> LeBow explained his change of heart in a 1998 speech:

[I]n the early 1990's, a number of new things happened. Various states around the country began filing lawsuits against the tobacco companies to recover the high costs associated with treating smokers who became ill. . . . These developments, coupled with some other factors, led me in my own mind to begin to question the "scorched earth" litigation strategy of the other tobacco companies - which was, to put it simply, "deny, deny, deny" that smoking causes cancer and any other disease and win all lawsuits at all costs.

Bennett S. LeBow, *Drexel Commencement Speech: The Importance of Independent Thought* (June 13, 1998) (transcript available at [http://www.liggett.net/html/drexel7\\_6\\_98.htm](http://www.liggett.net/html/drexel7_6_98.htm)) (emphasis in original).

<sup>53</sup> See John M. Broder, *Breaking Ranks: The Overview*, N.Y. TIMES, Mar. 21, 1997, at A1; *Second-Hand Smoke Trial in Miami Well Under Way*, 11 NO. 7 MEALEY'S LITIG. REP.: TOBACCO, Aug. 11, 1997.

Private tobacco plaintiffs have used the discovery and momentum generated by the state suits to support their claims.<sup>54</sup> While most courts have refused to certify tobacco class actions,<sup>55</sup> some class actions have moved forward,<sup>56</sup> and all of them rely on the groundwork laid by the state suits.<sup>57</sup> A class action of flight attendants claiming exposure to second-hand smoke,<sup>58</sup> in which LeBow testified at trial,<sup>59</sup> settled in 1997 for \$349 million.<sup>60</sup> In February 2000, plaintiffs filed a class action lawsuit accusing tobacco companies of price-fixing, based on documents discovered in the state cases.<sup>61</sup> Indeed, one of the plaintiffs' lawyers in the price-fixing class action had worked on the state tobacco lawsuits as the former antitrust chief for the State of Washington.<sup>62</sup>

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<sup>54</sup> See Richard A. Daynard & Mark Gottlieb, *Keys to Litigating Against Tobacco Companies*, TRIAL, Nov. 1999, at 18, 20 (listing "exploiting the discovery work of the state attorneys general" as one of keys to success against tobacco industry).

<sup>55</sup> See, e.g., *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), *cert. denied*, 525 U.S. 1114 (1999); *Castano v. American Tobacco Co.*, 84 F.3d 724 (5th Cir. 1996); *Chamberlain v. American Tobacco Co.*, 70 F. Supp. 2d 788 (N.D. Ohio 1999); *Clay v. American Tobacco Co.*, 188 F.R.D. 483 (S.D. Ill. 1999); *Hansen v. American Tobacco Co.*, 1999 U.S. Dist. LEXIS 11277 (E.D. Ark. 1999); *Thompson v. American Tobacco Co.*, 189 F.R.D. 544 (D. Minn. 1999); *Emig v. American Tobacco Co.*, 184 F.R.D. 379 (D. Kan. 1998); *Insolia v. Philip Morris, Inc.*, 186 F.R.D. 535 (W.D. Wisc. 1998), *rev'd on other grounds*, 216 F.3d 596 (7th Cir. 2000); *Ruiz v. American Tobacco Co.*, 180 F.R.D. 194 (D.P.R. 1998); *Walker v. Liggett Group, Inc.*, 175 F.R.D. 226 (S.D. W.V. 1997); *Richardson v. Philip Morris, Inc.*, 752 A.2d 200 (Md. 2000); *Small v. Lorillard Tobacco Co.*, 720 N.E.2d 892 (N.Y. 1999); *Geiger v. American Tobacco Co.*, 696 N.Y.S.2d 345 (N.Y. Sup. Ct. 1999).

<sup>56</sup> See *Engle v. R.J. Reynolds Tobacco Co.*, 672 So. 2d 39 (Fla. App. 1996); *Broin v. Philip Morris Cos.*, 641 So. 2d 888 (Fla. App. 1994); *Scott v. American Tobacco Co.*, 725 So. 2d 10 (La. App. 1998).

<sup>57</sup> See, e.g., *Wisconsin Court Asked to Certify Class of Lung Cancer Victims*, 5 ANDREWS MASS TORT LITIG. REP. 8 (Sept. 1998) (reporting, with regard to proposed federal court tobacco class action in 1998, *Insolia v. Philip Morris Inc.*, that "[t]he class certification motion relies heavily on documents produced during the Minnesota tobacco trial.").

<sup>58</sup> See *Broin v. Philip Morris Cos.*, 641 So. 2d 888 (Fla. App. 1994).

<sup>59</sup> See *Second-Hand Smoke Trial*, *supra* note 53 (reporting that LeBow testified on behalf of the flight attendants even though Liggett remained a defendant in the case).

<sup>60</sup> See *Ramos v. Philip Morris Cos.*, 743 So.2d 24, 27 (Fla. App. 1999).

<sup>61</sup> See James V. Grimaldi, *Tobacco Companies Face New Lawsuits*, WASH. POST, Feb. 8, 2000, at E3 ("In lawsuits filed by state attorneys general, documents from the tobacco companies emerged revealing explicit price-fixing agreements for more than half a dozen countries, said [attorney] Paul Gallagher . . . . Those documents form the basis of the lawsuit to be filed today.").

<sup>62</sup> See *id.* (reporting that Jon Ferguson, who found many of key documents while working as Washington's antitrust chief and lead attorney on state's tobacco suit, would work on class action). When asked why he resigned as Washington state's antitrust chief and joined a law firm to work on the class action, Ferguson replied, "Steve Berman got \$50 million and I got a plaque." James V. Grimaldi, *Hearsay*, WASH. POST, Feb. 14, 2000, at F35.

The most successful private action against tobacco to date is *Engle v. R.J. Reynolds Tobacco Co.*,<sup>63</sup> a Florida statewide class action of smokers that proceeded to trial in 1998.<sup>64</sup> Class counsel Stanley Rosenblatt introduced at trial many of the documents discovered in Minnesota's lawsuit,<sup>65</sup> and presented LeBow's testimony.<sup>66</sup> The *Engle* jury determined that the tobacco companies had deceived the public about the hazards and addictiveness of cigarettes,<sup>67</sup> and subsequently awarded compensatory damages of \$12.7 million for the three class representatives,<sup>68</sup> and \$144.8 billion in punitive damages, the largest monetary verdict in history.<sup>69</sup> Even if the *Engle* verdict is reduced or reversed on appeal, the jury's determination – which would have been unthinkable prior to 1994 when Mississippi filed the first of the state suits – stands as a testament to the power of government lawsuits to shift the balance of litigative power and to facilitate private class action success.

The history of the tobacco litigation demonstrates the folly of trying to make simple statements about complex litigation. My working definition of coattail class actions – class actions that follow government litigation seeking to benefit from the government's work – fails to capture the multi-directional causal links between government and private litigation in complex matters. Class actions often ride the

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<sup>63</sup> 672 So. 2d 39 (Fla. App. 1996).

<sup>64</sup> See Barry Meier, *Trial to Begin in Big Lawsuit by Smokers in Florida*, N.Y. TIMES, July 6, 1998, at A7.

<sup>65</sup> See *id.* ("Mr. Rosenblatt said he did not plan to use surprise witnesses or industry documents but would use records uncovered by Minnesota in its lawsuit against the industry."); Barry Meier, *Tobacco Industry Loses First Phase of Broad Lawsuit*, N.Y. TIMES, July 8, 1999, at A1 (hereinafter Meier, *First Phase*) ("Mr. Rosenblatt also presented thousands of internal industry documents, including many uncovered by lawyers preparing for Minnesota's case last year against the industry.").

<sup>66</sup> See *FL Jury Returns Verdict Against Tobacco Cos. in First Phase of Engle Trial*, 6 ANDREWS MASS TORT LITIG. REP. 7 (July 1999) (reporting that LeBow testified in *Engle* "that cigarettes are addictive and cause numerous deadly diseases," and that he broke ranks after he learned "that the industry had known about the health hazards of smoking for decades, and that tobacco companies had concealed and suppressed this information").

<sup>67</sup> See Meier, *First Phase*, *supra* note 65.

<sup>68</sup> See Barry Meier, *Jury Finds That Cigarettes Caused Smokers' Diseases*, N.Y. TIMES, Apr. 8, 2000, at A7.

<sup>69</sup> See Rick Bragg, *Tobacco Lawsuit in Florida Yields Record Damages*, N.Y. TIMES, July 15, 2000, at A1. The verdict imposed punitive damages of \$73.96 billion on Philip Morris, \$36.28 billion on R.J. Reynolds, \$17.59 billion on Brown & Williamson, \$16.25 billion on Lorillard Tobacco, \$790 million on Liggett Group, \$1.195 million on the Council for Tobacco Research, and \$278,389 on the Tobacco Institute. See *id.*; Rick Bragg & Sarah Kershaw, *Juror Says a 'Sense of Mission' Led to Huge Tobacco Damages*, N.Y. TIMES, July 16, 2000, at 1, 18.

coattails of government litigation, but sometimes the private litigation comes first.<sup>70</sup> Claims also may interact in a more complex process in which the government and private claims propel and reinforce each other. Whereas the Microsoft litigation offers a relatively clean example of coattail class actions, the tobacco litigation is better understood as a complex, two-way process. The state lawsuits turned out to be the breakthrough claims in the tobacco litigation, but it is unlikely that the attorneys general could have launched their attack without the benefit of prior litigation by private tobacco plaintiffs. In particular, the *Castano* class action, by demonstrating the potential power of well-financed, highly coordinated tobacco plaintiffs' lawyers, may have done as much as the state suits to change the momentum. Moreover, powerful insider information became available to tobacco plaintiffs' lawyers in the mid-1990's, greatly strengthening both the states' and private plaintiffs' legal claims.<sup>71</sup> It probably would be accurate to say that the confluence of these three factors – the insiders' information, the *Castano* class action, and the state attorney general lawsuits – turned the tide of the tobacco litigation.

Given the investigative powers of certain government agencies and the well-developed mass tort plaintiffs' bar, it may be that government actions will usually come first in antitrust and securities litigation, whereas individual or class suits will usually come first in mass tort litigation. Either way, recent experience shows that the onset of government litigation powerfully assists private lawsuits and class

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<sup>70</sup> In the Visa/MasterCard antitrust litigation, for example, the government sought to benefit from the private class action. A class action on behalf of retailers was filed against Visa and MasterCard in 1996. The United States Department of Justice, which filed an action against Visa and MasterCard in 1998, intervened in the class action in order to move for modification of the court's protective order to allow plaintiffs to share their document analysis with the Justice Department. The Justice Department had asked defendants to produce any documents they had turned over in the private action, and when the number of documents exceeded three million, the government intervened to obtain the plaintiffs' lawyers' analysis. See *In re Visa Check/MasterMoney Antitrust Litigation*, 190 F.R.D. 309 (E.D.N.Y. 2000); *Fed. Judge Permits DOJ to Intervene in Credit Card Antitrust Action*, ANDREWS ANTITRUST LITIG. REP., Feb. 2000, at 17; see also Mark Hamblett, *Justice Department Goes After Visa and Mastercard*, N.Y.L.J., June 8, 2000, at 5. For another example of government action triggered by private litigation, see Stephen Calkins, *An Enforcement Official's Reflections on Antitrust Class Actions*, 39 ARIZ. L. REV. 413, 422 & n.45 (1997) (describing NASDAQ Market Makers Antitrust Litigation).

<sup>71</sup> Paralegal Merrell Williams exposed internal Brown & Williamson documents showing the tobacco industry's knowledge of cigarette risks and nicotine addictiveness, and whistleblower scientist Jeffrey Wigand shed light on industry knowledge and practices. See PRINGLE, *supra* note 5, at 56-71, 177-93; ZEGART, *supra* note 5, at 77-81, 129-33, 181-93.

actions that follow.<sup>72</sup>

## II. OTHER DEVELOPMENTS MIXING PUBLIC AND PRIVATE LAWYERING IN MASS LITIGATION

Recent developments in mass litigation combine with coattail class actions to mix the roles of public and private lawyers. Indeed, the mixing of public and private lawyering roles can occur even before any piggyback class action or individual lawsuit has been filed; it occurs in the government litigation itself. One way such mixing occurs is through the retention of private lawyers to pursue government cases, such as trial lawyer David Boies in the Microsoft case, and dozens of high-profile plaintiffs' lawyers in the tobacco and handgun lawsuits. Another kind of public-private mixing occurs when government entities seek to recoup public funds spent to prevent or ameliorate harm by injurious industries, as in the tobacco, handgun, and lead paint cases.

