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On What A "Private Attorney General" Is—And Why It Matters

William B. Rubenstein 57 Vand. L. Rev. 2129 (2004)

Although the phrase "private attorney general" is commonly employed in American law, its meaning remains elusive. The concept generally serves as a placeholder for any person who mixes public and private features in the adjudicative arena. Yet there are so many players who mix public and private functions in so many different ways that the idea holds the place for a motley cast of disparate characters. My goal in this Article is to map these mixes—to distill from the singular private attorney general concept a range of distinct private attorneys general—and then to show why this new taxonomy is a helpful heuristic device. Specifically, I argue that the new taxonomy illuminates a weakness in the governing model of the class case. Scholars loosely associated with the law and economics movement have helpfully described class action lawsuits as presenting a classic agency problem: class action attorneys (agents) pursue the interests of their class member clients (principals) with little oversight or control. Consequently, class action scholarship has focused on identifying ways to better align the interests of the agents with those of their principals. This obsession with agent incentives assumed, without significant investigation, that there existed a stable group of principals with easily-identifiable interests. My typology demonstrates that different types of private attorneys general serve different types of principals, each of which combine public and private interests in different ways. If the goal of class action law is to align the attorneys' interests with those of their clients, it is necessary to identify clearly the precise nature of these underlying principals. That is the contribution of this piece.

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