CLASS ACTION SQUARED: MULTISTATE ACTIONS AND AGENCY DILEMMAS

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As the Supreme Court continues to restrict the reach of private class actions, numerous commentators have championed public enforcement actions by state attorneys general (AGs) as a superior alternative to hold corporations accountable for misconduct. While AG actions fill some of the void left by the forced retreat of the private class action, few scholars have seriously considered whether the agency problems that exist in private class actions also occur in AG actions. And, until now, no scholar has recognized the unique agency problems that arise when AGs act together in multistate actions.

Multistate actions are made up of two discrete layers of "class action." On the first level, AGs frequently aggregate the claims of state residents to bring actions on their behalf, with AGs acting like lead counsel and state residents resembling class members. On the second layer, when multiple AGs bring action together, another "class action" of a sort emerges, with a few AGs leading a "class" of states and their combined state residents. In other words, multistate action is class action squared.

Agency problems are not simply doubled in multistate actions by virtue of being class action squared. Rather, an entirely new host of agency dilemmas arise when the two layers of "class action" interact with each other. Put more simply, "class action squared" problems create temptations for AGs to "borrow" and "steal" in multistate actions in ways they could not if they pursued actions independently. These problems raise the question of whether multistate action is really a viable substitute for the private class action and challenge the notion that multistate action is always better than states going it alone.

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INTRODUCTION

Military generals understand the value of a good alliance. So do state attorneys general (AGs) who increasingly band together to pursue multistate actions.[1] AG alliances shift in multistate actions, often depending on their target. Highly partisan AG alliances have dominated recent multistate actions against the federal government, while broader bipartisan coalitions of AGs have formed in multistate actions against large corporations.[2] AGs face both opportunities and dilemmas in deciding whether to participate in multistate actions against large corporations. On the one hand, by aggregating claims in a multistate action, AGs can leverage their combined resources to mount high-stakes litigation, reaping large settlements for their states and residents. These multistate settlements can serve to deter future corporate fraud and compensate victims. But on the other hand, participating in multi-

1 *See* PAUL NOLETTE, FEDERALISM ON TRIAL: STATE ATTORNEYS GENERAL AND NATIONAL POLICYMAKING IN CONTEMPORARY AMERICA 21–22 (2015); Ann O'M. Bowman, *Horizontal Federalism: Exploring Interstate Interactions*, 14 J. PUB. ADMIN. RSCH. & THEORY 535, 541 (2004) ("This form of interstate cooperation appears to have become more popular over time, with the number of multistate lawsuits increasing during the decade."); Colin Provost, *The Politics of Consumer Protection: Explaining State Attorney General Participation in Multi-State Lawsuits*, 59 POL. RSCH. Q. 609, 610–12 (2006) (explaining that the overall number of lawsuits as well as the number of states participating in multistate actions has increased over time).

2 *See* Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 85–95 (2018); Paul Nolette & Colin Provost, *Change and Continuity in the Role of State Attorneys General in the Obama and Trump Administrations*, 48 PUBLIUS: J. FEDERALISM 469, 488–89 (2018).

state actions, ironically, can also undermine those same deterrence and compensation goals.

Class action lawsuits face a similar problem. Class actions aggregate numerous claims into a single lawsuit that would otherwise be too costly to bring individually.[3] They allow plaintiffs to receive compensation that they might otherwise forgo, and deter corporations from committing fraud that creates widespread harm but relatively small-scale individual damages.[4] But agency costs creep into class actions that undermine their ability to adequately compensate plaintiffs and properly deter corporate misconduct.[5] Agency costs occur when class counsel enters into "sweetheart settlements" that result in handsome fees for counsel while class members are left holding the bag—full of nearly worthless coupons.[6]

Recognizing this problem, the Supreme Court and policymakers have steadily restricted private class actions.[7] As they recede under judicial and regulatory pressure, a form of public aggregate litigation, parens patriae

3 *See* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1383 (2000).

4 *See* Edward Brunet, *Improving Class Action Efficiency by Expanded Use of* Parens Patriae *Suits and Intervention*, 74 TUL. L. REV. 1919, 1926–27 (2000); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U. L. REV. 439, 441 (1996) (arguing class actions are "important and useful, both to deter wrongful conduct and to provide compensation for injured plaintiffs").

5 *See* Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 536 (1991) ("Class actions thus are characterized by high agency costs: that is, a significant possibility that litigation decisions will be made in accordance with the lawyer's economic interests rather than those of the class."); John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–83 (1987) [hereinafter Coffee, *Entrepreneurial Litigation*]; Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8, 19–27 (1991).

6 *See* John C. Coffee Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 633 (1987) [hereinafter Coffee, *Rethinking the Class Action*] ("At its simplest, the classic form of opportunism in class actions is the 'sweetheart' settlement, namely one in which the plaintiff's attorney trades a high fee award for a low recovery."); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1151–52 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1053–54 (1996).

7 *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 852 & n.30 (1999); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 436–39 (2000) [hereinafter Coffee, *Class Action Accountability*]; Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v. Concepcion, 79 U. CHI. L. REV. 623, 626–27 (2012) [hereinafter Gilles & Friedman, *After Class*] ("Merited or not, the agency cost critique has certainly ushered in a backlash, spurring—among other things—significant restrictions in the rules governing the certification of both damages and injunctive classes, as well as the creation of new limitations upon standing, particularly in consumer class actions."); *see also* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 4, 119 Stat. 4, 9 (codified at 28 U.S.C. § 1332) (expanding federal jurisdiction in class actions).

actions, have flourished.[8] AGs have authority to bring parens patriae actions on behalf of their states and state residents.[9] These actions closely resemble private class actions because claims of state residents are aggregated into a single lawsuit led by a "lead counsel," in the form of an AG.[10] However, parens patriae actions lack the procedural and legal requirements of class actions.[11] Recognizing the power of parens patriae actions to accomplish the goals of class actions without the same procedural hurdles, some scholars have called for the expansion of parens patriae actions as a means to fill the void left by the forced retreat of the class action.[12] Others have urged caution in embracing parens patriae actions because agency costs also arise in

8 *See* Brunet, *supra* note 4, at 1921–22 ("Because of the perceived successful settlement of the state *parens patriae* tobacco cases, states have brought *parens patriae* suits against entire industries, including guns, lead paint, and more recently, health maintenance organizations. . . . [T]here now exists a blueprint for states to consider filing class-like lawsuits for injuries to their citizens' health and overall economic well-being.").

9 Actions by AGs seeking restitution and redress for state residents are often lumped into the term parens patriae. In this Article, I use the term parens patriae generally to refer to cases in which the AG brings action on behalf of state citizens for monetary relief, recognizing that parens patriae powers come from both common-law and statutory sources. *See* Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 492 (2012) [hereinafter Lemos, *Aggregate Litigation*] (using the term "parens patriae" similarly).

10 *See* Seth Davis, *Implied Public Rights of Action*, 114 COLUM. L. REV. 1, 45 (2014) (stating that parens patriae actions are "particularly likely to present many of the same problems as private class action enforcement"); Susan Beth Farmer, *More Lessons from the Laboratories:* Cy Pres *Distributions in* Parens Patriae *Antitrust Actions Brought by State Attorneys General*, 68 FORDHAM L. REV. 361, 362 (1999); Lemos, *Aggregate Litigation*, *supra* note 9, at 499–500; William H. Pryor Jr., *A Comparison of Abuses and Reforms of Class Actions and Multigovernment Lawsuits*, 74 TUL. L. REV. 1885, 1899 (2000); Amy J. Wildermuth, *Why State Standing in* Massachusetts v. EPA *Matters*, 27 J. LAND RES. & ENV'T L. 273, 300 (2007); Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 512 (1995) ("The *parens patriae* label . . . often merely dresses up actions that private parties could easily bring.").

11 *See* Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161, 16869 (2014) (holding that parens patriae action brought by AG was not subject to the removal provisions of the Class Action Fairness Act); Gilles & Friedman, *After Class*, *supra* note 7, at 660–61 ("Parens patriae suits are not subject to Rule 23 or contractual waiver provisions, and so avoid the majority of impediments to contemporary class actions."); Deborah R. Hensler, *Goldilocks and the Class Action*, 126 HARV. L. REV. F. 56, 56–57 (2012).

12 *See* Brunet, *supra* note 4, at 1919 (arguing that parens patriae suits "should cause efficiency gains . . . that could help the now tarnished reputation of the class action"); Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. LEGAL STUD. 47, 47 (1975) ("Because of the burdens imposed on the federal court system by class actions and because of their limitations, interest has been growing in the possibility of creating alternative procedures, such as *parens patriae* actions."); Farmer, *supra* note 10, at 362 (describing parens patriae actions as "an efficient alternative to consumer class actions"); Gilles & Friedman, *After Class*, *supra* note 7, at 660 ("In our view, state attorneys general—alone among public enforcers—have the ability to fill the void left by class actions, primarily through expanded use of the parens patriae powers that are currently on the books in most states.").

parens patriae actions like they do in class actions.[13] This observation has sparked a debate in the literature about whether parens patriae actions are in fact analogous to private class actions and the implications of the analogy on public enforcement.[14]

The conversation about class actions and parens patriae actions fails to consider an important development. It does not consider that AGs are increasingly acting together in multistate actions.[15] When AGs combine forces in multistate actions, the analogy to the class action compounds, and a second "class action" of a sort emerges. In this second "class action," AGs combine the aggregated claims of their states and states' residents. A few AGs lead this second "class" that resembles in a way how class counsel represents class members. This Article is the first to recognize that multistate actions are made up of two discrete layers where each layer can be analogized to a private class action, or what I dub "class action squared."

To date, the literature has not focused on multistate actions as being distinct from individual AG actions. As a result, multistate actions are understudied as a phenomenon and undertheorized in the literature.[16] This Article begins to fill the gap by theorizing about how agency problems arise in multistate actions and argues that unique agency costs arise in multistate actions by virtue of being "class action squared."

Agency problems in multistate actions are not simply doubled by virtue of being class action squared. Rather, new agency costs arise when two layers of "class action" interact in multistate actions. Put more simply, class action squared problems create temptations for AGs to "borrow" and "steal" from one another in multistate actions in ways they could not if they acted alone. AGs can "borrow" other states' more expansive enforcement statutes, even if a particular state legislature has made a policy judgment to the contrary.[17] And AGs can "steal" by allocating greater portions of settlements to their own states, with other AGs either oblivious or indifferent to the theft because of voter ignorance. Leading states in multistate settlements are regularly the states with the highest allocations of settlements, even if other participating states have larger populations or more affected state residents.[18]

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13 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 511.

14 *Cf. id.* at 499–500; Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 MINN. L. REV. 2313, 2352 (2016).

15 *See supra* note 1.

16 *See* Colin Provost, *An Integrated Model of U.S. State Attorney General Behavior in Multi-State Litigation*, 10 STATE POL. & POL'Y Q. 1, 2 (2010) ("Multi-state litigation deserves scholarly attention because its dynamics are still poorly understood, yet the key players involved believe that it has had profound effects on regulatory governance."); Amanda M. Rose, *State Enforcement of National Policy: A Contextual Approach (with Evidence from the Securities Realm)*, 97 MINN. L. REV. 1343, 1371–75 (2013); Mark Totten, *The Enforcers & The Great Recession*, 36 CARDOZO L. REV. 1611, 1664 (2015) ("[T]he role of multistate and multigovernment actions remains understudied.").

17 *See infra* Section III.A.

18 *See infra* Section III.B.

Recognizing class action squared agency problems is important because multistate actions are drastically altering the enforcement landscape. Some of the largest and most important settlements in American history are multistate actions, such as the Master Settlement Agreement with tobacco manufacturers[19] and the National Mortgage Settlement with mortgage servicers.[20] Not only can multistate actions yield billion dollar settlements, but they can also require sweeping corporate reforms that regulate the way entire industries do business.[21] Understanding that agency problems arise in multistate actions raises the question of whether they are preferable to private class actions and challenges the notion that multistate action is necessarily better than states going it alone.

Identifying agency problems raises the question of what can be done to reduce them. Agency costs persist when principals lack the ability to effectively monitor agents.[22] This Article proposes different avenues to increase oversight of multistate actions to reduce class action squared problems. First, voters could more effectively monitor AGs if there were greater transparency about settlements. Second, legislatures could exercise greater oversight over AGs through their lawmaking and budgeting powers. Third, judges could apply greater scrutiny to proposed settlements in multistate actions. Increasing the ability of voters, the legislature, and the judiciary to monitor AGs' behavior would reduce unique class action squared problems.

This Article proceeds in four parts. Part I sets forth the attributes of parens patriae actions, multistate actions, and private class actions. Part II explores how multistate action is class action squared. Part III discusses the unique class action squared agency problems that arise in multistate litiga-

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19 The Master Settlement Agreement is the largest civil settlement in American history. Donald G. Gifford, *Impersonating the Legislature: State Attorneys General and* Parens Patriae *Product Litigation*, 49 B.C. L. REV. 913, 968 (2008). The settlement occurred in 1998 with forty-six states participating for over $200 billion to be paid to the states over twenty-five years against the four largest U.S. tobacco companies. *See* Richard P. Ieyoub & Theodore Eisenberg, *State Attorney General Actions, the Tobacco Litigation, and the Doctrine of* Parens Patriae, 74 TUL. L. REV. 1859, 1860 (2000).

20 The National Mortgage Settlement occurred in 2012 and included forty-nine states, multiple federal agencies and state regulators, and the nation's five largest mortgage servicers for over $25 billion. *See* Press Release, U.S. Dep't of Just., Federal Government and State Attorneys General Reach $25 Billion Agreement with Five Largest Mortgage Servicers to Address Mortgage Loan Servicing and Foreclosure Abuses (Feb. 9, 2012) [hereinafter DOJ National Mortgage Settlement Press Release], https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-25-billion-agreement-five-largest; *see also* Totten, *supra* note 16, at 1639.