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<sup>72</sup> In addition to Microsoft and tobacco, the infant formula litigation of the early 1990's provides another interesting example of coattail class actions. The Federal Trade Commission ("FTC") and a number of states, following an aggressive government investigation, pursued antitrust claims against the top three infant formula manufacturers, alleging that the manufacturers fixed prices in violation of federal and state antitrust laws. See Kathleen Day, *A New Activism on Antitrust Policy: The FTC Initiates Aggressive Inquiry into Alleged Price Fixing by Infant Formula Giants*, WASH. POST, Jan. 13, 1991, at H1; Barry Meier, *What Prompted Investigations into Pricing of Baby Formula?*, N.Y. TIMES, Jan. 19, 1991, at 54 (reporting on investigations by FTC and state attorneys general in New York, Pennsylvania, Wisconsin, Texas, and Florida); Robert Pear, *F.T.C. Studying Infant Formula in Price Inquiry*, N.Y. TIMES, Dec. 31, 1990, at 1. Florida was the first to file suit in January 1991. See Barry Meier, *Florida Alleges Fixing of Prices on Infant Food*, N.Y. TIMES, Jan. 5, 1991, at 7. Within one month after Florida filed its lawsuit, and as the FTC and the other states pursued their investigations, two categories of private class actions emerged. First, consumer class actions were filed against the manufacturers, alleging that shoppers had paid inflated prices for infant formula due to illegal price-fixing. Second, classes of retailers and wholesalers sued the manufacturers, alleging that they had paid illegally fixed prices on formula purchased for resale. See Wade Lambert & Gregory Stricharchuk, *Infant-Formula Makers Are Sued by Retailers Citing Overpayments*, WALL ST. J., Jan. 31, 1991, at B2. Two of the manufacturers settled with the federal government in 1992, while a federal suit against Abbott Laboratories went forward. See Robert Pear, *Top Infant-Formula Makers Charged by U.S. Over Pricing*, N.Y. TIMES, June 12, 1992, at A1. Subsequently, class action settlements were reached. See Barry Meier, *Abbott Labs Settles in Florida Suits*, N.Y. TIMES, May 25, 1993, at D5 (reporting that Abbott agreed to pay "\$79 million to wholesale purchasers of formula to settle a class-action suit, \$8 million to the state of Florida, and most of the rest – about \$53 million – to three major supermarket chains"); *Abbott Labs Settles FTC Case, Agrees Not to Collude on Ads*, WALL ST. J., Sept. 3, 1993, at A2 (noting that in May 1993, three manufacturers "settled consolidated federal antitrust litigation in Tallahassee, Fla., by agreeing to pay a total of more than \$230 million to drugstores, supermarkets and the state of Florida"); *Mead Johnson to Pay \$38.76 Million Settlement*, N.Y. TIMES, July 3, 1992, at D1 (reporting defendant Mead Johnson's agreement to pay \$38.76 million to settle retailer/wholesaler class action).



### A. Private Lawyers in Public Cases

The use of private lawyers to pursue government claims adds a new dimension to the mixing of private and public lawyering that coattail class actions entail. For example, in late 1997, Department of Justice antitrust chief Joel Klein asked David Boies to serve as trial lawyer for the United States in the Microsoft antitrust case. Boies, a prominent litigator who had formed his own firm after many years as a partner at New York's Cravath, Swaine & Moore, agreed to take the case for a substantially reduced hourly fee.<sup>73</sup> Klein explained that he hired Boies because he needed an experienced lawyer for the complex trial.<sup>74</sup> As one commentator put it, "Klein figured the best way to fashion a noose out of the mountain of incriminating company memos and e-mail messages was to bring in the most accomplished legal hangman available."<sup>75</sup> By all accounts, David Boies' performance at trial was an important factor in the government's trial victory.<sup>76</sup>

In the tobacco litigation, most of the state attorneys general retained plaintiffs' lawyers on contingent fees, including some of the most successful mass tort lawyers in the country. Although contingent fee arrangements had been used occasionally by government entities in the past,<sup>77</sup> the state tobacco litigation was precedent-setting in the scale and prominence of its use of contingent fee lawyers.<sup>78</sup> Ultimately, most of the fees were resolved by arbitration, rather than strictly pursuant to the contingent fee contracts, and some lawyers accepted reduced fees.<sup>79</sup>

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<sup>73</sup> According to one report, Boies charged the Justice Department \$250 per hour rather than his usual \$600 fee. See Bumiller, *supra* note 3, at B2. Predicting that his total bill would be \$100,000, Boies said that if it were a corporate client, "I would have added at least a zero." *Id.*

<sup>74</sup> See *id.* The Justice Department's own lawyers did not have the requisite experience, Klein said, because the antitrust division had not handled major antitrust cases for a number of years. See *id.*

<sup>75</sup> *Busting Bill Gates*, THE STANDARD, (Apr. 24, 2000), at <http://www.thestandard.com/article/display/0,1151,14251,00.html>.

<sup>76</sup> See Boies Wonder, NAT'L L.J., Dec. 27, 1999, at A8. For his work on the Microsoft case, *The National Law Journal* selected Boies as "Lawyer of the Year" for 1999. See *id.* The Internet magazine *The Standard* named him the Internet economy's "Most Powerful Consigliere". See *Busting Bill Gates*, *supra* note 75.

<sup>77</sup> See Glenn G. Lammi, *States Face Many Pitfalls When Hiring Contingent Fee Lawyers*, ANDREWS TOBACCO INDUS. LITIG. REP., Mar. 14, 1997, at 16218 (noting that such arrangements had been used in asbestos and environmental litigation); see also Karen Dillon, *Only \$1.5 Million a Year*, Am. Law., Oct. 1989, at 38 (noting that the Ness Motley firm received about \$2.3 million in fees for settling a \$14 million asbestos property damage case for the state of Minnesota).

<sup>78</sup> See Lammi, *supra* note 77.

<sup>79</sup> See Fordham Symposium, *supra* note 42, at 2828. In Minnesota, attorney Michael

Nevertheless, the fees are best understood as contingent, rather than hourly or flat, inasmuch as the lawyers would have received nothing had there been no recovery, and the amounts were driven largely by the size of the recovery.<sup>80</sup> Three states – Colorado, California, and Nebraska – chose to pursue tobacco lawsuits without retaining outside lawyers.<sup>81</sup> Contingent fee arrangements have similarly been used in the recent lawsuits filed by municipalities against lead paint manufacturers<sup>82</sup> and handgun manufacturers,<sup>83</sup> although Chicago decided to rely on its own city and county lawyers for its gun suit, with a law firm's pro bono assistance.<sup>84</sup> Blurring of public and private lawyer roles occurs most dramatically when government retention of contingent fee lawyers converges with another development: government recoupment claims against industries.

### *B. Public Lawyers in Private Plaintiffs' Shoes*

Increasingly, government lawsuits seek to recover money spent on preventing or treating harm caused by defendants' tortious conduct. These lawsuits put government lawyers in a role akin to private plaintiffs' tort lawyers, and arguably somewhat different from the traditional government lawyer role.<sup>85</sup> This characterization does not

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Ciresi had a 25% contingent fee agreement entitling his firm to \$1.5 billion, but agreed to accept a lesser fee of \$440 million. See *Michael Ciresi: The Anti-Marlboro Man Got the Best Results of Anyone Fighting Big Tobacco*, NAT'L L.J., Dec. 28, 1998, at A12. The Mississippi lawyers had agreed from the outset to allow the court to determine the fee amount. See Mississippi Panel Discussion, *supra* note 36, at 857-58.

<sup>80</sup> Legal ethicist Barbara Gillers explains that the state tobacco fees "are not measured by hourly rates, nor should they be. They are a variation of what has long been called 'value billing'; that is, you get in a sense what you pay for, and a contingency is a variation of that. It does not correspond to any particular hourly rate." Fordham Symposium, *supra* note 42, at 2841; cf. Samuel R. Gross, *We Could Pass A Law . . . What Might Happen if Contingent Legal Fees Were Banned*, 47 DEPAUL L. REV. 321, 321 (1998) (describing the two essential attributes of contingent fees as "No win, No pay" and "the lawyer's fee is proportional to the client's recovery").

<sup>81</sup> See Gale A. Norton, *The Long Term Implications of Tobacco Litigation* (Jan. 8, 2000), at 7 n.13 (unpublished manuscript, on file with author).

<sup>82</sup> See Barry Meier & Richard A. Oppel, *States' Big Suits Against Industry Bring Battle on Contingent Fees*, N.Y. TIMES, Oct. 15, 1999, at A1 (reporting that Ness Motley firm is handling Rhode Island's lead paint lawsuit on seventeen percent contingent fee contract).

<sup>83</sup> See Bob Van Voris, *Gun Cases Use Tobacco Know-How*, NAT'L L.J., Dec. 7, 1998, at A1 (reporting that, under their contingent fee contract, private lawyers in New Orleans gun lawsuit would get twenty percent of any settlement and thirty percent of any trial victory). New Orleans Mayor Marc Morial explained his decision to hire leading plaintiffs' lawyers to handle the city's suit: "You want lawyers who can take on giants." *Id.*

<sup>84</sup> See *id.*

<sup>85</sup> See Dagan & White, *supra* note 2, at 355 (calling current spate of government

apply very well to the Microsoft case, nor does it apply to most antitrust or securities actions brought by the government, in which government lawyers play a more familiar role as enforcers of the law. Although antitrust law empowers state attorneys general to sue as *parens patriae* to collect treble damages for harm caused to citizens,<sup>86</sup> the role of collecting money damages for antitrust harm has more commonly fallen to private plaintiffs.<sup>87</sup> Rather, the cases in which government lawyers have taken on roles most reminiscent of plaintiffs' tort lawyers have largely involved harm from dangerous products.

The leading example is the state tobacco litigation, in which state attorneys general sued tobacco companies to recover money the states spent to provide health care for cigarette-caused illnesses. The states' claims, many of which were novel on the law<sup>88</sup> and controversial on the facts,<sup>89</sup> varied from state to state, and included subrogation, consumer fraud, antitrust, unjust enrichment, restitution, and RICO, among others.<sup>90</sup> After the states had settled their claims, the U.S. Department of Justice filed its own action against the tobacco companies, claiming reimbursement for medical expenses.<sup>91</sup> Former Colorado Attorney General Gale Norton acknowledged the unusual nature of the state tobacco suits: "In a strict legal sense, the state is collecting only its own expenses for medical care and public services. In a less stringent sense, the state is aggregating the claims of its citizens and fulfilling a role

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lawsuits against industries to recover money spent ameliorating or preventing tort injuries "unfamiliar").

<sup>86</sup> See 15 U.S.C. § 15(c) (2000).

<sup>87</sup> See Calkins, *supra* note 70, at 431, 442 (explaining that in terms of redress, private class actions are more effective than government civil cases).

<sup>88</sup> See Gary T. Schwartz, *Tobacco, Liability, and Viscusi*, 29 CUMB. L. REV. 555, 556 (1999) ("A fair observation is that never has so much money changed hands as a result of litigation in which the theories underlying that litigation have been so uncertain – not necessarily wrong, but undeniably uncertain."); see also Dagan & White, *supra* note 2, at 373-76 n.90 (rejecting all claims asserted by the states except subrogation).

<sup>89</sup> One of the leading critics of the state tobacco claims is Professor Kip Viscusi, who has argued that the states are unable to prove causation and damages because, on balance, the states benefit financially from cigarettes. See Viscusi, *Postmortem*, *supra* note 51; W. Kip Viscusi, *The Governmental Composition of the Insurance Costs of Smoking*, 42 J. LAW & ECON. 575 (1999). Viscusi also has presented research on smokers' awareness of smoking's health risks, and their decision to smoke notwithstanding that awareness. See W. KIP VISCUSI, *SMOKING: MAKING THE RISKY DECISION* (1992).

<sup>90</sup> See Dagan & White, *supra* note 2, at 373-76 n.90; Maria Gabriela Bianchini, Comment, *The Tobacco Agreement That Went Up in Smoke: Defining the Limits of Congressional Intervention into Ongoing Mass Tort Litigation*, 87 CAL. L. REV. 703, 712 (1999).

<sup>91</sup> See Complaint, *United States v. Philip Morris, Inc.*, No. 1:99cv2496 (D.D.C. Sept. 22, 1999), <http://www.usdoj.gov/civil/cases/tobacco2/index.htm>.

similar to that of a class action."<sup>92</sup> There were earlier examples of government recoupment lawsuits,<sup>93</sup> but the tobacco suits forged new ground in the size of the recovery, the heavy use of contingent fee lawyers, and the coordinated multistate effort, providing a model for government plaintiffs to follow.<sup>94</sup>

Government litigation against other industries will follow. Many have called handguns "the next tobacco."<sup>95</sup> Thirty-one municipalities have sued gun manufacturers, dealers, and trade associations on recoupment theories similar to the states' tobacco claims.<sup>96</sup> In October 1998, New Orleans sued the gun industry to recover money spent responding to gun violence, claiming that handguns are defective because they do not incorporate available safety features.<sup>97</sup> Chicago filed a similar suit two weeks later. Within one year, twenty-nine municipalities had filed lawsuits,<sup>98</sup> and more have filed since.<sup>99</sup> On another front, Rhode Island has sued the makers of lead paint to recover costs of treating and educating lead-poisoned children as well as the costs of abating the lead

<sup>92</sup> Norton, *supra* note 81, at 6.

<sup>93</sup> See, e.g., *Denekas v. Shalala*, 943 F. Supp. 1073 (S.D. Iowa 1996); *United States v. Sosnowski*, 822 F. Supp. 570 (W.D. Wisc. 1993); *United States v. Blue Cross and Blue Shield of Michigan*, 726 F. Supp. 1517 (E.D. Mich. 1989); *In re Dow Corning Corp.*, 244 B.R. 634 (Bankr. E.D. Mich. 1999); see also Medicare Secondary Payer Act, 42 U.S.C. § 1395y (2000) (permitting recoupment actions for Medicare and Medicaid claims); Federal Medical Care Recovery Act, 42 U.S.C. §§ 2651-2653 (2000) (permitting recoupment actions for Department of Defense, Department of Veterans' Affairs, and Indian Health Service claims).

<sup>94</sup> See, e.g., Brian J. Siebel, *City Lawsuits Against the Gun Industry: A Roadmap for Reforming Gun Industry Misconduct*, 18 ST. LOUIS U. PUB. L. REV. 247, 249 ("The city and county gun lawsuits draw inspiration from and build on the lessons learned from the recent public lawsuits against the tobacco industry").

<sup>95</sup> See, e.g., Cohen, *supra* note 5, at 25 ("Guns are already being touted as 'the next tobacco.'"); Siebel, *supra* note 94, at 248 ("guns have become the next tobacco"); *Remarks of Alabama Attorney General Bill Pryor*, 29 CUMB. L. REV. 569, 570 (1999) [hereinafter *Remarks of Bill Pryor*] ("the mayors of New Orleans and Chicago have followed the tobacco precedent by filing lawsuits against the firearms industry").

<sup>96</sup> See *U.S. Cities v. The Gun Industry Lawsuits*, U.S. Cities Against the Gun Industry, at <http://www.handguncontrol.org/lap/index.html> (n.d.) (listing city lawsuits against gun industry); *Firearms Litigation: Current Cases*, Firearms Litigation Clearinghouse, at <http://www.firearmslitigation.org/cases.html> (n.d.); see also Paul M. Barrett & Vanessa O'Connell, *White House and Gun Industry May Discover Some Talking Points to Reach Deal on Lawsuit*, WALL ST. J., Dec. 13, 1999, at A36.

<sup>97</sup> See Complaint, *Morial v. Smith & Wesson Corp.*, No. 98-18578 (Orleans Parish Civ. Dist. Ct., Oct. 30, 1998), available at <http://www.handguncontrol.org/lap/pdf-bin/neworleans.pdf>; Siebel, *supra* note 94, at 265.

<sup>98</sup> See Siebel, *supra* note 94, at 248.

<sup>99</sup> See Center to Prevent Handgun Violence, *Handgun Control*, at <http://www.handguncontrol.org/lap/index.html> (last visited Nov. 19, 2000).

paint problem on public property.<sup>100</sup> Other targets await.<sup>101</sup> Indeed, a nationwide group of state attorneys general met in Nashville in 1999 to discuss future targets.<sup>102</sup> Given the success of the state tobacco suits, it was inevitable that government actors would pursue similar claims against others.

Some commentators have criticized the state attorneys general for behaving too much like private plaintiffs' lawyers. *The Wall Street Journal* complained of "the sue-the-socks-off-'em compulsions" of the state attorneys general, arguing that "the attorneys general increasingly have become little more than deputized posses running raids against the private sector."<sup>103</sup> Even the attorney general of Alabama criticized his fellow state attorneys general for filing the tobacco suits and the mayors for filing the handgun suits: "This dangerous marriage of the tort bar and governmental power must be severed soon before it further weakens what remains of limited government, the rule of law, and respect for individual responsibility."<sup>104</sup>

While there is nothing inherently problematic about government entities' suing industries to recover money damages,<sup>105</sup> some specific devices used in recent government recoupment actions are troubling, as the Article will discuss in Part Three, particularly the retention of private lawyers on contingent fees,<sup>106</sup> and the attempt to compromise private claims in settling public suits.<sup>107</sup> One thing is clear about the rise of government recoupment actions against industries that have caused widespread harm: it extends the phenomenon of coattail class actions well beyond the relatively familiar territory of securities and antitrust

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<sup>100</sup> See Complaint, Rhode Island v. Lead Indus. Ass'n (R.I. Sup. Ct. Oct. 12, 1999), available at <http://www.riag.state.ri.us/press/Oct99/Complaint.html>.

<sup>101</sup> See Dagan & White, *supra* note 2, at 355 ("Industries waiting in the wings for this treatment include lead paint makers, and perhaps even brewers, distillers, and producers of fatty foods."); Viscusi, *Postmortem*, *supra* note 51, at 544 ("The subsequent suits filed against the gun industry by several municipalities suggest that this phenomenon may be more widespread than being simply a tobacco related issue. Alcoholic beverages, cars, and lead paint similarly could emerge as targets for litigation.").

<sup>102</sup> See Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits After Tobacco: Is the Domino Effect for Lead Paint Manufacturers and Others Fair Game?*, 27 PEPP. L. REV. 685, 687 (2000).

<sup>103</sup> Editorial, *Who's Next*, WALL ST. J., Apr. 4, 2000, at A26.

<sup>104</sup> Remarks of Bill Pryor, *supra* note 95, at 570.

<sup>105</sup> This does not necessarily mean that the states and municipalities should prevail in their claims against the cigarette, handgun, and lead paint manufacturers. See *supra* notes 88-89 (noting that questions have been raised about some novel legal theories asserted in government recoupment actions).

<sup>106</sup> See *infra* notes 169-191 and accompanying text.

<sup>107</sup> See *infra* notes 146-153 and accompanying text.

piggyback litigation, and makes it a broader development in mass litigation.

Finally, in thinking about the mixing of private and public lawyer roles in mass litigation, it may be useful to pause on the idea of public law litigation.<sup>108</sup> David Rosenberg observed over fifteen years ago that mass tort litigation could be understood as a form of public law litigation.<sup>109</sup> With recent developments in mass tort litigation, particularly the use of settlement class actions, Linda Mullenix has suggested that a private law paradigm is more apt.<sup>110</sup> “[T]he end of the twentieth century has been the era of aggregate private dispute resolution,” Professor Mullenix writes.<sup>111</sup>

Coattail class actions and related phenomena suggest that mass tort litigation is more intertwined with government action, and thus more public, than Professor Mullenix suggests. Mullenix allows that the tobacco litigation involves government claims, but she downplays tobacco’s significance as a model in this regard:

With the recent exception of the tobacco litigation, mass tort litigation rarely is pursued by state attorney generals or other public officials acting *parens patriae* on behalf of citizens, as these officials would in antitrust litigation, for example. Thus, very little mass tort litigation is directly invested with a public purpose.<sup>112</sup>

The handgun and lead paint litigation suggests that government lawsuits early in the development of mass torts may become the rule, rather than the exception. The analogy to antitrust litigation is thus stronger than Mullenix grants, as government and private actions intermingle in the tobacco litigation and other mass torts, just as they intermingle in the Microsoft litigation and other antitrust matters.

As it has developed in recent years, litigation over widespread injuries – not only mass torts but also other matters involving allegations of widespread harm – belongs very much in the public sphere. The

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<sup>108</sup> See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (introducing concept of “public law litigation”).

<sup>109</sup> See David Rosenberg, *The Causal Connection in Mass Tort Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

<sup>110</sup> See Linda Mullenix, *Resolving Aggregate Mass Tort Litigation: The New Private Law Dispute Resolution Paradigm*, 33 VAL. U.L. REV. 413 (1999) [hereinafter Mullenix, *Private Law Paradigm*]; Linda Mullenix, *Lessons from Abroad: Complexity and Convergence*, 46 VILL. L. REV. (forthcoming Spring 2001) (manuscript at 1-2, on file with author), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=233659](http://papers.ssrn.com/paper.taf?abstract_id=233659).

<sup>111</sup> Mullenix, *Private Law Paradigm*, *supra* note 110, at 415.

<sup>112</sup> *Id.* at 426.

Microsoft antitrust litigation and the tobacco litigation, as well as the handgun, sweepstakes, lead paint, and other lawsuits mentioned in this Article, raise significant public policy issues and naturally draw the attention of government officials and the media. These matters fit much of Abram Chayes' public law litigation model, with their sprawling rather than bipolar party structure, and remedies that require continuing judicial or quasi-judicial involvement.<sup>113</sup> In these examples of recent mass litigation, government actors have played leading roles. At the same time, private lawyers remain powerful players in litigation over widespread harm,<sup>114</sup> and class actions provide a critical means for obtaining and distributing compensation. The question, then, is not whether mass litigation should be considered public or private, but rather how the dispute resolution system should make the best use of the attributes of each sphere. To answer this question, we must consider the differences between two types of representative litigation.

### III. NOT ALL REPRESENTATIVE LITIGATION IS ALIKE

The class action is the archetype of representative litigation, but it is not the only type. By definition, class representatives sue on behalf of themselves and others similarly situated.<sup>115</sup> But lawsuits brought by the government can also be viewed as representative litigation.<sup>116</sup> The purest example of representative litigation by the government is the *parens patriae* suit, in which a state sues as "parent of the country" to protect its

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<sup>113</sup> See Chayes, *supra* note 108, at 1282-84. While she focuses on the dissimilarities, Professor Mullenix acknowledges that mass tort cases fit several aspects of the public law paradigm. See Mullenix, *Private Law Paradigm*, *supra* note 110, at 424.

<sup>114</sup> See Barry Meier, *Bringing Lawsuits to Do What Congress Won't*, N.Y. TIMES, Mar. 26, 2000 (Week in Review), at 3 (discussing "use of concentrated legal firepower to set social policy" on handguns, tobacco, and HMO's).

<sup>115</sup> See Fed. R. Civ. P. 23(a) ("One or more members of a class may sue or be sued as representative parties on behalf of all . . .").

<sup>116</sup> Municipal government litigation can itself be divided into "public" and "private" aspects, inasmuch as municipal corporations can sue in their public capacity as governing bodies or in their quasi-private capacity as property owners. See 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10.05, at 304 (3d ed. 1996) ("A municipal corporation has a twofold character and dual powers . . . . The one is variously designated as public, governmental, political or legislative, in which the municipal corporation acts as an agency of the state. The other is variously designated as municipal, private, quasi-private, or proprietary."). For a discussion of the municipal handgun litigation in terms of the municipalities' public and private capacities, see Note, *Recovering the Costs of Public Nuisance Abatement: The Public and Private City Sue the Gun Industry*, 113 HARV. L. REV. 1521 (2000) [hereinafter *Harvard Gun Note*].

quasi-sovereign interest in the health and welfare of the people,<sup>117</sup> but arguably all government lawsuits should represent the interests of the citizenry. Not all representative litigation is alike, however. In litigation over widespread harm, government lawsuits and class action lawsuits generally serve non-identical purposes, represent the interests of overlapping but different groups, and are driven by different incentives.

As a formal matter, the role of the government lawyer differs from the role of the private class action lawyer. The public lawyer represents the employing government agency or entity, which in turn represents the public as part of a constitutional structure of democratic government. While it would be facile and incorrect to say that the government lawyer simply represents the public and should do whatever the lawyer personally believes will advance the public interest,<sup>118</sup> it would be equally incorrect to say that the government lawyer owes no greater duty to the public good than does a private lawyer.<sup>119</sup> A Federal Bar Association ethics opinion contrasted "the private practitioner [who] represents the client's personal or private interest" with the government lawyer, whose "employment requires him to observe in the performance of his professional responsibility the public interest sought to be served by the government organization of which he is a part."<sup>120</sup> The duties of the government lawyer are not measured in terms of the interests of any particular subgroup of citizens, nor even in terms of maximizing penalties or recoveries.<sup>121</sup>

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<sup>117</sup> See *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592 (1982); Jack Ratliff, *Paras Patriae: An Overview*, 74 TUL. L. REV. 1847 (2000).

<sup>118</sup> See Jeffrey Rosenthal, *Who Is the Client of the Government Lawyer?*, in *ETHICAL STANDARDS IN THE PUBLIC SECTOR* 13, 16-19 (Patricia E. Salkin ed. 1999); William Josephson & Russell Pearce, *To Whom Does the Government Lawyer Owe the Duty of Loyalty When Clients Are in Conflict?*, 29 HOW. L.J. 539 (1986); Geoffrey P. Miller, *Government Lawyers' Ethics in a System of Checks and Balances*, 54 U. CHI. L. REV. 1293, 1294 (1987).