21 *See* Gifford, *supra* note 19, at 967–68; Matthew C. Turk, *Regulation by Settlement*, 66 U. KAN. L. REV. 259, 260 (2017); Paul Nolette, *State Attorneys General Are More and More Powerful. Is That a Problem?*, WASH. POST (Mar. 5, 2015, 3:00 PM), https://www.washingtonpost.com/news/monkey-cage/wp/2015/03/05/state-attorneys-general-are-more-and-more-powerful-is-that-a-problem/ ("AG-led lawsuits have become a crucial part of the American regulatory landscape, particularly since their resolution often involves millions (even billions) in fines and new regulatory requirements for the targeted industries.").

22 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 519.

tion, and Part IV considers some reforms to increase voter, legislative, and judicial monitoring to reduce agency problems in multistate actions.

I. Public and Private Aggregate Litigation: Parens Patriae and Class Actions

AGs are uniquely empowered to bring public aggregate litigation, called parens patriae actions, to benefit their states and state residents.[23] Private lawyers, also referred to as "private attorneys general," bring private aggregate litigation, such as class actions.[24] Both public and private aggregate litigation seek to compensate injuries and deter corporate misconduct.[25] However, public aggregate action has escaped much of the criticism aimed at class actions for agency cost problems.[26] As pressure has mounted on class actions, public aggregate litigation has thrived in recent years, in part due to the increased prominence of multistate actions.

A. *State Attorneys General Powers and Enforcement Actions*

AGs hold a unique state government office. They have broad authority to bring parens patriae actions for the benefit of their states and residents. Parens patriae actions aim to deter misconduct and increasingly seek public compensation for state residents. AGs are increasingly pursuing their parens patriae actions together in multistate actions.

1. Roles and Responsibilities of State Attorneys General

AGs hold a unique position in state government. In most states, the office of AG was either created or continued by state constitution.[27] Each of the fifty states and six territories of the United States have an AG's office or its functional equivalent.[28] The vast majority of AGs are directly elected statewide, although some AGs are appointed by other state officials or institutions.[29] Most AGs are elected to serve four-year terms.[30] The specific duties

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23 *See* Nolette, *supra* note 1, at 38 (shifting from representing only the state to representing the state and state residents "was significant because by serving as the representatives of individuals and groups allegedly harmed by corporate conduct, AGs essentially became a form of class action litigator").

24 This Article focuses primarily on the analogy between AG actions and private damages class actions and refers to private damages class actions under Federal Rule of Civil Procedure 23(b)(3) by the shorthand "class actions."

25 *See* Cox, *supra* note 14, at 2350–51; Wolfman & Morrison, *supra* note 4, at 441.

26 *See* Alexander, *supra* note 5, at 536; Coffee, *Entrepreneurial Litigation*, *supra* note 5, at 882–83; Macey & Miller, *supra* note 5, at 7–8.

27 *See* Nat'l Ass'n Att'ys Gen., State Attorneys General Powers and Responsibilities 7 (Emily Myers ed., 4th ed. 2018).

28 *See id.* at 12, 107.

29 *See* William P. Marshall, *Break Up the Presidency? Governors, State Attorneys General, and Lessons from the Divided Executive*, 115 Yale L.J. 2446, 2448 n.3 (2006). Forty-three of the nation's Attorneys General are elected statewide separately from the Governor or other state institutions. *Id.* State AGs are appointed in the other seven states: Alaska, Hawaii,

of AGs vary from state to state. However, the most important duties of the office include "control of litigation concerning the state; . . . providing formal opinions to clarify the law; . . . criminal law enforcement, primarily on the appellate level; law reform and legislative advocacy; and investigative authority."[31]

AGs serve multiple constituencies in carrying out their duties. AGs have the broad power to "protect the public interest" and the wide discretion to determine what actions to take in the public's interest.[32] In addition to representing the public interest, AGs also represent the state as a political entity and defend state agencies.[33] Because AGs conduct litigation on behalf of the state, AGs are referred to as the state's chief legal officer or chief law enforcement officer.[34]

AGs are considered enforcement generalists, with duties that span myriad issues.[35] They have considerable latitude in setting their enforcement agendas and determining how to deploy the office's resources in accordance with their priorities.[36] AGs and their staffs are salaried public servants and are not compensated based on the outcomes of individual cases.[37] While AG offices have become more sophisticated over time, they often operate under significant budget constraints.[38] Their resources are stretched across many enforcement priorities, and they must carefully utilize their office resources.[39]

Maine, New Hampshire, New Jersey, Tennessee, and Wyoming. *Id.* In Maine, the Attorney General is selected by the state legislature and, in Tennessee, by the state supreme court. *Id.* In the other five states, Alaska, Hawaii, New Hampshire, New Jersey, and Wyoming, the Attorney General is appointed by the Governor. *Id.*

30 *See* NAT'L ASS'N ATT'YS GEN., *supra* note 27, at 18.

31 *Id.* at 11.

32 *See* Florida *ex rel.* Shevin v. Exxon Corp., 526 F.2d 266, 268–69 (5th Cir. 1976) ("[The AG] typically may exercise all such authority as the public interest requires. And the attorney general has wide discretion in making the determination as to the public interest.").

33 *See About NAAG*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/naag/about_naag.php (last visited Sept. 19, 2020).

34 *See* Brandon D. Harper, Comment, *The Effectiveness of State-Filed Amicus Briefs at the United States Supreme Court*, 16 U. PA. J. CONST. L. 1503, 1510 (2014).

35 *See* Margaret H. Lemos, *State Enforcement of Federal Law*, 86 N.Y.U. L. REV. 698, 717 (2011) [hereinafter Lemos, *State Enforcement*] ("State enforcement also empowers a different set of agents—elected, generalist attorneys general."); Elysa M. Dishman, *Enforcement Piggybacking and Multistate Actions*, 2019 BYU L. REV. 421, 435.

36 *See* Dishman, *supra* note 35, at 436.

37 *See* Margaret H. Lemos & Max Minzner, *For-Profit Public Enforcement*, 127 HARV. L. REV. 853, 861–62 (2014). But both federal enforcers and AG offices may benefit from "revolving funds" that allow these enforcers to keep a portion of enforcement penalties to fund their offices. *Id.* at 864.

38 *See id.* at 859.

39 *See* Paul Harzen Beach, *The* Parens Patriae *Settlement Auction*, 52 GONZ. L. REV. 455, 464 (2017).

Some have quipped that the acronym "AG" stands for "aspiring governor."[40] AGs have a reputation for future political ambitions to run for higher political office such as governor or U.S. senator.[41] Empirically, it has been shown that a majority of AGs run for higher office; however, AGs most likely to run for future political office are those that lead multistate actions.[42] AGs can build a strong policy record based on enforcement actions in order to propel them to higher office.[43] At the same time, as AGs have risen in prominence to be national enforcers and policymakers, the office of AG has been recognized as an influential political office in its own right.[44]

The broad authority to initiate lawsuits on behalf of the state and its residents is one of the AG's most important powers. AGs have recently flexed this authority to bring parens patriae actions against large corporations as a means of seeking relief for their states and residents.[45] Engaging in this litigation has elevated the prominence of AGs to national policymakers.[46]

2. Parens Patriae Litigation Authority

AGs have broad discretion and authority to bring parens patriae actions.[47] The authority for parens patriae actions comes from multiple sources including state and federal statutes and the common law.[48] The most straightforward source of parens patriae authority is state statutes that allow AGs to seek restitution for state consumers injured by violations of state consumer protection statutes.[49] AGs also derive parens patriae authority to seek damages for state residents under other state and federal laws.[50] Most

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40 *See* Colin Provost, *When Is AG Short for Aspiring Governor? Ambition and Policy Making Dynamics in the Office of State Attorney General*, 40 PUBLIUS: J. FEDERALISM 597, 597 (2009) [hereinafter Provost, *Aspiring Governor*].

41 *See id.* at 597.

42 *See id.* at 597, 612.

43 *See id.* at 599.

44 *See* NOLETTE, *supra* note 1, at 20.

45 *See* Brunet, *supra* note 4, at 1921–22.

46 *See id.*; Totten, *supra* note 16, at 1613; Elysa M. Dishman, *Settling Data Protection Law: Multistate Actions and National Policymaking*, 72 ALA. L. REV. (forthcoming 2021) (manuscript at 4), https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3577167_code2392605.pdf?abstractid=3577167&mirid=1.

47 *See* NOLETTE, *supra* note 1, at 41. "*Parens patriae* literally means 'parent of the country' and refers to the sovereign's role as guardian of persons under legal disabilities." Louise Harmon, *Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment*, 100 YALE L.J. 1, 18 (1990) (quoting *Parens Patriae*, BLACK'S LAW DICTIONARY (5th ed. 1979)).

48 *See* NAT'L ASS'N ATT'YS GEN., *supra* note 27, at 106–09; Lemos, *Aggregate Litigation*, *supra* note 9, at 493.

49 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 492. The line between AG actions seeking restitution under state consumer protection law and suits under parens patriae is muddled with restitution actions being referred to as parens patriae actions. This Article refers to both as parens patriae actions. *See id.* at 492–93.

50 *See* NOLETTE, *supra* note 1, at 39–40 (listing federal statutes that authorize AG parens patriae actions); Cox, *supra* note 14, at 2328. For a discussion about how states enforce federal laws, see generally Lemos, *State Enforcement*, *supra* note 35.

parens patriae actions are based on express statutory authority,[51] even though parens patriae has "deep roots in the common law."[52]

The common-law doctrine of parens patriae allows states to vindicate the state's "sovereign" or "quasi-sovereign interests."[53] The leading Supreme Court case on modern common-law parens patriae is *Alfred L. Snapp & Son, Inc. v. Puerto Rico*.[54] The Court in *Snapp* reiterated that the doctrine of parens patriae allows states to bring action to protect their sovereign or quasi-sovereign interests.[55] A state's sovereign interests include "the power to create and enforce a legal code, both civil and criminal."[56] But the term "quasi-sovereign interests" is ill-defined.[57] Generally, quasi-sovereign interests are "a set of interests that the State has in the well-being of its populace."[58] They include the state's "interest in the health and well-being—both physical and economic—of its residents in general."[59] Importantly, "the State must be more than a nominal party,"[60] meaning both the state and the individuals must have an interest in the claim.[61] That being said, the state's claim may be "parasitic" on the claim of the state residents, meaning that the aggregated private interests of state residents may provide the basis of a "quasi-sovereign *state* interest."[62]

The parens patriae common-law doctrine requires state residents' claims to be substantial in number and similar to each other. The state cannot bring a parens patriae action on behalf of "particular individuals."[63] Rather, the state must act on behalf of its "residents in general" that form a "suffi-

51 Cox, *supra* note 14, at 2328 ("Government enforcers rarely rely on common law *parens* doctrine for public compensation."). However, courts do not always distinguish between parens patriae authority based on statute and common law and use the term "parens patriae" loosely to refer to any state representative litigation. *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 493.

52 Lemos, *Aggregate Litigation*, *supra* note 9, at 493. For a history of parens patriae, see Lawrence B. Custer, *The Origins of the Doctrine of* Parens Patriae, 27 EMORY L.J. 195, 201–206 (1978); Jack Ratliff, Parens Patriae*: An Overview*, 74 TUL. L. REV. 1847, 1850–53 (2000).

53 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 602, 607 (1982).

54 *See id.*

55 *See id.* at 601.

56 *Id.*

57 *Id.* (stating the category of "'quasi-sovereign' interest . . . is a judicial construct that does not lend itself to a simple or exact definition"); *see also* Ratliff, *supra* note 52, at 1851 ("'Quasi-sovereign' is one of those loopy concepts that comes along often enough to remind us that appellate courts sometimes lose their moorings and drift off into the ether. It is a meaningless term absolutely bereft of utility.").

58 *Snapp*, 458 U.S. at 602.

59 *Id.* at 607.

60 *Id.*

61 *See* Ratliff, *supra* note 52, at 1857–58.

62 Lemos, *Aggregate Litigation*, *supra* note 9, at 494–95 (emphasis in original).

63 *Snapp*, 458 U.S. at 607 n.14; *see also* Cox, *supra* note 14, at 2327 ("A key limitation on a *parens* action is that the state suit cannot represent solely private interests.").

ciently substantial segment of [the state's] population."[64] The claims of the state residents are also similar in parens patriae actions. For example, in *Snapp*, the parens patriae action was based on the similar claims of Puerto Rican residents who were discriminated against in temporary job opportunities on East Coast farms during a particular harvest season.[65] "In other words, private interests can rise to the level of a quasi-sovereign *state* interest when sufficiently aggregated."[66]

While state residents' claims must be sufficiently aggregated, typically the state residents represented in parens patriae actions are a subset of the general public. These parens patriae group members are usually the real parties of interest in the action.[67] Even though they are the real parties of interest in the action, there are generally few procedural protections in place for parens patriae group members.[68] For example, notice of the action is generally not provided to parens patriae group members, nor do they have the opportunity to "opt out" of the action.[69]

AGs seek a variety of remedies in parens patriae actions including injunctive relief, civil penalties, and public compensation.[70] AGs are increasingly seeking public compensation for the injuries of their state residents.[71] For example, the Arizona AG sued and settled with General Motors (GM) and received compensation for Arizona consumers based on faulty ignition switches in their vehicles.[72] The Washington,[73] Illinois,[74] and Mississippi

64 *Snapp*, 458 U.S. at 607. However, the "Court has not attempted to draw any definitive limits on the proportion . . . that must be adversely affected." *Id.* In *Snapp*, the number of state citizens was relatively few, only impacting 787 temporary jobs for Puerto Ricans when the population of Puerto Rico was over 3 million. *Id.* at 599, 609.