<sup>119</sup> See Rosenthal, *supra* note 118, at 24-25.

<sup>120</sup> Federal Bar Association Ethics Op. 73-1, *reprinted in* 32 FED. B.J. 71, 72 (1973); *see also* Federal Bar Association, Code of Professional Responsibility, Federal Ethical Consideration 5-1, *reprinted in* 60 A.B.A.J. 1541, 1543-44 (1974) ("The immediate professional responsibility of the federal lawyer is to the department or agency in which he is employed, to be performed in light of the particular public interest function of the department or agency.").

<sup>121</sup> Jeremy Rabkin, contrasting the position of White House counsel with the position of Justice Department lawyers, wrote:

The U.S. Department of Justice proclaims this motto on the wall of the attorney general's rotunda: "The United States wins its point whenever justice is done its citizens in the courts." Even when it loses a legal battle, in other words, the Justice Department may still console itself that its clients have been served – at least when the opposing party is also an American citizen. Attorney General Griffin Bell articulated the premise of this thought in 1977 when he affirmed that,



Here I should acknowledge a weakness in my argument. Government lawyers often find themselves in adversary litigation or negotiation akin to private adversary dealings. Arguably the adversary system works best when the government lawyer seeks to maximize the interests of the government entity, within the usual constraints of advocacy ethics.<sup>122</sup> Still, it seems to me that government lawyers appropriately perceive their role as involving consideration of the public good beyond that ordinarily exercised by private lawyers.

In contrast to the duties of government lawyers, private class counsel owe a duty of loyalty to the members of the particular class.<sup>123</sup> Indeed, the certification of a class action is premised upon a finding that the lawyer will adequately represent the class interests.<sup>124</sup> In a money

for the Justice Department, "the people are your client."

Jeremy Rabkin, *White House Lawyering: Law, Ethics, and Political Judgments*, in GOVERNMENT LAWYERS 107, 107 (Cornell W. Clayton ed. 1995). I would not go so far as to accept the characterization that the Justice Department lawyer's client is simply "the people." Even Mr. Rabkin does not extend the point to all government lawyers. *See id.* Nevertheless, the passage illustrates the rather different perception of the roles of Justice Department and private lawyers.

In the criminal justice realm, the ethical obligations of defense lawyers contrast with those of prosecutors. Compare MODEL RULES OF PROF'L CONDUCT R. 3.1 (allowing exception to rule against non-meritorious contentions to allow criminal defense lawyers to "so defend the proceeding as to require that every element of the case be established") with MODEL RULES OF PROF'L CONDUCT R. 3.8 (addressing "Special Responsibilities of a Prosecutor," including obligation not to prosecute without probable cause, and obligation to disclose exculpatory evidence).

<sup>122</sup> *See, e.g.,* Lybbert v. Grant Cty., 1 P.3d 1124, 1129 (Wash. 2000) (declining to create a "two-tiered system of advocacy, one for legal representatives of the government and the other for counsel of private parties"); *see also* Fed. R. Civ. P. 11 (constraining advocacy conduct); MODEL RULES OF PROF'L CONDUCT R. 3.1-3.9 (same).

<sup>123</sup> *See In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 226, 223 (2d Cir. 1987) (noting that class counsel owes a fiduciary duty to class members); *In re "Agent Orange" Prod. Liab. Litig.*, 800 F.2d 14, 18-19 (2d Cir. 1986) (noting that divergence of interests among class members "presents special problems because the class attorney's duty does not run just to the plaintiffs named in the caption of the case; it runs to all of the members of the class"); *Pettway v. American Cast Iron Pipe Co.*, 576 F.2d 1157, 1176 (5th Cir. 1978) (noting that class counsel owes fiduciary duties to each member of class); *Greenfield v. Villager Indus., Inc.*, 483 F.2d 824 (3d Cir. 1973) (holding that class counsel has duty to ensure that class members receive proper settlement notice); *Singer v. AT&T Corp.*, 188 F.R.D. 681, 690 (S.D. Fla. 1998) ("the class attorney has a fiduciary duty to the court as well as to each member of the class"); Deborah Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183, 1203 (1982); G. Donald Puckett, Note, *Peering into a Black Box: Discovery and Adequate Attorney Representation for Class Action Settlements*, 77 TEX. L. REV. 1271, 1290-91 ("The adequate attorney representation requirement imposes fiduciary duties upon the class attorney that are owed to each individual member of the class.").

<sup>124</sup> *See* Fed. R. Civ. P. 23(a)(4) (permitting class certification only if "the representative parties will fairly and adequately protect the interests of the class"); *Amchem Prods., Inc. v.*

damages class action, unless special circumstances present class interests that outweigh recovery maximization, class counsel generally should seek to maximize the recovery for the class. This is not to say that the duties of class counsel are easily defined,<sup>125</sup> but rather that the duties of class counsel to the class of those harmed by alleged wrongdoing can be fairly contrasted with the duties of government lawyers to the public interest more broadly conceived.

Not only do the formal loyalties of public and private lawyers differ, but different incentives and mindsets drive their conduct. The public lawyer faces incentives largely driven by politics;<sup>126</sup> private plaintiffs' lawyers face incentives largely driven by fees.<sup>127</sup> Especially in class actions, where clients generally do not closely monitor class counsel's conduct, fee-based incentives drive important decisions by plaintiffs' lawyers.<sup>128</sup> The mindset of plaintiffs' lawyers differs from the mindset of government lawyers, as it should, both as a matter of loyalty duties and as a rational response to incentives. The private lawyer's decision whether a claim has enough merit to pursue,<sup>129</sup> for example, differs significantly from the prosecutorial discretion expected of government lawyers.<sup>130</sup> In sum, even though plaintiffs' class action lawyers are often described as private attorneys general, they face rather different incentives than the attorneys general of the federal and state

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Windsor, 521 U.S. 591, 626 n.20 (1997) ("The adequacy heading also factors in competency and conflicts of class counsel."); see also *Hansberry v. Lee*, 311 U.S. 32 (1940) (addressing adequacy of representation as matter of constitutional due process).

<sup>125</sup> See Puckett, *supra* note 123, at 1291 ("Although courts uniformly recognize the existence of these fiduciary duties [owed by class counsel to class members], they have struggled to define their specific content.").

<sup>126</sup> See, e.g., DEBORAH CAULFIELD RYBAK & DAVID PHELPS, *SMOKED: THE INSIDE STORY OF THE MINNESOTA TOBACCO TRIAL* 442 (1998) (noting Attorney General Skip Humphrey's rise in polls for the Minnesota gubernatorial race following the state's tobacco trial and settlement); Wendy E. Wagner, *Rough Justice and the Attorney General Litigation*, 33 GA. L. REV. 935, 936 n.9 (1999) ("Even the attorneys general and governors who support the litigation seem to capitalize on the political appeal of waging war against the tobacco industry.").

<sup>127</sup> See Coffee, *Plaintiff's Attorney*, *supra* note 11, at 683-84 ("[F]or analytical purposes, one better understands the behavior of the plaintiff's attorney in class and derivative actions if one views him not as an agent, but more as an entrepreneur who regards a litigation as a risky asset that requires continuing investment decisions.").

<sup>128</sup> See *id.* at 677.

<sup>129</sup> This decision has a business component, deciding whether the likelihood of success and amount of damages justifies the risk of a contingent fee. See *id.* at 677-98. It also has an ethical component, deciding whether the claim is supported by a reasonable factual and legal basis. See FED. R. CIV. P. 11; MODEL RULE OF PROF'L CONDUCT R. 3.1.

<sup>130</sup> See STANDARD FOR CRIMINAL JUSTICE 3-3.9; Roscoe B. Starek III, *Prosecutorial Discretion: A View from the Federal Trade Commission*, 20 REGULATION No. 4 (1997).

governments.<sup>131</sup> Given the entrepreneurial nature of plaintiffs' class action representation, it is essential to consider the economic incentives on plaintiffs' lawyers.<sup>132</sup> With the duties and incentives of public and private lawyers in mind, we turn to the implications of this analysis for government lawsuits and for class actions that follow them.

#### IV. IMPLICATIONS FOR GOVERNMENT ACTIONS

When a government entity sues a defendant for conduct alleged to have caused widespread harm, the government lawyers cannot ignore the private class actions on the horizon. Rather, the government lawyer should think about the government litigation's impact on subsequent private suits through issue preclusion, document dissemination, or compromise of private claims or litigation opportunities. In addition, government entities should be wary of entering contingent fee arrangements with private lawyers.

##### A. *The Public Good of Litigation Outcomes and Information*

Government litigation concerning widespread harm can never be viewed as a self-contained legal process. The government litigation is bound to have an impact on private lawsuits, either through the issue

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<sup>131</sup> As a separation of powers matter, many have argued that legislatures or agencies are better positioned to regulate industries and enact social policy, rather than attorneys general pursuing policy initiatives through the courts. See, e.g., *Remarks Bill Pryor*, *supra* note 95, at 571 ("These kinds of lawsuits threaten limited government because they shift political disputes from the legislative arena to the judiciary. Regulation and taxation of products that would otherwise be politically impossible becomes tempting when the debate can be framed as a legal dispute where so-called damages are owed by an unpopular industry to the public."); Viscusi, *Postmortem*, *supra* note 51, at 544 (arguing that taxation and regulation of cigarettes should be left to legislative process, and that state attorneys general were primarily concerned "with the dollar amount reaped by the states as part of the settlement, which is their principal area of responsibility, rather than formulating broadly based regulatory initiatives"). My focus is not on the separation of powers among the government branches, but rather on the separation of roles between government lawyers and private lawyers. Notwithstanding the separation of powers concerns, attorneys general are far more politically accountable than private plaintiffs' lawyers. See Meier, *supra* note 114, at 3 (noting concerns about exercise of power by private lawyers who "are not answerable to the public they supposedly represent"). The press often conflates these two issues – separation of powers between the legislative and judicial branches, and concerns about trial lawyers exercising policy-making power. See, e.g., Cohen, *supra* note 5, at 26.

<sup>132</sup> See Coffee, *Plaintiff's Attorney*, *supra* note 11, at 726-27 ("Convenient and comforting as it is to view the attorney only through this nostalgic lens of fiduciary analysis, a fixation on this mode of analysis is likely to blind us to the real issues relating to the incentives and misincentives that the law today creates for the plaintiff's attorney.").

preclusive effect of a judgment, or through the gathering and dissemination of documents and other information.

If government litigation proceeds to a final judgment after issues have been litigated and determined, then the judgment may have an issue preclusive effect on subsequent private litigation. For example, courts may deem a determination that a product is defective or that a defendant violated the securities or antitrust laws conclusive in later cases, as a matter of offensive nonmutual issue preclusion.<sup>133</sup> This potential for issue preclusion gives rise to asymmetrical bargaining positions in government lawsuit settlement negotiations, as it does whenever the first of multiple related lawsuits against a common defendant approaches trial. The government possesses a bargaining advantage, because defendants favor settlements to avoid the risk of an adverse judgment that would have issue preclusive effect in subsequent private lawsuits.<sup>134</sup> In the Microsoft antitrust litigation, the risk of issue preclusion gave Microsoft a powerful incentive to prefer settlement.<sup>135</sup> One suspects that Judge Jackson was counting in part on this incentive when he issued his findings of fact and then gave the parties time to negotiate a settlement before entry of a final judgment.<sup>136</sup> Not only did Judge Jackson's findings

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<sup>133</sup> See *Parklane Hosiery v. Shore*, 439 U.S. 322, 332-33 (1979) (giving issue preclusive effect, in private securities class action, to determination in government civil enforcement action that defendants made material misrepresentations in proxy statement).

<sup>134</sup> See Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 956-59 (1998). Issue preclusion applies only to final judgments. See RESTATEMENT (SECOND) OF JUDGMENTS § 13, § 27 & comment k (1982).

<sup>135</sup> A number of observers noted this at the time. See, e.g., *Seven Suits So Far as Pressure on Microsoft is Escalating*, N.Y. TIMES, Nov. 23, 1999, at C6 (noting that private class action suits would "reinforce pressure on the software company to reach an out-of-court settlement with the Justice Department," because "settlement would make it far more difficult for private plaintiffs to use the judge's findings to build a foundation for a case against Microsoft"); Segal, *supra* note 26 ("Indeed, the threat of an outpouring of lawsuits is one reason that experts believe Microsoft might try to settle the case in the coming months.").

<sup>136</sup> Judge Jackson appointed Judge Richard Posner as a mediator, but months of talks ended with no settlement agreement. Some speculated that Microsoft and the Justice Department were able to agree, but the state attorneys general were unwilling. See *Text of Statement Issued by Judge Posner*, reprinted in N.Y. TIMES, Apr. 2, 2000, at 22 (stating, after mediation failed to produce agreement, "I particularly want to emphasize that the collapse of the mediation is not due to any lack of skill, flexibility, energy, determination or professionalism on the part of the Department of Justice and Microsoft Corporation."). The chosen mediator was certainly well-positioned to point out the incentive for Microsoft, not that it needed any pointing out. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 576-78 (4th ed. 1992) (discussing incentives created by asymmetry of offensive nonmutual issue preclusion).

After the findings of fact but before final judgment, Microsoft's incentive derived from the window created by the final judgment requirement for issue preclusion. Until

of fact practically invite consumers to file class actions,<sup>137</sup> they also spelled out emphatically the court's factual determinations, giving Microsoft fair warning of the issue preclusive effect should the parties fail to settle.

The skilled government lawyer understands this issue preclusion risk as one of the strategic incentives at play for the defendant in settlement negotiations. I would suggest, however, that the government lawyer should consider issue preclusion as more than a bargaining chip. The government expends public resources in pursuing lawsuits against wrongdoers not only to achieve a particular result as a matter of settlement or remedy, but also in part to reach a public determination of the matter.<sup>138</sup> Public determination of a matter, in the form of a final judgment based on issue determinations, constitutes a public good both in the economic sense of the term<sup>139</sup> and in the sense of an overall benefit to the people. When government lawyers decide whether to settle with a defendant, they should consider the settlement's impact in foreclosing issue preclusion for private litigants. While they should pursue attractive settlement options with defendants where the public benefit to be obtained by the settlement outweighs the value of a public determination, they should not ignore the risk of inefficiency and inconsistency engendered by a pre-judgment settlement.

Beyond the preclusive effect of adjudication, government litigation generates information that private litigants use in their own lawsuits. Even if the Microsoft case had settled before final judgment, thus foreclosing any issue preclusion, it would have provided a tremendous boost to private consumer class actions. The government's pleadings, evidence, and trial arguments provide a roadmap for private litigators to follow.<sup>140</sup>

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entry of a final judgment, the findings of fact most likely were not entitled to preclusive effect. Thus, there was a period when Microsoft knew the near-certain outcome of trial but retained a strong chance to avoid the issue preclusive effect of that outcome. See RESTATEMENT (SECOND) OF JUDGMENTS § 13 (stating finality requirement). There is some chance that the findings of fact would nevertheless have been deemed issue preclusive against Microsoft, following recent cases that have relaxed the finality requirement for issue preclusion under the doctrine of practical finality. See CHARLES A. WRIGHT ET AL., FED. PRAC. & PROC., § 4434 (1981 & Supp. 2000).

<sup>137</sup> See *supra* text accompanying notes 26-29.

<sup>138</sup> See generally Owen Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984) (arguing that settlement is not necessarily better than judgment and should not be encouraged).

<sup>139</sup> See Erichson, *Interjurisdictional Preclusion*, *supra* note 134, at 956-57 n.42 (discussing issue adjudication as public good in economic sense, and accompanying free rider problem).

<sup>140</sup> Materials are easily available to plaintiffs' lawyers at the Justice Department's

Government documentary discovery, especially, can facilitate the pursuit of claims by private plaintiffs. Not only does the government action provide plaintiffs with valuable information, but access to that information greatly reduces plaintiffs' costs. For example, documents gathered and culled by Minnesota's lawyers in their famously thorough tobacco discovery<sup>141</sup> proved critical in subsequent private litigation, most notably in the *Engle* class action.<sup>142</sup> However, the availability of such information depends in large part on government lawyers' insistence on making discovered information public, and their unwillingness to agree to restrictive confidentiality provisions. Minnesota's lawyers appropriately treated their discovery as the generation of public information rather than purely as the amassing of litigation advantage.<sup>143</sup>

### *B. Public Compromise of Private Claims*

In settlement negotiations between the government and defendants, the government may be tempted to play a valuable but dangerous bargaining chip: the power to compromise future private claims through changes in the governing law. It is more complicated than that, of course. Restricting private claims would generally require legislative action, so such restrictions cannot simply be offered by a negotiating government lawyer.<sup>144</sup> Moreover, the litigating entity may differ from the government entity with power to affect the private claims.<sup>145</sup> Nevertheless, concerns over attempts to compromise private claims as

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website. See *Antitrust Case Filings*, U.S. Department of Justice: Antitrust Division, at [http://www.usdoj.gov/atr/cases/ms\\_index.htm](http://www.usdoj.gov/atr/cases/ms_index.htm) (n.d.).

<sup>141</sup> Minnesota lawyer Michael Ciresi's document discovery in the tobacco case was so thorough that other plaintiffs' lawyers made fun of it. According to one account, attorney Ron Motley said of Ciresi and his thirty-three million pages of documents, "He doesn't even know half of what he's got. We targeted our discovery. That idiot just asked for everything, and now he's stuck with it." ZEGART, *supra* note 5, at 319.

<sup>142</sup> See *supra* text accompanying note 65.

<sup>143</sup> When Minnesota overcame the defendants' attorney-client privilege argument, for example, Attorney General Humphrey announced, "This is the truth that we have been seeking. Now the American people will know, and justice is going to be done." RYBAK & PHELPS, *supra* note 126, at 332. The transparently political tone of Humphrey's proclamation drives home the point that political incentives can and should lead government lawyers to make litigation decisions with broader interests in mind than those of the claimants in any particular lawsuit.

<sup>144</sup> Thus, the parties to the 1997 global tobacco settlement proposal understood that they needed Congressional action to effectuate the litigation-restricting provisions of their agreement.

<sup>145</sup> The municipalities suing handgun manufacturers, for example, are in no position to offer the manufacturers legal protection from private claims, even if such protection could be afforded by changes in state or federal law.

part of a settlement of a government lawsuit, given the nature of "the government" as a litigant, are not far-fetched. Indeed, such compromise of private claims very nearly materialized in the tobacco litigation.

In the global tobacco settlement proposal negotiated in June 1997 by the tobacco defendants, state attorneys general and others,<sup>146</sup> the parties agreed to powerful limits on lawsuits by tobacco plaintiffs. Although that settlement proposal ultimately fell apart in Congress, it warrants examination as an extraordinary attempt to compromise private tort claims in pursuit of a government litigation settlement. Naturally, as a settlement of the state governments' claims, the global settlement proposal would have barred subsequent claims by the states.<sup>147</sup> In addition, however, the settlement would have prohibited private plaintiffs from bringing tobacco lawsuits as class actions.<sup>148</sup> Nor would plaintiffs have been allowed to use joinder, consolidation, or other procedural devices to address tobacco claims other than by filing individual complaints.<sup>149</sup> The settlement would have restricted the use of certain evidence in subsequent suits,<sup>150</sup> as well as limiting who could sue and who could be sued.<sup>151</sup> Moreover, the settlement would have placed annual caps on the total amount of compensatory damages tobacco defendants would be required to pay,<sup>152</sup> and would have barred punitive damages entirely.<sup>153</sup> Compromise of private claims and procedural opportunities in settlement of government litigation raises serious concerns.

Compromise of private compensatory claims, whether by outright bar or by limitations such as the annual damages cap in the proposed tobacco settlement, should not be used to settle government lawsuits without adequate provision for the compensation of claimants. As Professors Hanoch Dagan and James White have shown, the proposed

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<sup>146</sup> *Proposed Tobacco Industry Settlement*, at <http://stic.neu.edu/settlement/6-20-settle.htm> (June 20, 1997).

<sup>147</sup> *See id.* tit.VIII.A.1.

<sup>148</sup> *See id.* tit.VIII.B.2.

<sup>149</sup> *See id.* ("no class actions, joinder, aggregations, consolidations, extrapolations or other devices to resolve cases other than on the basis of individual trials, without defendant's consent").

<sup>150</sup> *See id.* tit.VIII.B.7 (barring discovery or use of evidence that tobacco companies developed reduced risk tobacco products, to prove their knowledge of health risks).

<sup>151</sup> Plaintiffs would have been limited to individuals and their heirs, except for third-party payor suits filed before June 9, 1997. *See id.* tit.VIII.B.5. Defendants would have been limited to manufacturers and their agents. *See id.*

<sup>152</sup> *See id.* tit.VIII.B.9 -VIII.B.11.

<sup>153</sup> *See id.* tit.VIII.B.1.

tobacco settlement did not adequately provide for compensation, despite possible indirect benefits to individual tobacco plaintiffs.<sup>154</sup> Dagan and White persuasively argue that "governmental interference with the compensatory awards of injured citizens in the name of the public good cannot be deemed just unless it is accompanied by compensation."<sup>155</sup> Settlements ordinarily require compromising claims for less than full compensation to account for the uncertainty of recovery. Particularly given the history of plaintiff failures in the tobacco litigation, something less than full damages could be deemed adequate compensation in a settlement. The 1997 global settlement proposal, however, offered little if any value to individual tobacco plaintiffs. It would have, in essence, filled government coffers by selling impediments to plaintiffs' claims.

Punitive damages raise somewhat different issues. Given the nature and purpose of punitive damages, plaintiffs' claims of entitlement to punitive damages are much weaker than claims of entitlement with regard to compensatory damages. Although punitive damages arguably serve a partly compensatory function in some cases, compensation fares poorly as a justification for punitive damage awards.<sup>156</sup> Some commentators suggest that deterrence and retribution may create an entitlement to punitive damages.<sup>157</sup> To whatever extent victims can claim an entitlement to see the wrongdoer punished, that entitlement is met as long as sufficient punishment is inflicted on the defendant, and does not lead to the conclusion that the victim has a right to receive a punitive damages payment. Thus, in determining whether it is legitimate for the government to compromise private punitive damages claims in settlement of government litigation, as the proposed tobacco settlement would have done, the essential question is whether the defendant has been adequately punished by the government litigation.<sup>158</sup>

Sometimes the compromise of claims masquerades as procedural reform. The 1997 proposed tobacco settlement did not bar tobacco lawsuits outright, but would have prohibited certain procedural mechanisms. Pursuant to the settlement, private plaintiffs would have been unable to use class actions or other joinder or consolidation procedures to aggregate claims against the tobacco companies. In

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<sup>154</sup> See Dagan & White, *supra* note 2, at 364-65, 368-69.

<sup>155</sup> *Id.* at 414.

<sup>156</sup> See *id.* at 418-19.

<sup>157</sup> See *id.* at 420-24.

<sup>158</sup> For an argument that the proposed tobacco settlement did not punish the defendants enough to justify the settlement provision barring punitive damages, see Humphrey, *supra* note 45, app. at 419-20.



essence, the settlement was an effort to enact substance-specific procedural reforms for tobacco cases that could not be accomplished in the context of broader class action reform.

As a matter of litigation policy it serves no valid purpose to prohibit tobacco class actions across the board. Class action rules leave plenty of room for courts to reject tobacco class actions where the courts decide that individual lawsuits would be the superior method.<sup>159</sup> Indeed many courts have refused to certify class actions in tobacco cases.<sup>160</sup> In the relatively rare case where a court decides that class action would be the superior method of resolving the dispute, it is difficult to see the rationale for allowing individual lawsuits but not the class action.<sup>161</sup> As others have noted, and as was transparently the goal of the defendants, the main effect of a prohibition on class actions would be to increase the cost to plaintiffs of bringing tobacco claims, and thus to decrease the likelihood that lawyers would be willing to make the financial commitment to pursue such claims.<sup>162</sup> While concessions in pursuit of settlement are to be expected, there is something troubling about a concession that merely enhances inefficiency.

If government entities settle their claims by compromising the claims of citizens, as they sought to do in the proposed tobacco settlement, those citizens would have a reasonable argument that the settlement was an unconstitutional taking entitling them to just compensation. This argument is laid out powerfully by Professors Dagan and White.<sup>163</sup> As Dagan and White put it, "a strict takings doctrine is the only viable protection for citizens from the dangers inherent in governmental interference with their claims against injurious industries."<sup>164</sup> To grant that citizens may have a viable takings claim if the government compromises citizens' claims without just compensation, however, is not

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<sup>159</sup> See FED. R. CIV. P. 23(b)(3) (permitting certification of Rule 23(b)(3) money damages class action only upon finding that "a class action is superior to other available methods for the fair and efficient adjudication of the controversy").

<sup>160</sup> See cases cited *supra* note 55.

<sup>161</sup> As Richard Daynard and Graham Kelder put it, "[t]he only possible purpose of eliminating these legal devices in the settlement proposal was to make it impossible for plaintiff attorneys to bring, or state courts to process, cases against the tobacco industry in an efficient and cost-effective manner." Richard A. Daynard & Graham E. Kelder, *The Many Virtues of Tobacco Litigation*, TRIAL, Nov. 1998, at 34, 38.