65 *Id.* at 597–98, 609.

66 Lemos, *Aggregate Litigation*, *supra* note 9, at 495.

67 *See id.* at 495 n.38.

68 *See id.* Others have also argued that there is a lack of procedural protections when federal agencies provide monetary compensation in public enforcement. *See* Adam S. Zimmerman, *Distributing Justice*, 86 N.Y.U. L. Rev. 500, 502–03, 554–55 (2011).

69 *See* Cox, *supra* note 14, at 2326, 2330. However, a notable exception is the antitrust context, which under federal law and several state statutes requires similar procedures as private class actions such as notice and the ability to opt out. *Id.*

70 *See* Gilles & Friedman, *After Class*, *supra* note 7, at 661.

71 *See* Cox, *supra* note 14, at 2352 (noting the current trend of public compensation for federal agencies and state AGs); Georgene Vairo, *Is the Class Action Really Dead? Is That Good or Bad for Class Members?*, 64 Emory L.J. 477, 517, 520 (2014).

72 *See* Rebecca R. Ruiz, *General Motors Is Sued by Arizona for $3 Billion over Recalls*, N.Y. Times (Nov. 20, 2014), https://www.nytimes.com/2014/11/20/business/arizona-sues-gm-for-3-billion-over-recalls.html. Interestingly, Arizona began in a multistate action against GM that was not seeking consumer restitution, but later instead brought its own action seeking consumer restitution. *Id.* Arizona settled with GM for $6.28 million with a minimum of $200 for each impacted consumer. *See* Press Release, Ariz. Off. of the Att'y Gen., AG Brnovich Obtains $6.28 Million for Arizonans Who Purchased Recalled GM Vehicles (Mar. 7, 2018) [hereinafter Arizona GM Press Release], https://www.azag.gov/press-release/ag-brnovich-obtains-628-million-arizonans-who-purchased-recalled-gm-vehicles.

73 *See* Press Release, Wash. State Off. of the Att'y Gen., AGO Recovers $63 Million in Price-Fixing Scheme Affecting Millions of Washingtonians (May 15, 2015), https://

AGs[75] individually brought action against manufacturers of LCD screens under their respective antitrust statutes seeking compensation for their state residents for a price-fixing scheme. Compensation in parens patriae actions can be in the form of damages, which is more common in antitrust actions,[76] and in the form of restitution, which is more common in consumer protec-

www.atg.wa.gov/news/news-releases/ago-recovers-63-million-price-fixing-scheme-affecting-millions-washingtonians.

74 *See* Press Release, Ill. Off. of the Att'y Gen., Court Approves Distribution of over $190 Million to Illinois Consumers in Settlement over Fixed Prices for LCD Screens (Jan. 11, 2018), https://illinoisattorneygeneral.gov/pressroom/2018_01/20180111.html.

75 In fact, the Supreme Court case, *Mississippi ex rel. Hood v. AU Optronics Corp.*, grew out of such an action brought by the Mississippi AG. 571 U.S. 161, 166 (2014). An eight-state multistate action also settled with LCD manufacturers for the same price-fixing schemes in violation of antitrust laws. *See* Press Release, N.Y. State Off. of the Att'y Gen., A.G. Schneiderman Announces $571 Million Settlement with LCD Panel Manufacturers in Price Fixing Case (July 12, 2012), https://ag.ny.gov/press-release/2012/ag-schneiderman-announces-571-million-settlement-lcd-panel-manufacturers-price.

76 Damages in parens patriae actions are most common in the antitrust context, but are also available in other contexts under state statutes. *See* ALASKA STAT. § 45.50.577(b) (2020); ARK. CODE ANN. § 4-75-212(b) (2020); CAL. BUS. & PROF. CODE § 16760(a)(1) (West 2020); COLO. REV. STAT. §§ 6-4-111(1), (2) (2020); CONN. GEN. STAT. §§ 35-32(c), (d) (2020); DEL. CODE ANN. tit. 6, § 2108(b) (2020); FLA. STAT. § 542.22(2) (2019); HAW. REV. STAT. § 480-14(b) (2019); IDAHO CODE § 48-108(2) (2020); 740 ILL. COMP. STAT. 10/7(2) (2020); MD. CODE ANN., COM. LAW § 11-209(b)(5) (West 2020); NEB. REV. STAT. § 84-212 (2020); NEV. REV. STAT. § 598A.160(1) (2020); N.H. REV. STAT. ANN. § 356:4-a(II) (2020); OHIO REV. CODE ANN. § 109.81(A) (LexisNexis 2020); OKLA. STAT. tit. 79, § 205(A)(1) (2020); OR. REV. STAT. § 646.775(1)(A) (2019); 6 R.I. GEN. LAWS § 6-36-12(a) (2020); S.D. CODIFIED LAWS § 37-1-23 (2020); UTAH CODE ANN. § 76-10-3106 (LexisNexis 2020); W. VA. CODE § 47-18-17(a) (2020). Many states also have parens patriae statutes in nonantitrust contexts. *See, e.g.*, CONN. GEN. STAT. § 3-129c (2020) (authorizing Connecticut Attorney General to sue as parens patriae on behalf of state residents subjected to personal income tax by New York City); D.C. CODE § 28-3909(c)(5) (2020) (authorizing parens patriae suits for restitution and damages on behalf of consumers for violations of Washington, D.C. consumer protection laws); FLA. STAT. § 626.909(3) (2019) (authorizing parens patriae actions for damages on behalf of Florida victims of unauthorized insurance transactions); N.J. STAT. ANN. § 2A:53A-21(c) (West 2020) (authorizing parens patriae actions on behalf of New Jersey victims of bias crimes); P.R. LAWS ANN. tit. 32, § 3341 (2019) (authorizing parens patriae actions for damages on behalf of Puerto Rico consumers); 40 R.I. GEN. LAWS §40-8.2-6(a) (2020) (authorizing parens patriae actions for damages on behalf of Rhode Island victims of medical assistance fraud); WASH. REV. CODE §19.86.080 (2020) (authorizing parens patriae actions for restitution on behalf of Washington victims of consumer protection violations). Some federal statutes also authorize state AGs to enforce federal law through parens patriae actions. *See, e.g.*, 15 U.S.C. § 15c(a)(1) (2018) (authorizing suit for violations of federal antitrust law); *id.* § 1679h(c)(1) (authorizing suit for violations of federal law governing credit repair organizations); *id.* § 1681s(c) (credit reporting agencies); *id.* § 5712(a) (pay-per-call services); *id.* § 6103(a) (telemarketers); *id.* § 6309(c) (professional boxing matches); *id.* § 7804(a)(1) (sports agents); *id.* § 6504(a)(1) (children's online privacy protection); *id.* § 7706(f)(1) (email spam).

tion actions.[77] Parens patriae actions are most commonly settled and settlements may include a combination of injunctive relief, civil penalties, and public compensation.[78]

While AGs have the authority to bring parens patriae actions alone, they are increasingly bringing parens patriae actions together to form multistate actions.[79] AGs' multistate actions have made headlines as they pursued large corporations and obtained record settlements. The increasing trend of high-profile multistate actions has propelled AGs into the spotlight as national policymakers and enforcers.[80]

3. Multistate Actions

Multistate actions have been a game changer for AGs seeking to hold corporations accountable. By combining forces, AGs have been able to bring enforcement actions against large industries and obtain record-breaking settlements. AGs have brought multistate mass products liability lawsuits against manufacturers of tobacco, lead paint, automobiles, and guns.[81] During and after the financial crisis of 2008, there was a series of multistate actions against Wall Street banks,[82] rating agencies,[83] and mortgage servicers.[84]

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77 Restitution is most common in the context of consumer protection parens patriae actions. *See, e.g.*, 815 ILL. COMP. STAT. 505/7 (2020); N.J. STAT. ANN. § 49:3-69 (West 2020); *see also* ARIZ. REV. STAT. ANN. §§ 44-1521 to 1534 (2020) (allowing AG to seek a court order to "[r]estore to any person in interest any monies or property" acquired in violation of the statute and allowing AG to enter into an AOD to provide for "restitution to aggrieved persons"); 815 ILL. COMP. STAT. 505/7 (2020) (noting an AG may seek a court order for restitution for violation of Consumer Fraud and Deceptive Business Practices Act); IOWA CODE § 714.16 (2020) (allowing AG to seek a court order for restitution and providing that "[a] claim for reimbursement may be proved by . . . evidence that would be appropriate in a class action"); N.Y. EXEC. LAW § 63(12) (McKinney 2019) (AG may seek an order "directing restitution and damages"); OHIO REV. CODE ANN. § 1345.07 (LexisNexis 2020) ("On motion of the attorney general . . . the court may make appropriate orders . . . to reimburse consumers found to have been damaged. . . .").

78 *See* Cox, *supra* note 14, at 2350, 2355; Lemos, *Aggregate Litigation*, *supra* note 9, at 527.

79 *See* Nolette, *supra* note 21.

80 *See* NOLETTE, *supra* note 1, at 18; Dishman, *supra* note 46 (manuscript at 8).

81 *See* Brunet, *supra* note 4, at 1921; Gifford, *supra* note 19, at 914.

82 *See* Totten, *supra* note 16, at 1646–49 (discussing multistate actions during and in the wake of the Great Recession).

83 *See, e.g.*, Press Release, Cal. Off. of the Att'y Gen., California Attorney General's Office Announces $150 Million Settlement with Financial Services Company Moody's for Inflating Mortgage-Backed Securities Ratings (Jan. 13, 2017), https://oag.ca.gov/news/press-releases/california-attorney-generals-office-announces-150-million-settlement-financial; Press Release, Conn. Off. of the Att'y Gen., Attorney General Jepsen Leads Multistate Coalition in $1.375 Billion State-Federal Settlement with Standard & Poor's (Feb. 3, 2015) [hereinafter Connecticut S&P Press Release], https://portal.ct.gov/AG/Press-Releases-Archived/2015-Press-Releases/Attorney-General-Jepsen-Leads-Multistate-Coalition-in-1375-Billion-StateFederal-Settlement-with-Stan;.

84 Dishman, *supra* note 35, at 448; *see* DOJ National Mortgage Settlement Press Release, *supra* note 20.

High-profile data breaches have also been the subject of multistate actions and settlements with Equifax,[85] Uber,[86] Neiman Marcus,[87] Nationwide Insurance,[88] and Target.[89] The opioid epidemic has also sparked a multistate investigation of the pharmaceutical industry.[90]

Multistate settlements are some of the largest settlements in American history. The Master Settlement Agreement between forty-six states and several tobacco companies settled for over $200 billion and was the largest settlement in American history.[91] The National Mortgage Settlement, between forty-nine states and five mortgage servicers, settled for $25 billion.[92] Other multibillion dollar settlements include settlements with Bank of America, JPMorgan, and others for their role in securitizing Residential Mortgage-Backed Securities (RMBS) as part of a multistate and federal coordinated

85 *See* Press Release, Fed. Trade Comm'n, Equifax to Pay $575 Million as Part of Settlement with FTC, CFPB, and States Related to 2017 Data Breach (July 22, 2019), https://www.ftc.gov/news-events/press-releases/2019/07/equifax-pay-575-million-part-settlement-ftc-cfpb-states-related.

86 *See* Press Release, N.Y. State Off. of the Att'y Gen., A.G. Underwood Announces Record $148 Million Settlement with Uber over 2016 Data Breach (Sept. 26, 2018) [hereinafter New York Uber Press Release], https://ag.ny.gov/press-release/2018/ag-underwood-announces-record-148-million-settlement-uber-over-2016-data-breach.

87 *See* Press Release, Mass. Off. of the Att'y Gen., AG Healey Joins $1.5 Million Multistate Settlement with Neiman Marcus over 2013 Data Breach (Jan. 8, 2019), https://www.mass.gov/news/ag-healey-joins-15-million-multistate-settlement-with-neiman-marcus-over-2013-data-breach.

88 *See* Press Release, N.Y. Off. of the Att'y Gen., A.G. Schneiderman Announces $5.5 Million Multi-State Settlement with Nationwide Mutual Insurance Company over 2012 Data Breach (Aug. 9, 2017), https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-55-million-multi-state-settlement-nationwide-mutual; Kevin McCoy, *Nationwide Mutual Insurance Agrees to $5.5M Settlement over Data Breach*, USA TODAY (Aug. 9, 2017), https://www.usatoday.com/story/money/2017/08/09/nationwide-mutual-insurance-agrees-5-5-m-settlement-over-data-breach/552687001/.

89 *See* Press Release, N.Y. Off. of the Att'y Gen., A.G. Schneiderman Announces $18.5 Million Multi-State Settlement with Target Corporation over 2013 Data Breach (May 23, 2017) [hereinafter New York Target Press Release], https://ag.ny.gov/press-release/2017/ag-schneiderman-announces-185-million-multi-state-settlement-target-corporation; Press Release, Cal. Off. of the Att'y Gen., Attorney General Becerra: Target Settles Record $18.5 Million Credit Card Data Breach Case (May 23, 2017) [hereinafter California Target Press Release], https://oag.ca.gov/news/press-releases/attorney-general-becerra-target-settles-record-185-million-credit-card-data; Rachel Abrams, *Target to Pay $18.5 Million to 47 States in Security Breach Settlement*, N.Y. TIMES (May 23, 2017), https://www.nytimes.com/2017/05/23/business/target-security-breach-settlement.html.