<sup>162</sup> See Humphrey, *supra* note 45, app. at 417-19.

<sup>163</sup> See Dagan & White, *supra* note 2, at 406-24. See also Gideon Kanner, *Smoke 'n' Mirrors in the Tobacco Settlement*, NAT'L L.J., Sept. 15, 1997, at A21. But see Bianchini, *supra* note 90, at 735-39 (arguing that provisions in proposed tobacco settlement did not constitute unconstitutional taking).

<sup>164</sup> Dagan & White, *supra* note 2, at 424.

to commend takings law as a sensible avenue for resolving claims of widespread harm. Lawsuits by injured persons against government entities would be a remarkably inefficient and roundabout way to resolve claims against an injurious industry. The point of allowing such takings claims would not be to encourage the use of a takings framework for mass litigation, but rather to deter government entities from compromising the claims of private parties without providing adequate compensation.

The fundamental danger in allowing government lawyers to use private claims as a bargaining chip is that negotiating parties will often prefer to resolve their dispute by shifting costs to absent third parties if possible.<sup>165</sup> With the cost-bearers absent from the bargaining table, however, such resolutions are unlikely to be optimal for society as a whole.<sup>166</sup> Thus, the question is whether potential private plaintiffs are adequately represented by the government's lawyers in a settlement negotiation between government entities and defendants.<sup>167</sup> Given the duty of government lawyers to represent their government entities, rather than the interests of any particular individual or class, the representative nature of government lawsuits cannot substitute for the representation of plaintiffs' interests by their own individually retained

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<sup>165</sup> David Luban explains this idea well:

The point is simple: two parties trying to apportion a loss are most likely to reach agreement if they can find a way to shift the burden to a third party who is not present at the bargaining table. For example, the parties to an environmental dispute may settle it through an agreement that a chemical company will dispose of waste at sites purchased in a remote community with no political clout. Similarly, a law firm may settle a malpractice claim with the Resolution Trust Corporation by agreeing not to contest liability provided that the settlement is within the firm's insurance limits, or a labor union and an employer may settle a controversy by passing the losses on to consumers.

David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2626 (1995).

<sup>166</sup> See *id.* (referring to settlements that create "public bads" rather than "public goods").

<sup>167</sup> In an analysis of the 1997 tobacco agreement, one commentator focused on the question of adequate representation, and found that the government lawyers exceeded the bounds of their powers in trying to negotiate away the rights of potential plaintiffs: "The attorneys general who drafted the tobacco agreement were likely without power to grant the tobacco industry all of the concessions contained in the document. In settling, they acted as representatives not only of the states, but also of all private litigants with existing or future claims against the tobacco industry in the United States." Bianchini, *supra* note 90, at 729. Ms. Bianchini notes that the doctrine of *parens patriae*, which allows states to sue on behalf of its citizens in certain situations, does not authorize the state to sue when it is "merely litigating as a volunteer the personal claims of its citizens." *Id.* at 729-30 (quoting *Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976)).

attorneys or class counsel.<sup>168</sup>

### C. Private Lawyers with Public Duties

Given the distinctly public role of the government lawyer, it can be troubling to see government entities hire private litigators to pursue matters of public importance. For one thing, government use of private lawyers raises concerns about accountability and corruption. Such contracts are susceptible to charges of political patronage, as some observers noted in the Mississippi tobacco litigation and others.<sup>169</sup> These concerns, however, are not unique to government's litigation functions, but rather apply to virtually every example of government outsourcing.<sup>170</sup> Thus, accountability and corruption concerns should be addressed as matters of decision-making authority, bidding processes,<sup>171</sup> and government ethics regulation, and need not be addressed here as a particular problem of public and private lawyer roles.

The government, like other clients, can hire outside lawyers on hourly, flat, or contingent fees. When private lawyers are hired by the government on an hourly or flat fee, it raises typical outsourcing issues, but need not present major problems of government legal policy. The use of David Boies as trial lawyer in the government's Microsoft case, for

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<sup>168</sup> See *supra* text accompanying notes 118-132 (comparing the responsibilities of public and private lawyers); see also Bianchini, *supra* note 90, at 726 ("[I]t is questionable whether the people who negotiated and drafted the Proposed [Global Tobacco] Settlement adequately represented the interests of the individuals that the document would have bound.").

<sup>169</sup> Some observers expressed concern about Attorney General Michael Moore's hiring of Richard Scruggs for Mississippi's tobacco lawsuit, despite Scruggs' strong reputation as a trial lawyer. Scruggs was Moore's long-time friend and fraternity brother, as well as the leading contributor to Moore's political campaigns. See Mississippi Panel Discussion, *supra* note 36, at 856; see also Lammi, *supra* note 77 (raising concerns about campaign contributions and choice of lawyers in Louisiana, Mississippi, and Texas). More broadly, Professor Lester Brickman has charged that "[i]n most states, the hiring was done on a pay-to-play basis," and that "many of the lawyers were selected on the basis of campaign contributions that they made to the state attorneys general." Fordham Symposium, *supra* note 42, at 2849.

<sup>170</sup> See Jack M. Sabatino, *Privatization and Punitives: Should Government Contractors Share the Sovereign's Immunity from Exemplary Damages?*, 58 OHIO ST. L.J. 175, 177 ("Unlike elected politicians, private contractors are at least one step removed from the democratic process and are apt to be more attentive to their own bottom-line financial success than they are to catering to the popular will. For a host of reasons, government itself is prone to do an inadequate job in supervising those hired firms.").

<sup>171</sup> See Cupp, *supra* note 102, at 699 (favoring use of "Sunshine Act" to require open and competitive bidding for lawyers seeking to represent government entities (citing AM. LEGIS. EXCHANGE COUNCIL, *Private Attorney Retention Sunshine Act*, Jan. 1, 1999)).

example, did not create any serious trouble in terms of the roles of public and private lawyers. There was no indication that Boies functioned differently in that matter than if he had been a full-time Justice Department employee, except that he had more experience in complex trials than any of the Justice Department antitrust lawyers.<sup>172</sup> Nor does the government's use of pro bono lawyers, as in Chicago's handgun suit,<sup>173</sup> raise major concerns.

With contingent fees, the problem is much more serious. The primary reason contingent fee arrangements should not be used for government lawsuits is that government legal authority should not be given to someone with a direct financial stake in a matter.<sup>174</sup> In contrast to the government lawyer's incentives, the contingent fee lawyer's incentives are more entrepreneurial than political. Generally, the contingent fee lawyer's primary incentive is to maximize the monetary recovery, which corresponds with the primary interest of most private plaintiffs. However, the government's interest and the public good are not necessarily advanced by inflicting the maximum penalty on defendants.<sup>175</sup> For example, whereas political incentives would more likely drive government lawyers to insist upon making information public,<sup>176</sup> a contingent fee lawyer faces a powerful incentive to negotiate

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<sup>172</sup> See Bumiller, *supra* note 3. See also Robert A. Levy, *Hired Guns Corral Contingent Fee Bonanza*, LEGAL TIMES, Feb. 1, 1999, at 27 [hereinafter Levy, *Hired Guns*] (noting that hourly fee agreements "might be justified to acquire unique outside competence or experience").

<sup>173</sup> See Van Voris, *supra* note 83.

<sup>174</sup> See Norton, *supra* note 81, at 8.

<sup>175</sup> One commentator emphasized some of the points on which the interests of the state and contingent fee lawyers may diverge:

Lawyers relying on a contingency fee recovery will invariably have interests adverse to what should be the larger goal of the state – seeking justice. . . . The financial stake might compel the plaintiffs' attorneys to make day-to-day decisions on matters such as discovery, the use of witnesses or documents, and general litigation strategy in a manner markedly different that would the state lawyers. It might be, at some point in the litigation, in the best interests of a state to pursue injunctive, rather than monetary relief, seek one or two of the claims but not all of them, settle the suit, or even abandon it. All of these developments could be contrary to the private lawyers' maximum recovery interest.

Lammi, *supra* note 77.

<sup>176</sup> Minnesota attorney general Skip Humphrey opposed the national tobacco settlement in part because he believed that "[t]he document disclosure provisions were weak and uncertain." Humphrey, *supra* note 45, at 402. Similarly, Mississippi attorney general Michael Moore has spoken of his state's role in making information public:

[O]ne of the most important things that we've done – and I'm really proud of our state because Mississippi almost became the sanctuary for the truth. I mean,

with defendants for higher monetary payments conditioned on confidentiality.<sup>177</sup> As Chicago's deputy corporation counsel explained when the city decided not to retain contingent fee lawyers for its handgun suit, "It is very important to us that this case be driven by the public policy issues. . . . We didn't want someone who would be jacking up the highest damages for their contingent fee."<sup>178</sup> Another commentator makes the point by example: "Imagine a state attorney general corraling criminals on a contingency basis or state troopers paid per speeding ticket."<sup>179</sup> Just as contingent fees are prohibited in criminal defense or divorce representation<sup>180</sup> due to concerns that such fees would create incentives contrary to public policy and the client's interests,<sup>181</sup> so should contingent fees be disfavored or prohibited for government litigation where they create incentives inconsistent with the duties of

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when we filed our lawsuit, one of the main things that we wanted to do was to get the truth out of the industry. And if you will remember the Bryan Williams documents, which frankly probably broke open this thing. That guy comes to Mississippi and brings those documents. Dick [Scruggs] and I – we get them out all over the world and take them to the Justice Department so that through the litigation the truth gets out.

Mississippi Panel Discussion, *supra* note 36, at 869-70.

<sup>177</sup> Cf. Anthony J. Basinsky, "Sunshine" *Laws Bar Secret Settlements*, NAT'L L.J., Mar. 24, 1997, at B10 ("Some plaintiffs . . . may use the confidentiality issue as a bargaining chip."). It is not clear whether monitoring by government clients can sufficiently constrain lawyers accustomed to entrepreneurial litigation. I acknowledge that government clients' monitoring of contingent fee lawyers undoubtedly exceeds client monitoring in most class actions.

<sup>178</sup> Van Voris, *supra* note 83 (quoting deputy corporation counsel Lawrence Rosenthal).

<sup>179</sup> Levy, *Hired Guns*, *supra* note 172.

<sup>180</sup> The relevant ABA model rule provides:

A lawyer shall not enter into an arrangement for, charge, or collect:

(1) any fee in a domestic relations matter, the payment or amount of which is contingent upon the securing of a divorce or upon the amount of alimony or support, or property settlement in lieu thereof; or

(2) a contingent fee for representing a defendant in a criminal case.

MODEL RULES OF PROF'L CONDUCT R. 1.5(d). *See also* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-106(C) (prohibiting contingent fees in criminal cases); MODEL CODE OF PROF'L RESPONSIBILITY EC 2-20 ("contingent fee arrangements in domestic relation cases are rarely justified").

<sup>181</sup> *See* ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT 60-62 (4th ed. 1999) (noting concern that contingent fees may discourage criminal defense counsel from plea bargaining or from introducing mitigating evidence establishing lesser included offense, and may discourage matrimonial lawyers from supporting reconciliation of spouses).

government lawyers.<sup>182</sup>

A second reason to disfavor contingent fees is that they allow government entities to pursue litigation without having to budget for it. Of course, from the vantage point of resource-strapped government entities, this is the primary argument in *favor* of contingent fees.<sup>183</sup> The classic justification for contingent fees is to provide access to lawyers for clients unable to afford hourly or flat fees.<sup>184</sup> While government entities hardly fit the usual image of the indigent client, the political unworkability of paying hourly fees for certain litigation initiatives may put government entities in a somewhat analogous position. Without contingent fees, it seems likely that the state tobacco lawsuits would not have been pursued with such vigor, and perhaps not filed at all.<sup>185</sup>

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<sup>182</sup> Unlike the prohibitions on criminal and matrimonial contingent fees, which are contained in lawyers' ethics rules, *see* MODEL RULES OF PROF'L CONDUCT R. 1.5(d), any prohibitions or restrictions on government contingent fees may be better suited for legislation. While both types of restrictions address problematic incentives created by contingent fees in particular types of cases, the criminal and matrimonial restrictions are sensibly understood as concerns about lawyer overreaching, whereas the government restriction is better understood as a concern about how government entities go about their legal business. *See infra* text accompanying notes 183-187 (discussing government use of contingent fee lawyers as separation of powers problem).

<sup>183</sup> The private lawyer who was lead counsel for the State of Florida in its tobacco lawsuit observed that the Florida attorney general's office had neither the funding nor the personnel to handle the case: "They couldn't get any money. The state in our contract set forth the fact that the state could not handle this litigation. The legislature would not appropriate any money." Fordham Symposium, *supra* note 42, at 2856 (quoting Robert Montgomery). Similarly, the private attorney who was lead trial lawyer for Minnesota commented, "I never saw one legislature, except California, say, 'Wait a minute. Let's appropriate money for these lawsuits. Let's spend money on this. This is such a good deal.'" *Id.* at 2839 (quoting Michael Ciresi). *See also* Lammi, *supra* note 77 ("The hope of avoiding asking the legislature to fund controversial litigation, especially litigation created and pursued by private lawyers, is what made contingency fee arrangements so appealing in the Medicaid suits.").

<sup>184</sup> *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 528 (1986). Indigence is not, however, a prerequisite for contingent fees. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 94-389 (1994) ("The fact that a client can afford to compensate the lawyer on another basis does not render a contingent fee arrangement for such a client unethical.").

<sup>185</sup> *See* Fordham Symposium, *supra* note 42, at 2840-41 ("there are industries that will not be taken on, there are cases that will not be brought, unless we allow contingency fees") (quoting Barbara Gillers). Mississippi's attorney general described his pitch to the private lawyers: "Here's the deal, I need you to sue the tobacco companies for me, and you are going to have to pay all the expenses and it may be as much as \$10 or \$12 million, and you have very little chance of winning. Nobody's ever collected a penny before, and it's going to get tough. And they're going to sue you. It's going to get horrible. Are you in or are you out?" *See* Mississippi Panel Discussion, *supra* note 36, at 857 (quoting Michael Moore).

The problem is that government checks and balances depend largely on purse-strings, and contingent fees make those purse-strings disappear or at least put the strings beyond the reach of the legislative branch. Ordinarily, if an attorney general's office wants to pursue significant litigation, it must allocate resources to that litigation rather than to something else. If the attorney general's office is unable or unwilling to do so, then it must seek additional resources from the legislature. The budget thus allows the legislative branch to check the zealotry of executive branch lawyers.<sup>186</sup> Contingent fees allow the attorney general's office to pursue litigation without worrying about the budget, and thus without the immediacy of budget-based political accountability.<sup>187</sup>

The tobacco litigation is the leading example of government use of contingent fee lawyers. The perceived success of the tobacco litigation is likely to spur the use of such arrangements for future lawsuits. The tobacco model may be misleading, however. I contend that contingent fee lawyers should not be used to pursue government litigation, even if the tobacco litigation is viewed in hindsight as a successful use of such arrangements. The tobacco litigation involved three factors that presented the strongest possible scenario for government use of contingent fee lawyers. First, in the tobacco litigation, the risk of non-recovery was high. At least for the earlier states to sue, the history of tobacco lawsuits suggested a low chance of success.<sup>188</sup> Second, enormous resources were needed to pursue the litigation seriously,<sup>189</sup> enough to

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<sup>186</sup> For an example of a legislative attempt to derail executive branch pursuit of tobacco litigation, see Eric Pianin, *Federal Tobacco Lawsuit Is Targeted*, WASH. POST, June 9, 2000, at A16 (describing attempt by members of Congress to cut off funding for Justice Department's recoupment lawsuit against tobacco industry).

<sup>187</sup> See Norton, *supra* note 81, at 8 ("By the use of contingent fee lawyers, Attorneys General gain an unparalleled ability to determine the size of their own agency budgets. Unless specific statutes are adopted, such as those recently passed in Texas and North Dakota, the Attorney General can hire a number of law firms without needing to get budgetary approval from the legislature and the Governor."). As the attorney general of Alabama puts it, "If government officials want to pursue novel and risky litigation, then they should have to justify the use of the taxpayers' money for that venture. Public officials should not be allowed to create an illusion of a risk-free shot at some kind of lawsuit lottery." William H. Pryor, Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1917 (2000).

<sup>188</sup> See Humphrey, *supra* note 45, at 398 ("At the time, the cons [of suing the tobacco industry] were a lot more obvious than the pros. . . . The industry had the reputation of being invincible in court. . . . In short, the decision to sue appeared long on risk and short on reward."). See also *supra* text accompanying note 31.

<sup>189</sup> The law firm retained by Minnesota, for example, spent nearly \$30 million in lawyer time, in addition to \$5 million for expert witnesses and \$5 million for other expenses. See RYBAK & PHELPS, *supra* note 126, at 443.

daunt even a state attorney general's office, particularly given the high chance of failure. Finally, the tobacco litigation was extremely high profile. It was watched closely by the press, the public, and government officials.

The first two factors may render litigation well-suited for contingent fees as a general matter, but it is the third criterion – the litigation's high-profile status – that addresses the problematic incentives of contingent fee lawyers handling public lawsuits. In high-profile litigation, political incentives<sup>190</sup> may drive litigation decisions notwithstanding the retention of contingent fee lawyers. Thus, the fact that Minnesota and other states made tobacco documents public, despite their representation by contingent fee lawyers,<sup>191</sup> does not mean that the same would necessarily happen in lawsuits that lack the sustained public and political attention that characterized the tobacco cases. In sum, contingent fee arrangements by government entities are problematic, and even if their use in the tobacco litigation is viewed as a success, the use of such fees should not be extended to other matters.

## V. IMPLICATIONS FOR COATTAIL CLASS ACTIONS

Just as we should think about government lawsuits in light of the private class actions that benefit from them, we should think about class actions in light of the government litigation that lays their groundwork. In particular, we should think about whether coattail class actions add anything of value, and we should think about implications for attorney fee awards.

### A. *The Value of Coattail Class Actions*

Barely had the ink dried on Judge Thomas Penfield Jackson's findings of fact in the Microsoft antitrust trial when plaintiff's lawyers began filing class actions against the software giant. One could hardly ask for a better portrait of everything that is predatory about class-action plaintiff's lawyers.<sup>192</sup>

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<sup>190</sup> By "political incentives," I do not mean to convey negative connotations, as in "they did it for *political* reasons rather than for the public good." Rather, I simply mean the incentives that are built into our system of government, many of which are essential for the proper functioning of government institutions.

<sup>191</sup> See *supra* note 176 (quoting attorneys general Skip Humphrey and Michael Moore on their insistence on making documents public).

<sup>192</sup> Editorial, *Actions Without Class*, WASH. POST, Dec. 2, 1999, at A38.



The most fundamental question about coattail class actions is whether they serve the public good or merely enrich the lawyers. Should class action lawyers who piggyback on the success of government litigation be applauded, or reviled as "tort parasites"?<sup>193</sup> A parasite derives sustenance from another organism without making any useful contribution. Coattail class actions can be considered parasitic, in the sense of adding nothing of value, only if one objects to the substantive law that underlies both the government and private litigation, or if one believes that government actions fully satisfy the goals of that substantive law. The relationship between government litigation and coattail class actions is better described as one of symbiosis, an association of mutual advantage.<sup>194</sup> Not only do private class actions often advance government litigation,<sup>195</sup> but the two complement each other as deterrence and compensation mechanisms.<sup>196</sup>

For victims of widespread harm, compensation generally comes from private rather than government litigation. Particularly where individual damages are too small to justify individual lawsuits, a class action can be the best procedural mechanism for obtaining compensation.<sup>197</sup> As for

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<sup>193</sup> Editorial, *Judge Posner's Brief*, WALL ST. J., Nov. 23, 1999, at A22. See also Walter Olson, *A Microsoft Suit with a Sure Winner*, N.Y. TIMES, Nov. 23, 1999, at A27 (commenting that only lawyers are likely to benefit from class actions against Microsoft).

<sup>194</sup> Professor John Coffee suggested this description in his analysis of plaintiffs' lawyers as private attorneys general. See Coffee, *Private Attorney General*, *supra* note 1, at 225 ("[A]lthough some have characterized such 'tag-along' private enforcement actions as 'parasitic,' it may be more accurate to describe the relationship between public and private enforcer as symbiotic.").

<sup>195</sup> See *supra* text accompanying notes 70-71.

<sup>196</sup> Professor Coffee has argued that some value is added by private actions that piggyback on government work.

"This phenomenon of 'free riding' by the private plaintiff on governmental enforcement efforts is by no means without social utility: First, it does escalate the penalty structure above the modest fine schedules that are authorized by law (and nullified by inflation). Absent these private actions, the monetary penalties for antitrust and securities fraud plainly would be insufficient to deter. Second, it often may be more efficient for public agencies to concentrate on detection (an area where they have the comparative advantage because of their superior investigative resources) and leave the actual litigation of the case to private enforcers, who are frequently more experienced in litigation tactics."

Coffee, *Private Attorney General*, *supra* note 1, at 224-25.

<sup>197</sup> The success of class actions for compensating victims depends, to some extent, on the vigilance of judges in reviewing class settlements and attorneys' fees. As many others have observed, without careful judicial supervision, class actions may result in nearly worthless coupon settlements for the class with disproportionately large fees for the lawyers. See, e.g., DEBORAH R. HENSLER ET AL., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN, EXECUTIVE SUMMARY 32-35 (1999) (recommending judges award

deterrence, even the pounding of a major government lawsuit may be inadequate to achieve the correct deterrence level if it does not force the defendant to internalize the costs of the harm imposed. Private class actions, more than government litigation, compel defendants to pay the costs of injuries.<sup>198</sup> Even though a coattail class action does not serve the "private attorney general" purpose of searching out otherwise undetected violators and enforcing the law against them,<sup>199</sup> that does not mean such class actions fail to bring deterrence closer to an optimal level.<sup>200</sup> Thus, when Bill Gates accuses that "[t]hese class-action cases are just piling on,"<sup>201</sup> our question should be whether they are piling on something of value that is not redundant of what was achieved by the government action.

Not only do coattail class actions add something of value to government actions in terms of compensation and deterrence, but they are superior to non-coattail class actions as a matter of both efficiency and legitimacy. For the critics who call coattail class actions "parasitic" or "predatory" or "piling on," one wonders whether they would be any less critical of the same class actions if they were filed without prior government action. In terms of efficiency, prior government litigation makes the private litigation cheaper by issue preclusion, legal analysis, and factual development.<sup>202</sup> Additionally, if courts properly take these advantages into account when awarding attorneys' fees,<sup>203</sup> then the efficiency savings should not, as critics complain, merely enrich the lawyers.

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fees based on funds actually disbursed or coupons actually redeemed).

<sup>198</sup> As one commentator stated in the wake of the *Engle* punitive damages verdict, "It was one thing when cities and states started to line up to sue the industry. It is another if the millions of Americans who believe they became ill from smoking can start lining up to file claims." Barry Meier, *Industry Crosses Troubling Line*, N.Y. TIMES, July 15, 2000, at A11.

<sup>199</sup> See Coffee, *Private Attorney General*, *supra* note 1, at 220-223 (noting that when plaintiffs' lawyers piggyback on government work, those plaintiffs' lawyers do nothing to increase probability of detection of violations of law). See also Coffee, *Plaintiff's Attorney*, *supra* note 11, at 692 ("The strength of private enforcement is that it supplements the enforcement resources of the state by creating incentives for a potentially unlimited number of enforcers to enter the field and search out violations of law.").

<sup>200</sup> By raising defendants' costs and liability, coattail class actions add to the deterrent impact of government litigation, contrary to *The Washington Post's* charge that, "Nor do the suits act – as class actions sometimes do – as a check on corporate behavior, since these cases bring nothing new to the table but merely seek to cash in on the findings from preexisting Justice Department litigation." Editorial, *supra* note 7.

<sup>201</sup> Brinkley & Lohr, *supra* note 20, at C2.

<sup>202</sup> See *supra* text accompanying notes 133-143.

<sup>203</sup> See *infra* text accompanying notes 206-216.

Not only are coattail class actions more efficient than non-coattail class actions, one should also expect that they are less likely to be frivolous. Given the political checks on the actions of attorneys general and other government lawyers, and given that government lawyer compensation is not driven by litigation outcomes to the same extent as private lawyer compensation, one would expect government lawyers to be somewhat less likely than private litigators to pursue litigation without a reasonable basis. When a private plaintiff's lawyer files a class action, the existence of prior government litigation based on the same liability allegations, especially if that government litigation succeeded, lends at least some additional credibility to the class action complaint.

The usefulness of coattail class actions is less clear with regard to punitive damages. A reasonable argument might be made that courts should bar punitive damages if there has already been a sufficient civil enforcement remedy imposed against the defendant for the same conduct. However, courts have been unreceptive to such arguments where defendants object to punitive damages after having suffered prior punitive damage awards or criminal liability.<sup>204</sup> At least when determining the amount of punitive damages, courts should consider the extent to which prior government litigation has punished the defendant.<sup>205</sup>

### B. Attorneys' Fees

Lawyers who file coattail class actions should nearly always earn lower fees than they would have earned had they achieved the same result without the benefit of prior government litigation. In general, fees for class counsel are determined by the court, to be awarded out of the common fund created by the judgment.<sup>206</sup> Courts use two different methods in awarding such fees: the lodestar method and the percentage-of-outcome method. Under either method, courts should award lower

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<sup>204</sup> See Howard M. Erichson, *Enough is Enough: Solving the Problem of Punitive Overkill in Multiple-Plaintiff Litigation*, 152 N.J.L.J. 246 (Apr. 20, 1998).