90 *See* Nadia Kounang, *41 State Attorneys General Subpoena Opioid Manufacturers*, CNN (Sept. 20, 2017), https://www.cnn.com/2017/09/19/health/state-ag-investigation-opioids-subpoenas/index.html; *see also* Nolette & Provost, *supra* note 2, at 483–88.

91 *See supra* note 20 and accompanying text.

92 *See* DOJ National Mortgage Settlement Press Release, *supra* note 20.

working group,[93] and with Standard & Poor's for its ratings of toxic investments during the financial crisis.[94]

Multistate settlements not only command high-dollar settlements, but also instigate sweeping corporate reforms. For example, the National Mortgage Settlement changed the way mortgages are serviced and foreclosed.[95] The Master Settlement Agreement changed how tobacco companies could advertise.[96] Multistate settlements have implemented these reforms, even in the face of historic opposition to the same type of regulations in state legislatures and Congress.[97] This regulatory ability puts tremendous power in the hands of AGs and has led some scholars to raise concerns about AGs regulating nationwide through settlements.[98]

The claims asserted on behalf of state residents in multistate actions are generally factually similar, arising from the same series of underlying events, and are asserted against the same defendant or group of defendants. They also rely on similar theories, even though they are based on different states' laws. For example, the National Mortgage Settlement combined the claims of state residents based on similar instances of mortgage servicing and foreclosure abuses leading up to and during the financial crisis.[99] Similarly, the Target multistate settlement included similar claims of consumers whose credit card information was hacked from Target's information systems.[100]

Multistate actions often involve many states, sometimes with almost every state in the country participating in the action.[101] For example, the National Mortgage Settlement had forty-nine participating states,[102] the Target multis-

93 *See* Press Release, U.S. Dep't of Just., Bank of America to Pay $16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading up to and During the Financial Crisis (Aug. 21, 2014), https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading; Press Release, U.S. Dep't of Just., Justice Department, Federal and State Partners Secure Record $13 Billion Global Settlement with JPMorgan for Misleading Investors About Securities Containing Toxic Mortgages (Nov. 19, 2013), https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-13-billion-global-settlement.

94 *See* Connecticut S&P Press Release, *supra* note 83.

95 *See* Consent Judgment at A-1 to A-42, United States v. Bank of Am. Corp., No.12-cv-00361 (filed in D.D.C. Apr. 4, 2012); DOJ National Mortgage Settlement Press Release, *supra* note 20.

96 *See* Master Settlement Agreement at 18–28 (Nov. 1998), http://www.naag.org/assets/redesign/files/msa-tobacco/MSA.pdf; *see also* Gifford, *supra* note 19, at 914.

97 *See* Gifford, *supra* note 19, at 914.

98 *See* NOLETTE, *supra* note 1, at 23; Gifford, *supra* note 19, at 915 (quoting Robert B. Reich, *Don't Democrats Believe in Democracy?*, WALL ST. J. (Jan. 12, 2000), https://www.wsj.com/articles/SB947635315729229622); Turk, *supra* note 21, at 259; Dishman, *supra* note 46 (manuscript at 4).

99 *See* DOJ National Mortgage Settlement Press Release, *supra* note 20.

100 *See* sources cited *supra* note 89.

101 The number of states participating in multistate actions is increasing. *See* NOLETTE, *supra* note 1, at 21–22.

102 *See* DOJ National Mortgage Settlement Press Release, *supra* note 20. Similar actions against mortgage servicers had wide participation among the states. For example, settle-

tate settlement had forty-seven participating states,[103] the Western Union multistate settlement had fifty participating states,[104] and the Master Settlement Agreement had forty-six states.[105] Since each AG represents a large number of state residents, the interests of many states and people are represented in multistate actions.

While many states may participate in multistate actions, generally only a few states lead them.[106] For example, the Target multistate action was led by Illinois and Connecticut.[107] AGs may also form an executive committee to lead a multistate action. For example, the National Mortgage Settlement was led by an executive committee of AGs.[108] The same states tend to take a leadership role in multistate litigation.[109] For example, the New York AG

ments with PHH, SunTrust, HBSC, and Ocwen all had forty-nine states participating in the settlements. *See* Press Release, N.Y. Off. of the Att'y Gen., A.G. Schneiderman Announces $45 Million Multi-State Settlement with PHH Mortgage Corporation (Jan. 3, 2018), https://ag.ny.gov/press-release/ag-schneiderman-announces-45-million-multi-state-settlement-phh-mortgage-corporation; Press Release, Consumer Fin. Prot. Bureau, CFPB, State Authorities Order Ocwen to Provide $2 Billion in Relief to Homeowners for Servicing Wrongs (Dec. 19, 2013), https://www.consumerfinance.gov/about-us/newsroom/cfpb-state-authorities-order-ocwen-to-provide-2-billion-in-relief-to-homeowners-for-servicing-wrongs/; Press Release, U.S. Dep't of Just., Federal Government and State Attorneys General Reach Nearly $1 Billion Agreement with SunTrust to Address Mortgage Loan Origination as Well as Servicing and Foreclosure Abuses (June 17, 2014), https://www.justice.gov/opa/pr/federal-government-and-state-attorneys-general-reach-nearly-1-billion-agreement-suntrust; Press Release, Mass. Dep't of Just., $470 Million State-Federal Settlement Reached with HSBC over Unlawful Foreclosures, Loan Servicing (Feb. 5, 2016), https://www.mass.gov/news/470-million-state-federal-settlement-reached-with-hsbc-over-unlawful-foreclosures-loan.

103 *See* New York Target Press Release, *supra* note 89.

104 Press Release, N.Y. Off. of the Att'y Gen., A.G. Schneiderman Announces Settlement with Western Union to Develop Stronger Anti-Fraud Programs (Jan. 31, 2017), https://ag.ny.gov/press-release/ag-schneiderman-announces-settlement-western-union-develop-stronger-anti-fraud.

105 *See* Ieyoub & Eisenberg, *supra* note 19, at 1859.

106 *See* NOLETTE, *supra* note 1, at 26; Bowman, *supra* note 1, at 540–41 ("A core group of eleven states, many of them large states, appears to have played leadership roles, given their high level of involvement."); Prentiss Cox, Amy Widman & Mark Totten, *Strategies of Public UDAP Enforcement*, 55 HARV. J. ON LEGIS. 37, 95–97 (2018) (describing a "[h]eavies" group of states that lead multistate actions); Dishman, *supra* note 35, at 451–52; Provost, *supra* note 16, at 3.

107 *See* 2016-2017 CONN. ATT'Y GEN. ANN. REP. 22–23 [hereinafter CONN. ANN. REP.]; Press Release, Ill. Off. of the Att'y Gen., Attorney General Madigan Announces $18.5 Million Settlement with Target over Data Breach (May 23, 2017) [hereinafter Illinois Target Press Release], http://www.illinoisattorneygeneral.gov/pressroom/2017_05/20170523b.html.

108 For example, the states that served on the National Mortgage Settlement Executive Committee were Iowa, Arizona, California, Colorado, Connecticut, Delaware, Florida, Illinois, Massachusetts, North Carolina, Ohio, Tennessee, Texas, and Washington. *See* Consent Judgment at B-5, *supra* note 95.

109 *See* NOLETTE, *supra* note 1, at 26–28 ("Many states participate in multistate litigation, but only a few states typically take a leading role in these efforts.").

leads multistate actions more often than any other AG, and nearly twice as often as the next most active AG in leading multistate actions.[110]

Multistate actions often begin with one AG or a small group of AGs doing much of the early investigative work.[111] "[T]he states initiating the action will often propose a multistate working group and offer to chair or co-chair the group."[112] These leading AGs play an important coordinating role, performing litigation tasks such as organizing document reviews.[113] That same small group of AGs files the first lawsuits and then negotiates the settlement through executive or negotiating committees.[114] "Typically, the lead[ing AGs] will send out settlement information to the other [AGs]" who are "not currently part of the [action], to determine [whether they want] to join a proposed settlement."[115] Leading AGs who negotiate settlements "play the most important role in bringing a case to its conclusion."[116]

While a few AGs consistently lead multistate actions, other AGs who participate contribute significantly fewer resources to the action.[117] Once a lawsuit is initially filed after investigation, some AGs may "file lawsuits in their own states" and "help with the remainder of the work to be done."[118] Some AGs contribute "nothing more than a signature" on the settlement agreement that the leading AGs have already negotiated.[119] These AGs essentially free-ride on the enforcement resources and efforts of leading AGs.[120] In essence, multistate litigation is organized as a pyramid with a few leading AGs at the top and other AGs making smaller contributions on the lower levels of the pyramid.

By bringing an action together, states can more efficiently leverage state enforcement resources.[121] Using their combined efforts and resources, AGs

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110 *See id.* at 27.

111 *See* Provost, *supra* note 16, at 3.

112 NOLETTE, *supra* note 1, at 26. The National Association of Attorneys General (NAAG) facilitates interactions among AGs, and coordinates federal-state working group and multistate actions, in particular multistate antitrust actions. *See What Is the National Association of Attorneys General (NAAG)?*, NAT'L ASS'N ATT'YS GEN., https://www.naag.org/naag/about_naag/faq/what_is_the_national_association_of_attorneys_general_naag.php (last visited Sept. 19, 2020).

113 NOLETTE, *supra* note 1, at 26.

114 *Id.*

115 *Id.*

116 *Id.*; *see also* Cox et al., *supra* note 106, at 84 (explaining that enforcers who serve on executive or monitoring committees are "always the leaders who move [the case] forward and bring it to a close").

117 *See* Cox et al., *supra* note 106, at 84; Dishman, *supra* note 35, at 42582.

118 Provost, *supra* note 16, at 3.

119 Cox et al., *supra* note 106, at 84 ("Participants may lend nothing more than a signature to a settlement agreement . . . .").

120 *See* Dishman, *supra* note 35, at 425.

121 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 523 (noting "[a]ttorneys general have limited budgets and small staffs" but "can achieve some economies of scale by banding together in multistate actions"); Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5, 9 (2004) (noting attor-

may be able to demand greater compensation for their combined state residents and collectively hold corporations accountable. The attributes and goals of AG actions closely resemble class action lawsuits.

B. Private Class Actions

Private class actions allow claims to be aggregated in order to compensate injuries and deter misconduct more efficiently.[122] Class actions allow for economies of scale by combining many small claims into a single action that would otherwise be too costly to pursue individually. They provide redress for situations that incur widespread injuries but generate only small-scale damages.[123] Class actions are privately funded by entrepreneurial attorneys who self-finance the litigation and are only paid upon achieving a recovery for the class.[124] These private counsel have been referred to as "private Attorney Generals" because of their role in "vindicat[ing] the public interest" by bringing class action lawsuits.[125] However, in many instances, the private attorney general has not lived up to its ideal and has fueled the agency cost critique of class actions.[126]

1. Attributes of Class Actions

Class actions are a distinct form of litigation that's attributes are shaped by procedural rules, such as the Federal Rules of Civil Procedure.[127] There

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neys general offices are "chronically underfunded"); Totten, *supra* note 16, at 1664 (noting absent collaboration, states could not have played a critical role in Great Recession enforcement).

122 *See* Brunet, *supra* note 4, at 1927 ("[T]he class action device provided potential for an efficient deterrent to wrongdoing. Corporate wrongdoers would no longer be safe if they only caused small injuries."); Wolfman & Morrison, *supra* note 4, at 441; *see also* Gilles & Friedman, *After Class*, *supra* note 7, at 626.

123 *See* Brunet, *supra* note 4, at 1926 (noting that "[b]y aggregating potential claims that might not have been economically filed, the class action created the possibility that valid legal and factual claims could be compensated"); Vairo, *supra* note 71, at 528.

124 *See* Brunet, *supra* note 4, at 1923. However, states use a public/private funding hybrid with AGs hiring private counsel to bring actions on behalf of the state based on contingency fees. *See* Margaret H. Lemos, *Privatizing Public Litigation*, 104 GEO. L.J. 515, 533 (2016).

125 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, 216 (1983) [hereinafter Coffee, *Private Attorney General*]; William B. Rubenstein, *On What a "Private Attorney General" Is—And Why it Matters*, 57 VAND. L. REV. 2129, 2134 (2004) (quoting Associated Indus. N.Y. v. Ickes, 134 F.2d 694, 704 (2d Cir. 1943)).

126 *See* Coffee, *Private Attorney General*, *supra* note 125, at 215–20.

127 *See* FED. R. CIV. P. 23. In most states, the state procedural rules largely mirror the Federal Rules of Civil Procedure. *See* Kelso L. Anderson, *Fifty-State Survey Provides Rudder on State Class Action Law*, AM. BAR ASS'N, https://www.americanbar.org/groups/litigation/publications/litigation-news/book-reviews/fifty-state-survey-provides-rudder-on-state-class-action-law/ (last visited Sept. 7, 2020) ("Knowledge of key U.S. Supreme Court precedents that impact state class action law is particularly useful in the 45 states where procedural laws mirror Rule 23.").

are several procedural requirements for a class action to be certified.[128] First, class actions are required to have "numerous" class members.[129] Second, there must be common questions of law or fact among the class.[130] Such questions of law or fact must "predominate over any questions affecting only individual members."[131] "Commonality" has been interpreted by the Supreme Court to require that class members must "have suffered the same injury," that "[t]heir claims must depend upon a common contention" that is "central to the validity of each one of the claims," and that resolution of the common contention must resolve a central issue "in one stroke."[132] This stricter version of the commonality requirement has increased the difficulty of class certification.[133] Third, class actions are required to have a class representative.[134] A class representative is a plaintiff who must have claims that are "typical" of the claims of the class.[135]

Class actions also have notice and opt-out procedures in place to protect class members. Class members must be notified of the action and given the opportunity to opt out.[136] Notice must be the "best notice that is practicable under the circumstances" which is generally individual notice.[137] Class members may choose to opt out of the class and instead pursue individual action. However, if class members do not opt out of the class, they will be bound by the ultimate resolution of the case and precluded from future action.[138]

Courts are responsible for protecting the class's interests at important junctions of the litigation including certification and settlement. Courts determine whether a class will be certified based on procedural requirements. As part of certification, the court must find that the class action is "superior" to other alternatives such as individual lawsuits.[139] Class counsel

128 *See* Fed. R. Civ. P. 23; Lemos, *Aggregate Litigation*, *supra* note 9, at 502–03.

129 Fed. R. Civ. P. 23(a)(1).

130 *See* Fed R. Civ. P. 23(a)(2).

131 Fed. R. Civ. P. 23(b)(3).

132 Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–50, 350 n.5 (2011) (quoting Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 (1982)).

133 *See* Maureen Carroll, *Class Action Myopia*, 65 Duke L.J. 843, 886 (2016).

134 *See* Fed. R. Civ. P. 23(a)(4) (noting that the class representative is charged with "fairly and adequately protect[ing] the interests of the class").

135 Fed. R. Civ. P. 23(a)(3) (class representative's claims must be "typical" of the claims of the class).

136 Fed. R. Civ. P. 23(c)(2)(B).

137 Fed. R. Civ. P. 23(c)(2)(B). In a private damages class action, notice is required to be the "best notice that is practicable under the circumstances" which is generally individual notice "to all members who can be identified through reasonable effort." *Id.* This is in contrast to the notice required in Rule 23(b)(1) and (b)(2) classes, which only requires "appropriate notice" to be given to the class. Fed. R. Civ. P. 23(c)(2)(A).

138 *See* Fed. R. Civ. P. 23(c)(2)(B)(vii). Courts may require that class members have another opportunity to opt out once they know the proposed terms of the settlement. Fed. R. Civ. P. 23(e)(4).

139 Fed. R. Civ. P. 23(b)(3) (requiring a finding that the "class action is superior to other available methods for fairly and efficiently adjudicating the controversy").

must be appointed by the court.[140] The court is required to consider several factors in appointing class counsel including counsel's experience, knowledge of applicable law, and the resources counsel can commit to representing the class.[141] Courts are also required to approve class action settlements but "only after a hearing and on finding that it is fair, reasonable, and adequate."[142] As part of the court's review of the settlement, the court will determine whether the attorneys' fees are reasonable.[143]

Class counsel plays a central role in class actions. Class counsel represents the interests of the entire class, not solely the interests of the class representative or a certain subset of the class.[144] Lead counsel has an "obligation to act fairly, efficiently, and economically in the interests of all parties and parties' counsel."[145] Class counsel "act[s] for the [class] either personally or by coordinating the efforts of others . . . in presenting written and oral arguments" to the court, developing a litigation plan, conducting discovery, and negotiating a settlement.[146]

There may be many lawyers at the outset of the litigation vying for the role of lead counsel. Intense competition often occurs among lawyers to be appointed class counsel, since it is "an appointment that may implicitly promise large fees and a prominent role in the litigation."[147] Lawyers may also collaborate among themselves and make proposals to the court for the appointment of lead counsel.[148] Committees of counsel, such as executive committees, may also be formed when class "members' interests and positions are sufficiently dissimilar to justify giving them representation in decision making."[149]

Large class actions have developed into highly evolved structures with the participation of many attorneys.[150] "The dominant class action model is a pyramid-shaped structure comprised of numerous small law firms."[151] There may be multiple lead counsel at the top of the pyramid.[152] Other

140 FED. R. CIV. P. 23(g)(1).

141 FED. R. CIV. P. 23(g)(1)(A).

142 FED. R. CIV. P. 23(e)(2). Classes may also be certified at the same time that they are settled. *See* FED. R. CIV. P. 23(e) advisory committee's note to 2003 amendment. In these settlement classes, certifying the class and approving the settlement occur at the same time, so class members generally receive one notice of both the certification and the proposed terms of the settlement. *Id.*

143 *See* FED. R. CIV. P. 23(h).

144 *See* FED. R. CIV. P. 23(g)(4).

145 MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.22 (2004).

146 *Id.* § 10.221.

147 *Id.* § 10.224.

148 *See id.* § 22.62; Coffee, *Private Attorney General*, *supra* note 125, at 249–50.

149 MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

150 *See* Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 147–49 (2006) [hereinafter Gilles & Friedman, *Class Action Myth*] ("The class action bar is a highly evolved organism.").

151 *Id.* at 148.

152 *See id.*; *see also* MANUAL FOR COMPLEX LITIGATION (FOURTH) § 10.221.

lawyers in the pyramid have less significant responsibilities, with attorneys on the lowest strata of the pyramid doing the "yeoman's work" of the litigation such as document review.[153] This structure enables an "ad hoc consortia of entrepreneurial lawyers to tackle massive litigation projects."[154] Lawyers in class actions typically have fee agreements among participating lawyers on how the fees and expenses will be shared among the lawyers working on a class action.[155]

Large class actions may also have multiple subclasses, with each subclass being represented by its own attorney.[156] Class action settlements may thus be subject to bargaining among many attorneys, whether it is bargaining for a greater compensation for a subclass or attorneys bargaining for a greater share of the attorneys' fees.[157]

The class action is a unique form of aggregate litigation that allows for compensation and deterrence to be achieved more economically. However, it also alters the relationship between the attorney and client in a class action. The relationship of class counsel to the class has led to a powerful agency cost critique of class actions.

2. Agency Cost Critique of Class Actions

Private class actions have receded under recent judicial and legislative pressure.[158] The Supreme Court has increasingly interpreted the procedural requirements in class actions to make them more difficult to bring.[159] This

153 Gilles & Friedman, *Class Action Myth*, *supra* note 150, at 149.

154 *Id.* at 148.

155 *Id.* at 139–51.

156 *See* FED. R. CIV. P. 23(c)(5), 23(g)(1); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 627 (1997) (quoting *In re* Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 743 (2d Cir. 1992), *modified on reh'g* 993 F.2d 7 (1993)) (requiring subclassing for greater class cohesion under the commonality certification requirements); Coffee, *Class Action Accountability*, *supra* note 7, at 374.

157 Coffee, *Class Action Accountability*, *supra* note 7, at 397–98.

158 *See* Class Action Fairness Act of 2005, Pub. L. No. 109-2, § 5(b), 119 Stat. 4, 12 (codified at 28 U.S.C. § 1453(b)) (allowing the removal of most significant class filings to federal court); Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. CHI. LEGAL F. 403, 403–04 ("The class action concept is under assault. Critics seem to have won the day. . . . In this climate, it is difficult to find a positive spin on either Rule 23 or the class action mechanism itself."); Brunet, *supra* note 4, at 1920 (stating "[t]hese are not happy times for the class action mechanism" because Supreme Court cases have "cast a pall over the device"); Cox, *supra* note 14, at 2314–17 (noting that class actions are receding under judicial and legislative pressure); Gilles & Friedman, *After Class*, *supra* note 7, at 658 (stating that "[c]lass actions are on the ropes"); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. 729, 745, 823 (2013) (surveying many ways courts and legislatures have weakened the private class action).

159 For example, the Supreme Court has tightened the requirements for class certification. *See* Comcast Corp. v. Behrend, 569 U.S. 27, 34 (2013) (heightening the predominance requirement for certification); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 349–352 (2011) (heightening the requirement of commonality in class action certification inquiry under Rule 23(a)(2)). The Court has also upheld the enforceability of arbitration clauses

movement has been fueled in part by the long-recognized agency problems that arise in class actions that "prevent [their] efficiency and beg for serious reform."[160]

The dominant critique of class actions emerged from Professor John Coffee who observed that "[h]igh agency costs" inherent in class action litigation "permit opportunistic behavior by attorneys" and "as a result, it is more accurate as a descriptive matter to view the attorney as an independent entrepreneur than as an agent of the client."[161] Attorneys and clients operate in a principal-agent relationship where attorneys act as the agents for their principal-clients.[162] Agency costs are "the costs a principal incurs to ensure his agent remains loyal and the costs incurred from agent disloyalty that is not worth preventing."[163] Agency costs exist in any attorney-client relationship, but they are particularly problematic in class actions where class members have little incentive or ability to monitor class counsel.[164] Common agency costs that arise in class actions include conflicts of interest, lack of monitoring, and asymmetry of resources.[165]

First, conflicts of interest between the class and the class counsel increase the agency costs in class actions. There is an inherent conflict between the class who has an interest in maximizing recoveries and class counsel who has an interest in maximizing fees.[166] This conflict exists in all attorney-client relationships, but traditional clients have greater ability and incentives to monitor their attorneys and that reduces this source of agency costs.[167] But in class actions, this conflict of interest often manifests itself in early, inadequate settlements or "sweetheart settlements" that are structured to provide large fees to counsel and paltry compensation to class members.[168]

Different compensation models attempt to align the interests of the class with class counsel and reduce agency costs, but in practice they create incen-

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containing class action waivers in standard form contracts. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231–38 (2013); AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 344 (2011); *see also* Gilles & Friedman, *After Class*, *supra* note 7, at 639–60 (discussing the impacts of *AT&T Mobility LLC v. Concepcion* on the future of class actions); Vairo, *supra* note 71, at 479 ("It is no secret that the United States Supreme Court has made obtaining class certification and group dispute resolution more difficult.").

160 Brunet, *supra* note 4, at 1929; *see* Coffee, *Class Action Accountability*, *supra* note 7, at 379; Gilles & Friedman, *After Class*, *supra* note 7, at 626–27.

161 Coffee, *Rethinking the Class Action*, *supra* note 6, at 628.

162 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 518.

163 Beach, *supra* note 39, at 466. Professor Coffee provides a more nuanced explanation but centers on the same concepts. *See* Coffee, *Entrepreneurial Litigation*, *supra* note 5, at 883 (discussing that agency costs "consist of (1) the costs of monitoring the agent, (2) the costs the agent incurs to advertise or guarantee his fidelity ('bonding' costs), and (3) the residual costs of opportunistic behavior that it is not cost-efficient to prevent").

164 *See* Beach, *supra* note 39, at 468–69.

165 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 512–30.

166 *See id.* at 512.

167 *See* Beach, *supra* note 39, at 468.

168 *Id.* at 473.

tives that exacerbate the potential for conflicts of interest.[169] In class actions, counsel typically plays two conflicting roles as both financier of the litigation and agent of the class.[170] Regardless of the compensation model, counsel pays the upfront costs of litigation and only is compensated once the plaintiff recovers. Financing litigation is a powerful incentive for attorneys to settle, and settle early, in order to recover their fees instead of expending additional resources to litigate to trial and risk not recovering any fees at all.[171]

The traditional compensation model for class actions is a percentage of the recovery payment formula. It operates like a contingency fee, providing counsel a percentage of the class's recovery.[172] The attorney's fee in this model is usually fifteen to thirty percent of the overall class recovery.[173] This model theoretically aligns the interests of the attorney and class since the attorney earns a greater fee if the class gets a higher recovery. But, in practice, conflicts of interest arise when attorneys' fees are a percentage of the recovery, which creates incentives for counsel to agree to early, inadequate settlements.

For example, attorneys may be better off accepting a smaller fee if it does not require the lawyer to expend time and resources litigating, even if a higher recovery is in the client's best interest.[174] With potentially one-third of the recovery on the line, class counsel has a much larger stake in the outcome of the litigation than any individual class member.[175] As a result, the attorney may be more risk averse than class members and willing to agree to an early settlement on the rationale that a "juicy bird in the hand is worth more than the vision of a much larger one in the bush."[176] Counsel is incentivized to couple a high caseload with little investment in each case to spread the risk over multiple cases. This strategy is efficient because a high volume of cases may give the attorney "a greater certainty of the same economic reward through multiple small settlements than does an equivalent investment of time in a single action of greater merit."[177]

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169 *See* Beach, *supra* note 39, at 487–92 (discussing how compensation models create conflicts of interest that increase agency costs); Coffee, *Private Attorney General*, *supra* note 125, at 247 (discussing how the lodestar compensation formula creates incentives for collusive and inadequate settlements).

170 *See* Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. Rev. 1273, 1275 (2012).

171 *See id.* at 1275–76.

172 *See* Beach, *supra* note 39, at 487–88.

173 John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 Colum. L. Rev. 288, 292 (2010).

174 *See* Macey & Miller, *supra* note 5, at 44 (noting, for example, "where the attorney earns a percentage of the judgment, the attorney has an incentive to settle early at a relatively low figure in order to maximize her profit").

175 *See* Coffee, *Private Attorney General*, *supra* note 125, at 230–31 (describing the class attorney as the real party of interest in a class action lawsuit rather than class members).

176 Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964), *aff'd on reh'g en banc by an equally divided court*, 340 F.2d 311, 312 (2d Cir. 1965); *see* Coffee, *Private Attorney General*, *supra* note 125, at 230 n.34.