<sup>205</sup> In the punitive damages phase of the *Engle* Florida smokers' class action, the defendants argued that they were already paying billions of dollars to the states, see Barry Meier, *Jury's Action Raises Concerns for Tobacco Industry*, N.Y. TIMES, July 16, 2000, at 19, but the jury concluded that the state settlements had not sent a sufficiently strong message. See Bragg & Kershaw, *supra* note 69, at 1 (reporting, based on interview with jury foreman, that jurors wanted to send powerful message, and that "[s]ettlements with the states that had challenged the industry had not sent that strong message, but the award of punitive damages . . . would, the jury hoped").

<sup>206</sup> See HERBERT NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 14.03 (3d ed. 1992).

fees for coattail class actions than they would award in the absence of prior government litigation.

Under the "lodestar method," class counsel fees ordinarily should be lower in coattail class actions than in class actions that do not follow government litigation. The lodestar method involves multiplying reasonable hours by a reasonable rate.<sup>207</sup> By taking advantage of work accomplished by government lawyers, the litigation should take fewer hours of work by class counsel. This is borne out by the experience of plaintiffs' lawyers in tobacco cases tried after the breakthroughs of the state cases,<sup>208</sup> in contrast with the experience of tobacco plaintiffs' lawyers just a few years earlier.<sup>209</sup> The amount of fees paid to private lawyers handling the state tobacco lawsuits generated public outrage,<sup>210</sup>

<sup>207</sup> The lodestar method is the usual method of calculating attorneys' fees under fee-shifting statutes. See *City of Burlington v. Dague*, 505 U.S. 557, 562 (1992). It is also an occasional method of calculating attorneys' fees in class actions involving a common fund. See ALBA CONTE, *ATTORNEY FEE AWARDS* § 2.10 (2d ed. 1993).

<sup>208</sup> While there is no question that Stanley Rosenblatt put an enormous amount of work into the *Engle* Florida smokers' class action and the *Broin* second-hand smoke flight attendants' class action – the *Engle* trial alone lasted two years and included 157 witnesses, see Bragg, *supra* note 69, at A1, A11 – it is also clear that he relied heavily on documents unearthed in the state cases, particularly the Minnesota suit. See *supra* text accompanying note 65; see also Daynard & Gottlieb, *supra* note 54, at 24 ("One primary reason tobacco cases are proceeding to trial in increasing numbers is that discovery is no longer the ordeal it once was. . . . While depositions of witnesses may still be expensive, particularly where multiple defendants are involved, many of the key documents necessary to establish the defendants' liability are now available on the Internet.").

<sup>209</sup> In the mid-1990's, the *Castano* group's effort to get a nationwide tobacco class certified came to a dead end with the Fifth Circuit's decertification of the class, based in part on the "immaturity" of the tobacco litigation and the perceived unmanageability of a trial. See *Castano v. American Tobacco Co.*, 84 F.3d 734, 747-49 (5th Cir. 1996). Several years earlier, a New Jersey law firm voluntarily dismissed a strong tobacco suit after years of trial and appeals, see *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992); Henry J. Reske, *Cigarette Suit Dropped: Lawyer for Estate of Rose Cipollone Says Litigation Too Expensive*, A.B.A. J., Feb. 1993, at 30, and the firm sought unsuccessfully to withdraw from its representation of other tobacco plaintiffs, explaining that the firm was spending too much time and money on the cases without a reasonable likelihood of recovery. See *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414 (D.N.J. 1993); *Smith v. R.J. Reynolds Tobacco Co.*, 267 N.J. Super. 62 (N.J. Super. Ct. App. Div. 1993); see also E.E. Mazier, *Law Firms May Establish that Unreasonable Financial Burden Justifies Withdrawal from Case*, N.J. LAW., Oct. 18, 1993, at 21. As one commentator stated in connection with the plaintiffs' verdict in the *Engle* Florida smokers' class action, "Just a few years ago the idea that an individual smoker could legally triumph against a tobacco producer was unthinkable." Barry Meier, *Industry Crosses Troubling Line*, N.Y. TIMES, July 15, 2000, at A11.

<sup>210</sup> See, e.g., Editorial, *\$6700 An Hour? Lawyers' Tobacco-Suit Fees Invite Revolt*, USA TODAY, May 22, 2000, at 24A; Editorial, *Fee, Fi, Fo, Fum, Giant Awards for Lawyers Boggle Mind*, COLUMBUS DISPATCH, May 11, 1999, at 10A; Editorial, *Contingency Fee Limits*, DENVER POST, Apr. 25, 2000, at B8; Robert J. Samuelson, *Justice, Not Plunder*, WASH. POST, July 27, 2000, at A23; Dana S. Ciolino, *How Much Should the Tobacco Lawyers Get?*, THE TIMES-

but at least the lawyers at the forefront of the state tobacco suits were engaged in high-risk, breakthrough litigation; there were no coattails for them to ride. In contrast, the class action lawyers in the Microsoft antitrust litigation did not spend the time to draft their pleadings from scratch, sensibly preferring to refer to the Justice Department litigation.<sup>211</sup> While the Microsoft class action lawyers must do the work to prove causation and damages, the work to establish that the defendant violated the antitrust laws was largely taken care of by the government lawyers.<sup>212</sup> Moreover, inasmuch as prior government litigation increases the likelihood of success in piggyback private suits,<sup>213</sup> thus decreasing the lawyers' risk of non-payment, their counsel fees should not be enhanced by as large a risk multiplier as they might be entitled to if the failure risk were higher.<sup>214</sup>

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PICAYUNE, May 25, 2000, at B7. See also Michael Ciresi: *The Anti-Marlboro Man Got the Best Results of Anyone Fighting Big Tobacco*, NAT'L L.J., Dec. 28, 1998, at A12 (quoting plaintiffs' lawyer Michael Ciresi: "The amounts they asked for are just obscene."); Robert A. Levy, *Hired Guns Corral Contingent Fee Bonanza*, LEGAL TIMES, Feb. 1, 1999 (quoting plaintiffs' lawyer John Coale: "[The] figures are beyond human comprehension . . . The work does not justify them."). But see Dick Scruggs, *Lawyers Earned Those Fees*, USA TODAY, May 22, 2000, at 24A.

<sup>211</sup> See, e.g., Complaint, *DeJulius v. Microsoft Corp.*, No. 1:99CV03148, 1999 U.S. Dist. LEXIS 19184, at \*1-2 (D.D.C. Nov. 29, 1999).

<sup>212</sup> A lawyer for one of the class actions filed in the wake of Judge Jackson's findings of fact acknowledged, "Judge Jackson's finding gets us to third base on the liability issue. We still have a way to go for damages." Dennis J. Opatrny & Renee Deger, *A New Front in the Microsoft War* (Nov. 23, 1999), available at <http://www.lawnewsnetwork.com/stories/A10142-1999Nov22.html> (quoting attorney Daniel Mogin).

<sup>213</sup> See *supra* note 10 (discussing empirical findings of higher success rates in private antitrust and securities actions that follow government proceedings); see also Daynard & Gottlieb, *supra* note 54, at 18 ("Tobacco litigation is no longer an impossibly difficult endeavor for plaintiff attorneys.").

<sup>214</sup> In statutory fee cases, the Supreme Court has held that the lodestar calculation may not be altered by a risk multiplier. See *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992). The Supreme Court has not addressed whether *Dague* applies in common fund class actions, but others have noted that such fee decisions present a different question from the statutory fee decision in *Dague*. The Ninth Circuit explained:

*Dague's* rationale for barring risk multipliers in statutory fee cases does not operate to bar risk multipliers in common fund cases. . . . As we read *Dague*, the concerns that drove the Court to reject contingency enhancements in the statutory fee context apply with much less force in common fund cases. Unlike statutory fee-shifting cases, where the winners' attorneys' fees are paid by the losing party, attorneys' fees in common fund cases are not paid by the losing defendant, but by members of the plaintiff class, who shoulder the burden of paying their own counsel out of the common fund. . . . There is nothing unfair about contingency enhancements in common fund cases because of the equitable notion that those who benefit from the creation of the fund should share the wealth with the lawyers whose skill and effort helped create it.

Under the more prevalent percentage-of-outcome method, much of the same reasoning applies. This method involves calculating fees as a percentage of the fund created by the judgment. Where less work is required of the lawyers, courts award a smaller portion of the fund.<sup>215</sup> Also, given this method's resemblance to contingent fee arrangements, courts naturally award a higher percentage for higher risk, and a lower percentage for lower risk.<sup>216</sup>

In sum, the lighter the work and the lower the risk, the less the lawyer should earn, regardless of which fee calculation method a court prefers. Coattail class actions can serve a valuable function in bringing compensation to victims and in maintaining an appropriate level of deterrence, but that does not mean they are as valuable as breakthrough litigation, or that the lawyers should earn as much as they would have had their task been more formidable.

### CONCLUSION

Much can be accomplished by government lawsuits that break down barriers against seemingly invincible defendants, and by class actions that extend the benefits of such government lawsuits by providing compensation to individual victims. The government suit and coattail class action make a powerful two-pronged attack. Government litigation provides impetus and information to further the class actions, and class actions enhance the regulatory and deterrent effects of government suits. The two-pronged attack becomes troubling when the prongs do not merely reinforce each other, but rather lose their separate identities. When government lawyers seek to settle their actions by compromising the claims of private plaintiffs without adequate compensation, they have wrongly allowed the government action to invade the sphere of private litigation. By the same token, when government entities retain private lawyers on contingent fees, they have wrongly allowed the

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*In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1299-1300 (9th Cir. 1994).

<sup>215</sup> See, e.g., *In re A.H. Robins Co.*, 182 B.R. 128, 139-40 (E.D. Va. 1995) (limiting amount of contingent fees because plaintiffs' attorneys were engaging in repetitive litigation and not much work was required for each case), *aff'd sub nom Bergstrom v. Dalkon Shield Claimants Trust*, 86 F.3d 364 (4th Cir. 1996).

<sup>216</sup> See WRIGHT ET AL., *supra* note 136, § 1803 (1986 & Supp. 2000) ("the court should consider whether an award should be enhanced because of the contingent nature of succeeding in the action, a factor that is independent of any additional allowance that might be made for the quality of counsel's work."); see also Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 348 (1998) (noting common fund class action fee's "close parallel to individual contingent fee litigation").

incentive structures of private litigation to invade the governmental realm.

Despite the importance of maintaining some separation between government and private litigation,<sup>217</sup> it is essential that participants in each realm consider the other. Government lawyers should be aware that their own litigation generates outcomes and information that can be used for private litigation as a matter of issue preclusion, legal analysis, and, most significantly, factual investigation and discovery. Aware of producing these public goods, they should avoid negotiating with defendants for confidentiality without a compelling reason. In coattail class actions, punishment imposed by prior government litigation should be taken into account in determining the appropriateness and amount of punitive damages. Class counsel in coattail class actions generally should receive lower fee awards than they would have received in the absence of prior government litigation, to reflect the lighter work and lower risk involved.

In trying to draw out common lessons from rather disparate litigations, I risk oversimplification. This Article has emphasized the distinction between government and private litigation, and in so doing has sidestepped variations among government lawsuits. Municipalities differ from the federal and state governments as public plaintiffs.<sup>218</sup> Government lawsuits to recover money spent on preventing or treating harm, such as the dominant tobacco and handgun state claims, differ from *parens patriae* lawsuits to obtain compensation for harm to citizens. They also differ from government lawsuits to enforce statutory norms, such as the Microsoft case and most other government antitrust and securities litigation.

Nevertheless, the coattail class action pattern presents enough consistency to warrant examination, and the variety of government lawsuits share enough in common to allow a meaningful contrast between the representation of the people's interests through government litigation and the representation of class interests through private class actions. Given the primarily public duties and political incentives of

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<sup>217</sup> By this, I do not mean that government lawyers and private lawyers should not work together. See Erichson, *Informal Aggregation*, *supra* note 36, manuscript at 13-14 (discussing coordinated efforts between government and private lawyers). Rather, I mean that government lawyers and private lawyers are best situated to play different roles. See *supra* text accompanying notes 115-132.

<sup>218</sup> See *Harvard Gun Note*, *supra* note 116, at 1527 & n.38 (regarding inability of municipalities to sue as *parens patriae* on behalf of citizens); see also *supra* text accompanying note 108 (regarding dual character of municipal entities).

government lawyers, and the primarily private duties and monetary incentives of class action lawyers, it is possible to acknowledge the value of coattail class actions as a general matter, while raising questions about some of the recent manifestations. Viewing the phenomenon as a mixing of public and private lawyering roles may shed light on the use of representative litigation for resolving mass liability claims.