177 Coffee, *Private Attorney General*, *supra* note 125, at 231.

Conflicts of interest also arise where counsel agrees to a "sweetheart settlement" that sells out the interests of class members for high attorneys' fees in a settlement.[178] There is potential for collusion between class counsel and defendants to negotiate for little-to-no compensation for class members but pay high attorneys' fees in the settlement.[179] These settlements include highly criticized "coupon settlements" where class members are given "coupons" for products or services, while counsel is compensated with large attorneys' fees.[180]

Class members are poorly situated to monitor class counsel to reduce agency costs that result in adequate settlements. First, individual class members have little incentive to monitor class counsel. The stake in the litigation for each individual class member is so low that it is not in the economic interest of class members to actively monitor counsel.[181] Second, there is a collective action problem for the class to monitor counsel. There can be thousands of class members, and the coordination costs of getting so many class members to act in concert to monitor counsel is a tremendous hurdle for class members.[182] Third, class members are not procedurally empowered to effectively monitor counsel. Class counsel represents the entire class and not individual class members, so individual class members cannot direct the actions of class counsel.[183] Even the class representative is limited in this respect, and neither class members nor the class representative can fire class counsel.[184] Inability of the class to monitor counsel increases agency costs and the potential for inadequate settlements.

Asymmetrical stakes in class action litigation between class members and corporate defendants also increases the potential for inadequate settlements. Corporate defendants stand to lose more than any individual class member or even class counsel has to gain.[185] This asymmetry exists because the potential loss for the defendant represents the sum of all the class members' claims and class counsel's fee.[186] Corporate defendants also pay their own counsel's fees and have high discovery costs. In addition, corporations face potential reputational damage from class actions.[187] As a result, class action defendants typically are "willing to litigate more vigorously, expend more resources, pursue more collateral matters, and in general to seek to exploit this differential in their relative willingness to invest in the action."[188]

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178 *See* Coffee, *Rethinking the Class Action*, *supra* note 6, at 633.

179 *See* Coffee, *Private Attorney General*, *supra* note 125, at 243–44.

180 *See* Koniak, *supra* note 6, at 1151–52; Koniak & Cohen, *supra* note 6, at 1053–54.

181 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 519.

182 *See* Beach, *supra* note 39, at 469.

183 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 519.

184 *See* Coffee, *Class Action Accountability*, *supra* note 7, at 417–18 (stating class counsel cannot be fired by class members (or even the class representative)).

185 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 522.

186 *Id.*; *see also* Coffee, *Private Attorney General*, *supra* note 125, at 232–33, 247.

187 *See* Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. Pa. L. Rev. 2173, 2221–22 (2010).

188 Coffee, *Rethinking the Class Action*, *supra* note 6, at 636.

"The best [strategy] for class counsel, unwilling or unable to keep pace with the defendant's [expenditures], is . . . to settle the case" early.[189] The interests of defendants and class counsel align with an early settlement.[190] Defendants can limit their liability early where more extensive discovery and litigation may reveal a greater extent of the class's injuries. Early settlement also saves the defendant litigation costs and cabins potential reputational damage. Class counsel can also benefit from an early settlement since they are financing the litigation and can save time and resources by settling early. These early settlements may come at the cost of a higher recovery for class members who could benefit from more extensive discovery and litigation.

Agency problems also arise in the interactions among multiple lawyers interacting with one another in representing the class to the detriment of class members. There are no practical means that a large class can use to select or fire the class counsel. "[M]ultiple attorneys volunteer to serve as counsel to the class by filing separate parallel actions. These actions are then consolidated by the courts, and in the complex bargaining process that necessarily follows to choose the lead counsel," the fees are divided among multiple counsel and thus diluted.[191] Common pool agency problems may arise when multiple plaintiffs' attorneys vie for position in the class action pyramid.[192] When there are attorneys competing for fees in a class action, some attorneys may "'free ride' off the efforts" of other attorneys "because they perceive little incentive to overinvest their time into this common pool" when the amount of fees they will recover is unclear.[193] However, if no one is incentivized to invest in investigating and litigating the action, attorneys are more inclined to settle early, leading to inadequate settlements for class members.[194]

Agency costs have been considered in private class actions; however, the literature is beginning to consider how the agency cost critique applies to AG actions. The next Part discusses how multistate actions resemble class actions on two distinct levels, such that they can be characterized as class action squared.

II. Multistate Action as Class Action Squared

Scholars are just beginning to explore the similarities between AG actions and private class actions; however, these conversations have not considered their similarities in light of the recent increase in multistate actions. Multistate actions reveal that not only do private class actions closely resemble AG actions, but also that they have attributes of class actions on two distinct levels. On the first level, AGs aggregate claims on behalf of their states'

189 Lemos, *Aggregate Litigation*, *supra* note 9, at 522.
190 *See* Coffee, *Private Attorney General*, *supra* note 125, at 232–33.
191 *Id.* at 233.
192 *See* Brunet, *supra* note 4, at 1930; Coffee, *Private Attorney General*, at 232–33.
193 Brunet, *supra* note 4, at 1930 (citing Macey & Miller, *supra* note 5, at 8 n.5).
194 *See id.* at 1920–21.

residents like a private class action.[195] When AGs join together in multistate actions, a second layer of "class action" emerges. In this second "class action," states aggregate their collective claims along with the combined claims of their state residents with a few AGs leading the action. This means multistate actions are made up of two discrete layers, each resembling private class actions. In other words, multistate action is class action squared.

A. *The First Layer of "Class Action"*

The first layer of the multistate action that resembles a class action is the individual parens patriae action an AG brings on behalf of state residents. This first layer shares similar attributes and objectives with private class actions. Both types of actions aggregate claims and seek to compensate injuries and deter future wrongdoing. They are both a response to situations where misconduct perpetuates widely diffusive injuries but produces low-value individual claims.[196]

Both private class actions and parens patriae actions share similar attributes by aggregating numerous, similar claims into a single action. For example, class actions must meet procedural requirements of commonality and numerosity in order to be certified as a class.[197] The common-law parens patriae doctrine also requires "numerosity" in the sense that the AG's action must involve a "sufficiently substantial segment of [the state's] population."[198] And parens patriae actions also have a form of "commonality" since they generally arise from the same set of facts, share a similar legal theory, and are brought against the same defendant.[199]

Even though parens patriae and class actions have similar attributes, parens patriae actions lack the procedural protections provided in class actions.[200] For example, class members are provided individual notice of the action and the ability to opt out of the class.[201] Courts play a role in appointing class counsel and approving settlements they enter into on behalf of the class.[202] These protections allow class members to protect themselves by preserving their claims and provide judicial oversight to protect the class's interests. But such protections are noticeably absent in parens patriae

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195 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 488.

196 *See* Brunet, *supra* note 4, at 1922 ("The nature of these suits is to achieve broad compensation, to deter wrongful conduct by one or more defendants, and to focus on injuries to a large set of state citizens.").

197 *See* FED. R. CIV. P. 23(a).

198 Alfred L. Snapp & Son, Inc. v. Puerto Rico *ex rel.* Barez, 458 U.S. 592, 607 (1982).

199 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 502 ("And, while courts assessing claims of *parens patriae* authority do not make any explicit inquiry into commonality, the fact that the state must assert an injury to the members of the *parens patriae* group—the equivalent of a Rule 23 'class'—effectively ensures that there will be some legal or factual questions common to the group.").

200 *Id.* at 489.

201 FED. R. CIV. P. 23(c)(2)(B)(v).

202 FED. R. CIV. P. 23(e), (g).

actions where group members generally do not receive notice or the opportunity to opt out, and there is scant court supervision of settlements.[203]

The relationship between counsel and "class members" is also similar in class actions and parens patriae actions. Both class counsel and AGs are charged with representing the interests of a large group of people with whom they lack a traditional attorney-client relationship. In both types of action, counsel recruits their "clients" instead of the client hiring the attorney like in a traditional attorney-client relationship. Class counsel often directly recruits clients to be members of a class. Class counsel is ultimately appointed by a court and not directly chosen by class members. In parens patriae actions, AGs use their enforcement discretion to choose which cases to pursue, which in essence allows them to recruit their "clients" for any given action.[204] In both instances, the attorneys step into the role of the principal, making important decisions on behalf of their clients instead of carrying out specific client directives.

In both types of actions, the client has little ability to monitor or control his or her attorney during the course of the litigation. In class actions, class members do not hire and cannot fire class counsel.[205] The class is a large group of people who are geographically dispersed and have little meaningful contact with class counsel.[206] Similarly, the AG represents a large group of injured state residents who have little ability to monitor the AG's behavior in parens patriae actions. Democratic elections are not an effective means of monitoring for parens patriae group members. This is because parens patriae members are a discrete subset of the state electorate and alone are likely unable to "fire" the AG by electing someone else in the next election.[207] Further, by the time the next election cycle rolls around, the action will likely be settled, making it difficult to hold the AG accountable for a specific settlement.[208] Because the AG was elected to perform a host of functions and was elected based on a wide range of policy preferences, it is unlikely that an election is a means of monitoring behavior in a particular lawsuit.[209] Like class members, parens patriae members do not "hire" the AG like a traditional client, nor can they fire her at will. This lack of control increases the potential for agency costs.

Conflicts of interest are a type of agency cost that occur in both types of actions that yield inadequate settlements.[210] AGs face unique conflicts of

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203 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 504, 507–08.

204 *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 341 ("Class actions almost invariably come into being through the actions of lawyers—in effect, it is the agents who create the principals . . . ."); Lemos, *Aggregate Litigation*, *supra* note 9, at 488–89.

205 *See* Coffee, *Class Action Accountability*, *supra* note 7, at 418 (stating class counsel cannot be fired by class members (even the class representative)).

206 *See* Beach, *supra* note 39, at 469.

207 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 520–22.

208 *See id.* at 521.

209 *See infra* Section IV.A (discussing voter monitoring of AG enforcement actions).

210 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 511.

interest, even if they are purely motivated by the public good. Many conflicts of interest can arise for AGs by virtue of the fact that they represent the interests of many different "clients."[211] AGs represent the interests of the state, injured parens patriae group members, and the general public.[212] AGs must weigh those competing interests in negotiating a settlement.[213] For example, AGs must consider the interests of the state, general public, and parens patriae group members in determining the balance between injunctive relief, civil penalties, and public compensation.[214] It may be that the state would prefer higher civil penalties, the general public would prefer stricter injunctive relief, and parens patriae group members would prefer greater public compensation. These conflicts arise by virtue of AGs' unique role representing multiple "clients."[215]

AGs may also have political ambitions that potentially create conflicts of interest.[216] An AG may be tempted to favor a quick settlement that draws a splashy headline just in time for elections over lengthier litigation that would produce greater public compensation.[217] An AG may also be tempted to favor the interests of corporate campaign donors and lobbyists over the interest of injured state residents.[218] Favoring donors and lobbyists may increase campaign donations for future elections but doing so risks undercompensating injured state residents.[219] This conflict is similar to the conflict class counsel faces to "sell out" the interests of the class to pursue a higher fee award.[220]

The debate in the literature over the analogy between class actions and public compensation is fundamentally about the role of public and private enforcement. Some scholars argue that public enforcers seeking compensation are serving the same role or mimicking private enforcers, whose role traditionally has been to compensate private injuries.[221] To the extent that public enforcers are serving the same purpose as private enforcers, inadequate settlements are an important concern, especially if public settlements

211 *See* Marshall, *supra* note 29, at 2455–57.

212 *See* Lemos, *Aggregate Litigation, supra* note 9, at 511–16.

213 *See id.* at 513 (arguing conflicts of interests exist when AGs represent the state, injured parens patriae group members, and the general public interests).

214 *See* Cox, *supra* note 14, at 2352.

215 *See* Marshall, *supra* note 29, at 2462–63 ("[T]he [AG's] role is significantly more complex than that of a private attorney . . . . [D]ual representation of a state entity and the state or public interest is also not an ethical violation. . . .").

216 *See* Provost, *Aspiring Governor, supra* note 40, at 597.

217 *See* Elizabeth Chamblee Burch, *Constructing Issue Classes*, 101 VA. L. REV. 1855, 1870 (2015) ("[P]ublic officials might exchange a rapid settlement with splashy headlines for insubstantial contributions to victims.").

218 *See* Eric Lipton, *Lobbyists, Bearing Gifts, Pursue Attorneys General*, N.Y. TIMES, Oct. 29, 2014, at A1.

219 *Id.*; *see* Lemos, *Aggregate Litigation, supra* note 9, at 514–16.

220 *See* Lemos, *Aggregate Litigation, supra* note 9, at 515–16.

221 *See* Lemos & Minzner, *supra* note 37, 861–63; Zimmerman, *supra* note 68, at 554–55.

preclude subsequent private action.[222] Others, however, view public and private enforcement as distinct, with public enforcement serving the public good and private enforcement seeking compensation for private rights.[223] Inadequate compensation is less concerning under this approach because public enforcers can use their discretion to trade off among a variety of remedies in the public interest, especially if subsequent private action is not precluded.[224]

As AGs are increasingly stepping into the domain of private enforcers to compensate private injuries in parens patriae actions, there is reason for concern about inadequate settlements. Scholars have raised concerns about the preclusive effects of parens patriae actions on subsequent private action.[225] Some courts have found that parens patriae actions have preclusive effects depending on the type of law at issue[226] and the remedy being sought.[227] Certain states also have statutes that prohibit subsequent private action if state residents receive restitution in parens patriae actions.[228] There are also

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222 In fact, Professor Lemos argues that inadequate representation in parens patriae actions that result in preclusion rise to the level of constitutional Due Process violations. *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 510–11, 540.

223 *See* Cox, *supra* note 14, at 2315–16.

224 *See id.* at 2337, 2350.

225 Professor Lemos has argued that even though the case law is "surprisingly sparse, the prevailing view is that the judgment in a state case is binding 'on every person whom the state represents as *parens patriae*.'" Lemos, *Aggregate Litigation*, *supra* note 9, at 500 (quoting Farmer, *supra* note 10, at 384); *see also* Burch, *supra* note 217, at 1924 ("Precluding private suits in the wake of a *parens patriae* action can be particularly problematic since those suits have not been subjected to Rule 23's adequacy requirement and attorneys general may prioritize political agendas and quick resolution over private claimants' interests."); Davis, *supra* note 10, at 41 (stating that "substitute suits," such as state actions seeking public compensation, preclude later private claims and "may wrest control of private rights from an individual beneficiary without the procedures that protect a beneficiary's right to her day in court").

226 For example, in the antitrust context, parens patriae actions under certain federal antitrust statutes provide preclusive effects. Cox, *supra* note 14, at 2330. State courts have also found preclusive effects of state antitrust law. *See* Bonovich v. Convenient Food Mart, Inc., 310 N.E.2d 710, 711 (Ill. App. Ct. 1974) (holding unsuccessful parens patriae action by attorney general under state antitrust statute precluded private antitrust action against the same defendant since "the Attorney General's action . . . was brought on behalf of all the people in the state . . . who were adversely affected by the alleged antitrust violations"). That being said, antitrust parens patriae actions often have greater procedural requirements than other types of parens patriae actions. *See* Cox, *supra* note 14, at 2329–31.

227 Courts have also held that parens patriae actions have precluded subsequent claims for punitive damages. *See* Fabiano v. Philip Morris Inc., 54 A.D.3d 146, 150–53 (N.Y. App. Div. 2008); Brown & Williamson Tobacco Corp. v. Gault, 627 S.E.2d 549, 553–54 (Ga. 2006) ("The State's release of its punitive damages claim as parens patriae precludes plaintiffs from pursuing the same claim for punitive damages in this action.").

228 *See, e.g.*, HAW. REV. STAT. § 487-12 (2019) ("[T]he consumer's acceptance and full performance of restitution shall bar recovery of any other damages in any action on account of the same acts or practices by the consumer against the person or persons making restitution."); N.M. STAT. ANN. § 57-12-9 (2020) (stating that a person's "acceptance of restitution bars recovery of any damages in any action by him or on his behalf against the

instances where the effect of a parens patriae action may effectively preclude private causes of action and specifically class actions.[229] Inadequate settlements are particularly problematic if parens patriae actions preclude private action because state residents may be "stuck" with inadequate compensation without receiving the procedural protections that class members receive before being bound to a settlement.[230]

If, however, concerns about preclusion are overstated and private enforcement can be relied upon to compensate adequately, there is still reason to be troubled about agency problems that produce inadequate compensation in parens patriae actions. Even if state residents have the option to pursue private action because public compensation is inadequate, they may only realistically be left with the option of a class action. Class actions as a mechanism are being restricted by courts and Congress, which make them a difficult avenue to rely upon for compensation.[231] At the same time, they are also heavily critiqued for being subject to agency costs that produce inadequate compensation. Relying on private enforcement, and in particular class actions, is not a cure-all for inadequate compensation in parens patriae actions.

Furthermore, even if private rights are preserved, state residents may not exercise them based on a potentially mistaken belief that they have received all the compensation they deserve because a public settlement carries with it the imprimatur of government approval. It may be that state residents have greater faith in their AGs to negotiate a fair settlement, and they may not exercise their private rights based on that assumption.[232] Thus, the existence of public compensation in a settlement, even if it does not preclude private

same defendant on account of the same unlawful practice"). In contrast, other state statutes specifically preserve private rights. *See, e.g.*, TENN. CODE ANN. § 47-18-107 (2020) ("Assurance of voluntary compliance shall in no way affect individual rights of action which may exist independent of the recovery of money or property received pursuant to a stipulation in voluntary compliance . . . .").

229 For example, class actions may not be certified because a court may consider a parens patriae action to be "superior" to class actions. *See* FED. R. CIV. P. 23(b)(3); Cox, *supra* note 14, at 2369–74; Lemos, *Aggregate Litigation*, *supra* note 9, at 531. Another example is when AGs may negotiate settlements that require parens patriae members to waive their rights to private action as a condition of receiving compensation, which precludes subsequent private action. *See* Cox, *supra* note 14, at 2374–79.

230 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 489; Zimmerman, *supra* note 68, at 527.

231 *See* Burch, *supra* note 217, at 1856 ("Certifying fewer classes also seemingly correlates with increased public regulation through state attorneys' *parens patriae* power.").

232 Indeed, Professor Cox raises a similar concern in the context of required releases, namely that release comes with "the government enforcer's implicit encouragement to accept." Cox, *supra* note 14, at 2375. And that the public nature of the settlement makes it more credible that the relief is adequate compared to the consequence of released claims. *See id.*

action, may practically preclude or prevent state residents from exercising private rights.[233]

The debate over the analogy of public enforcement actions to class actions has important implications for AG actions seeking public compensation. The debate, however, has failed to consider the increasing trend of multistate actions. Multistate actions reveal a second layer that also resembles class actions.

B. The Second Layer of "Class Action"

A second layer of "class action" emerges when states pursue multistate action together. Multistate actions, like class actions, are an efficient means of aggregating the claims of many states together to hold large corporations accountable for misconduct. Individual AG offices have limited budgets and many enforcement priorities.[234] Enforcement actions against large corporations are expensive and time-consuming endeavors.[235] Large corporate targets often have deep pockets and are willing to expend significant resources to defend enforcement actions. This asymmetry of resources may make an action "uneconomical" for individual states. But multistate action levels the playing field by allowing states to pool their resources.[236] By facilitating actions where it would be uneconomical otherwise, multistate actions hold corporations accountable for misconduct that individual states could not on their own.[237]

This second layer resembles the characteristics of private class actions. First, like class actions, participating AGs aggregate the claims of their state residents together in multistate actions. These combined parens patriae group members resemble class members who do not direct or meaningfully

233 The public may trust public settlements more than private settlements because there is some evidence that "participation rates in public settlements can be substantially higher than in class action cases requiring filed claims." *Id.* Class actions often have participation of less than five percent, even in opt-out cases where the potential recipient's claims will be released regardless of participation in the class settlement. Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 751–54 (1988). In contrast, public compensation settlements often have much higher participation rates. *See, e.g.*, Thornton v. State Farm Mut. Auto Ins. Co., No. 1:06-cv-0018, 2006 WL 3359482, at *1 (N.D. Ohio Nov. 17, 2006) (approximately thirty-nine percent acceptance rate).

234 *See* Gilles & Friedman, *After Class*, *supra* note 7, at 668 (describing AG offices as "[c]hronically underfunded").

235 Jason Lynch, Note, *Federalism, Separation of Powers, and the Role of State Attorneys General in Multistate Litigation*, 101 COLUM. L. REV. 1998, 2005 (2001).

236 *Id.* at 2003–04.

237 *See* Thomas A. Schmeling, *Stag Hunting with the State AG: Anti-Tobacco Litigation and the Emergence of Cooperation Among State Attorneys General*, 25 LAW & POL'Y 429, 430 (2003) ("Acting together, the [state attorneys general] have won legal settlements or concessions from tobacco companies, auto manufacturers, toy makers, paint producers, and others, agreements that would have been quite unlikely if sought by individual [state attorneys general] acting alone.").

participate in the multistate action. Second, the combined parens patriae group members from many states are numerous, like the class members in a class action. Indeed, the combined parens patriae groups from many states have been described as "what may amount to a nationwide class of claimants."[238] The claims are also similar across state parens patriae groups because the claims generally arise from the same misconduct committed by the same corporation across state lines.[239]

As in private class actions, a small number of "entrepreneurial" AGs lead multistate actions.[240] Like class counsel, these leading AGs often recruit other states to participate in multistate actions to enlarge the "class."[241] They also play the most important role in directing multistate actions and negotiating the settlement just as class counsel do in the private class action context.[242] Leading AGs develop a pyramid structure to manage multistate actions to involve multiple lawyers and organize complex litigation similar to the organization of class actions.[243] Like class counsel, leading AGs in multistate actions sit on the top of the pyramid and direct an "ad hoc law firm" of other counsel who contribute to the action in varying degrees.[244] Just as there may be multiple lead counsels in a private class action, there are often multiple AGs leading the multistate action at the top of the pyramid.[245] Also similar to class actions, leading AGs may form an executive committee to lead litigation, or there may be a small number of AGs working together.[246]

In class actions, lead counsel directs other attorneys in performing various litigation tasks.[247] Class counsel plays an important role in setting the amount of compensation that the class will receive by virtue of counsel's role in negotiating a settlement. Class counsel also negotiates and determines the

238 Lemos, *Aggregate Litigation*, *supra* note 9, at 523.

239 Lynch, *supra* note 235, at 2008.

240 *See* NOLETTE, *supra* note 1, at 26; Bowman, *supra* note 1, at 541–42; Cox et al., *supra* note 106, at 52; Dishman, *supra* note 35, at 451–52 (citing NOLETTE, *supra* note 1, at 26); Provost, *supra* note 16, at 1, 7, 10, 12; Totten, *supra* note 16, at 1660–61 (describing leading AGs as entrepreneurial).

241 *See* NOLETTE, *supra* note 1, at 26; Coffee, *Private Attorney General*, *supra* note 125, at 220, 223 (stating private class lawyers recruit class members).

242 *See* Totten, *supra* note 16, at 1656–57.

243 *See* Gilles & Friedman, *Class Action Myth*, *supra* note 150, at 147–50.

244 *See id.*; Lynch, *supra* note 235, at 2004, 2008.

245 *See* Lynch, *supra* note 235, at 2008 ("The attorneys general also share staff and the costs incurred during the litigation, creating, in effect, a temporary law firm dedicated to a single case that has more resources available to it than any individual office could commit to the matter alone.").

246 *See id.*

247 *See* Gilles & Friedman, *Class Action Myth*, *supra* note 150, at 148 (noting that class actions use pyramid structure to "enabl[e] ad hoc consortia of entrepreneurial lawyers to tackle massive litigation projects"); *see also* Richard A. Epstein, *One Stop Law Shop*, LEGAL AFFS., Mar.–Apr. 2006, at 34, 37 ("Many large class-actions involving *antitrust and consumer-fraud issues, for example, are handled by ad hoc alliances among multiple firms that split their labor and share the rewards of the litigation.").*

fees for the other counsel that contribute to the class action.[248] Like class counsel, leading AGs can play a significant role both in determining compensation for "class members" and "compensation" for each participating AG. Leading AGs play an important role in the compensation for parens patriae group members in multistate actions because they play the most significant role in negotiating and allocating settlements. Parens patriae group members may receive public compensation through allocations to their state or through a "global fund" set up by the settlement, with distributions supervised by a monitor.[249] Leading AGs who negotiate the settlement also make important decisions about the balance between requiring corporations to make reforms and paying civil penalties and/or public compensation in settlements.[250] This balance affects the amount of public compensation that parens patriae group members will receive.

Even though an AG does not personally profit from a settlement, AGs' offices may receive a portion of the settlement in certain states.[251] An AG's "compensation" may ride on the amount allocated to her state if a state provides an AG's office a percentage of the funds they obtained from enforcement settlements.[252] These revolving funds can be an important part of an AG's office budget. Increasing the budget of the AG's office has tangible benefits to the AG such as more staff and resources to pursue her enforcement agenda and propel her political ambition.[253] The larger the portion of the settlement that is allocated to an AG's state, the greater the potential political "compensation" the AG receives in the form of increased publicity and opportunities for reputation building.[254] For ambitious AGs, this form of "compensation" may be particularly valuable heading into an election cycle.[255]

Both class counsel in private class actions and leading AGs in multistate actions have unique relationships with their "clients." Neither class counsel nor AGs are "hired" by their "clients" in the usual way that clients hire their lawyers. Like class counsel, leading AGs are also largely self-selecting, often by virtue of being the first to instigate an enforcement action.[256] While a leading AG is directly elected by her own state electorate, parens patriae group members from other participating states do not elect the leading AG and thus have no power to "fire" leading AGs. Furthermore, other AGs that

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248 *See* Gilles & Friedman, *Class Action Myth*, *supra* note 150, at 148–49.

249 For example, the National Mortgage Settlement involved the payment of public compensation by the defendants as supervised by a monitor. *See* Joseph A. Smith, Jr., *A Review and Assessment of the National Mortgage Settlement by Its Monitor*, 21 N.C. BANKING INST. 29, 35–36 (2017).

250 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 526–27.

251 *See* Lemos & Minzner, *supra* note 37, at 856.

252 *See id.* at 866.

253 *See id.* at 871.

254 *See id.* at 871, 892–93.

255 *See* Provost, *Aspiring Governor*, *supra* note 40, at 597 ("AGs who are active in multistate litigation are also likely to run for higher office.").

256 *See* Cox et al., *supra* note 106, at 84.

participate in the action also cannot "fire" the leading AGs or the executive committee, just as other attorneys participating in a class action cannot unilaterally replace class counsel. AGs can either seek a greater role in directing the litigation or "opt out" of multistate litigation altogether if they are dissatisfied with the direction of multistate litigation.[257]

That being said, "opting out" of multistate action and pursuing action independently may be easier in theory than in practice. States that tend to lead multistate actions are usually highly populous states with greater AG office resources.[258] For states with fewer resources, the choice may be to accept a settlement that required little to no public resources or face the political consequences of passing up settlement money.[259] Because only states that participate in the multistate action get a portion of the settlement and the settlement will likely occur regardless of an individual AG's participation, AGs may participate "to get a share of the settlement proceeds even if they disagree with the underlying legal theories" of the lawsuit or are dissatisfied with the settlement.[260] Furthermore, states with fewer resources may not pose a credible litigation threat to large corporate defendants that can vastly outspend AG offices, which means that defendants may offer lower settlements or not come to the settlement table if an under-resourced AG's office pursues action alone.[261]

While AGs have a decision, albeit perhaps difficult, to "opt out" of multistate litigation, parens patriae group members generally don't get to make that decision directly for themselves.[262] In multistate actions, parens patriae groups may be two steps removed from decisionmaking in multistate actions. On the first level, they are removed because the state is the named plaintiff in the AG's action, not the state residents.[263] On the second level, it may be another state's AG playing the leading role in the action and not their own AG, making it even more difficult to control the action via democratic means. When the difficulty of monitoring increases, so does the potential for agency

257 *See* Richard Lawson, *Insights from State AG Coordinated Opioid Investigation*, LAW360 (June 18, 2018), https://www.law360.com/articles/1052878/ (discussing states pulling out of the multistate opioid investigation).

258 *See* Bowman, *supra* note 1, at 540–41 (noting that the most active "core" group of leading states are large states).

259 *See* NOLETTE, *supra* note 1, at 28.

260 *Id.* at 28 ("This dynamic explains why, for example, Alabama AG William Pryor, a conservative Republican and consistent critic of his fellow AGs' use of litigation to regulate the tobacco industry, nevertheless signed the Master Settlement Agreement in 1998."); Provost, *supra* note 16, at 20 (using the example of the master tobacco agreement and arguing that we can "infer that AGs from conservative states will stick by free-market principles, but if the target becomes too tempting, they will rush in to claim their share of the reward as well").

261 *See* Lemos, *State Enforcement*, *supra* note 35, at 705.

262 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 507–08.

263 *See, e.g.*, Nevada v. Bank of Am. Corp., 672 F.3d 661, 667, 670 (9th Cir. 2012); Connecticut v. Moody's Corp., No. 10-cv-546, 2011 WL 63905, at *4 (D. Conn. Jan. 5, 2011).

costs, and multistate actions introduce new agency problems by virtue of being class action squared.

III. Class Action Squared Agency Problems

Scholars have long recognized that private class actions give rise to agency problems when the interests of class counsel diverge from the interests of class members.[264] This critique has been applied to parens patriae actions led by AGs.[265] But no one has considered the unique agency costs that arise in multistate actions by virtue of being class action squared. Class action squared does not simply double agency problems. Rather, an entirely new set of agency costs arises because two layers of "class action" interact with one another. Put more simply, AGs can borrow and steal in multistate actions in ways they could not if they were pursuing action alone. Class action squared agency dilemmas undermine the ability of multistate actions to compensate injuries and deter future wrongdoing. They also call into question whether multistate action is always better than states going at it alone.

A. Borrow

The temptation to "borrow" other states' more expansive enforcement statutes is a type of class action squared problem. States that lead multistate actions may have particularly strong state statutes or expansive investigatory powers. Strong state enforcement statutes provide leading states with leverage to bring large corporations to the settlement table. For example, the New York AG, who has broad enforcement and investigatory authority under New York state law, leads multistate actions more often than any other state AG.[266] That power gives other states, and even federal agencies, the ability to gain settlement benefits by joining forces with the New York AG.[267] New York's Martin Act is so important to other states that other states have filed amicus briefs in support of its expansive interpretation in New York state court.[268]

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264 *See* Coffee, *Class Action Accountability*, *supra* note 7, at 371–72.

265 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 511–12.

266 In fact, New York leads at a rate of nearly twice the rate of the next most active state leader. *See* Nolette, *supra* note 1, at 26–28; *see also* Jeff Izant, Note, *Mens Rea and the Martin Act: A Weapon of Choice for Securities Fraud Prosecutions?*, 2012 Colum. Bus. L. Rev. 913, 917–19, 927 (discussing New York's expansive enforcement statute).

267 *See* Eric W. Zitzewitz, *Prosecutorial Discretion in Mutual Fund Settlement Negotiations, 2003–7*, 9 B.E. J. Econ. Analysis & Pol'y, no. 1, 2009, at 1, 3 (arguing that settlement amounts are greater when the New York Attorney General participates in an enforcement action).

268 *See* Nina Hart, Note, *Moving at a Glacial Pace: What Can State Attorneys General Do About SEC Inattention to Nondisclosure of Financially Material Risks Arising from Climate Change?*, 40 Colum. J. Env't L. 99, 138 (2015) (citing People *ex rel.* Cuomo v. Greenberg, 994 N.E.2d 839, 839–40 (N.Y. 2013)).

Since corporations commonly settle multistate actions before meaningfully testing the legal basis for each state's claims in court, states may "borrow" stronger laws from other states and "hide" their relatively weaker legal claims by aggregating their claims with other states. Borrowing on the strength of others' claims (or hiding weaker claims) is a common feature in class actions.[269] Just as class members can borrow from the strength of the claims of other class members and "hide" their weaker claims in the class, states can "borrow" the strength of other states' enforcement statutes and hide their potentially weaker legal claims in multistate actions. In both instances, states and class members with weaker claims can receive financial settlements without facing the greater scrutiny that would likely occur if they brought action alone. Multistate actions rarely litigate the application of each state's law to the particular facts of the case. Rather, multistate actions are often settled relatively quickly without testing states' legal theories in court.

If states with weaker laws brought action alone instead of participating in a multistate action, they would be forced to rely on their own statutes and could not hide weaker claims among the claims of other states. Corporations would likely scrutinize the legal basis for an individual state's claims more closely and be willing to invest more resources in testing the claim in litigation. This means it is likely that AGs will have to invest more resources to obtain settlements that may be lower than the amounts that they could have received had they been able to "borrow" in multistate litigation.

An example of "borrowing" in multistate litigation occurred in the Target multistate settlement. A multistate investigation was initiated based on a 2013 data breach that occurred at Target during the holiday shopping season that "affected more than 41 million customer payment card accounts and exposed contact information for more than 60 million customers."[270] In a press release announcing the settlement, the Colorado AG explicitly stated that Colorado's data breach and privacy laws are "so weak compared to other states, we were unable to credibly take a leadership position in the litigation."[271] In fact, the AG announced that she would be convening a working group "to . . . recommend more effective legislation" in the next legislative session.[272] However, without changing Colorado law, the Colorado AG was able to participate in a multistate action and effectively "borrow" other states' stronger data privacy laws and receive a portion of the settlement. Colorado

269 *See* Coffee, *Class Action Accountability*, *supra* note 7, at 398, 429 (referring to the problem of weak claims in class action as a pooling problem).

270 *See* New York Target Press Release, *supra* note 89.

271 *See* Press Release, Colo. Att'y Gen.'s Off., Attorney General Coffman Joins $18.5M Settlement with Target Corporation Over 2013 Data Breach (May 24, 2017), https://stopfraudcolorado.gov/sites/default/files/press/finalpress-may2017releasetargetsettlement.pdf ("I will be convening a privacy working group this summer to research and recommend more effective legislation in the 2018 session. Colorado needs to move to the forefront in protecting consumers from theft of their personal information . . . .").

272 *Id.*

received $278,914 from the Target multistate settlement, which is similar to amounts received by some similarly populated states that participated in the action.[273] Indeed, an AG participating in the Target settlement stated that the settlement was allocated largely based on the population of participating states.[274] This means that a state's population was likely a more important factor in the allocating of the settlement than the legal strength of the state's claim. By participating in the multistate action and "borrowing" other states' stronger statutes, Colorado may have been able to obtain a larger settlement than it could have if the state brought action alone.

In contrast, several AGs did not participate in a series of multistate actions against Wall Street banks that securitized RMBS in the wake of the financial crisis. Despite the fact that these settlements were some of the largest in American history, certain states that were hit hard by the recession such as Nevada and Florida did not participate.[275] These AGs stated their reason for not participating was that they lacked the expansive enforcement statutes of other states.[276] These states did not engage in borrowing in the RMBS actions, even though they potentially could have tried to "hide" their weaker claims in with states with stronger enforcement statutes.

"Borrowing" is problematic as it allows AGs to circumnavigate their state legislatures. AGs may "borrow" other states' more expansive law in contravention of the balance struck by state legislatures.[277] AGs can also encroach on legislative and executive power when they strike settlements with corporations that create de facto regulations for the settling corporation and, by extension, entire industries.[278] AG "borrowing" in multistate actions raises

273 *Id.* Colorado's estimated 2013 population based on the 2010 census was 5,268,367, and it received $278,914. The next most populous state, Minnesota, had a population of 5,420,380 and received $283,736. Missouri, also a similarly populated state with 6,044,171, received $302,746. *State Population Census Estimates: 2013 Births, Deaths, Migration Totals*, GOVERNING, https://www.governing.com/gov-data/census/census-state-population-estimates-births-deaths-migration-totals-2013.html (last visited Sept. 20, 2020); Kavita Kumar, *Target Reaches $18.5 Million Settlement with States over Data Breach*, STARTRIB. (May 23, 2017), https://www.startribune.com/target-reaches-18-5-million-settlement-with-states-over-data-breach/423880353/ (reporting settlement amount received by Minnesota); Steph Kukuljan, *Target Corp. to Pay Missouri $303,000 over 2013 Data Breach*, ST. LOUIS BUS. J. (May 23, 2017), https://www.bizjournals.com/stlouis/news/2017/05/23/target-corpto-pay-missouri-303-000-over-2013-data.html.

274 Abrams, *supra* note 89 (quoting New York AG Eric T. Schneiderman).

275 *See* Dan Freed, *Florida, Nevada Can't Win for Losing on Mortgage Crisis*, STREET (Aug. 6, 2014), https://www.thestreet.com/story/12832469/1/florida-nevada-cant-win-for-losing-on-mortgage-crisis.html (noting that Florida, Nevada, Arizona, and Michigan, all states hit especially hard by the housing crisis, did not participate in the Citigroup or JPMorgan settlements).

276 *See id.*

277 *See* Gifford, *supra* note 19, at 913, 919.

278 *See id.* at 920 ("This reallocation of a primary regulatory role to the state attorney general is one not envisioned by state constitutions: the attorney general assumes a regulatory role traditionally regarded as belonging to the legislature and the administrative agencies it creates for specific regulatory tasks.").

separation-of-power concerns by allowing the executive to encroach on traditional legislative powers to define law and regulate.[279] It also highlights concerns about a "divided executive" where AGs compete with executive agencies' ability to regulate.[280]

The temptation to "borrow" in multistate litigation behavior creates conflicts of interest for AGs. For example, state legislatures may have made a deliberate policy decision to create "weak" or narrower enforcement statutes. If the AG's "client" is the state, it may be in the state's interests for AGs to advance the balance struck by the state legislature. This means that an AG may have to forgo participating in an enforcement action because the state lacks a strong legal basis to do so. But the state's interest in advancing its state law may come at the expense of parens patriae group members who have been injured by corporate misconduct and would like to receive public compensation. If the AG's "client" is parens patriae group members, it is likely in their interests to "borrow" from other states in order to get higher settlements. AGs face a conflict over whose interests to advance when faced with the temptation to "borrow" in multistate actions.

Conflicts of interest also arise when AGs "borrow" in multistate litigation to further their political ambitions. AGs may care little about the balances struck by state legislatures if participation in multistate settlements increases electoral support. A strategy of "borrowing" to advance the AGs' political ambitions, however, may also be at odds with securing the most relief for injured state residents. AGs who simply care about touting settlements in press releases may "borrow" to participate in multistate settlements, but neglect to monitor how the settlements are allocated.[281] Other AGs may acquiesce or even encourage other states' "borrowing" because leading a multistate action may be politically advantageous, even if it potentially dilutes a strong legal claim, and it may enable leading states to allocate to themselves a greater portion of the settlement.

"Borrowing" has been recognized in the context of private class actions and sub-classing has been used as a remedy for "borrowing" concerns. In *Ortiz v. Fibreboard Corp.*, the Supreme Court recognized that differences in the legal or economic strength of class members' claims may necessitate sub-classing when class members live in different jurisdictions with substantive laws that vary in their favorability to class members.[282] In this instance, there

279 *Id.* at 913 (AGs "seek to supplant the regulatory regimes previously enacted by Congress, the state legislature, or federal agencies with one that reflects their own visions").

280 Marshall, *supra* note 29, at 2455.

281 Indeed, there is evidence that government officials care more about announcing a settlement than actually collecting it. *See* Lemos & Minzner, *supra* note 37, at 883–86; *see also* Burch, *supra* note 217, at 1870 ("[P]ublic officials might exchange a rapid settlement with splashy headlines for insubstantial contributions to victims . . . ."); Ezra Ross & Martin Pritikin, *The Collection Gap: Underenforcement of Corporate and White-Collar Fines and Penalties*, 29 YALE L. & POL'Y REV. 453, 468 (2011) (finding that federal agencies systematically fail to collect the fines and penalties they impose).

282 527 U.S. 815, 856 (1999); Coffee, *Class Action Accountability*, *supra* note 7, at 387 n.43, 395 n.66.

are questions about whether counsel may allocate a higher award to class members in jurisdictions with more favorable laws (or subclass them) or average the awards regardless of the strength of the jurisdiction's substantive law.[283] If the damage award is averaged, the class members in the jurisdiction with the adverse laws will be "borrowing" from those in jurisdictions with favorable laws to the detriment of those class members. In the private class action context, the danger of "borrowing" has been recognized to some degree, and there is the potential remedy of sub-classing in these cases.[284]

In the context of multistate actions, "borrowing" raises similar concerns about compensation. Borrowing allows AGs in states with weaker legal claims to have potentially larger settlements. On the other side, however, states with stronger legal claims may receive smaller settlements because the weaker claims dilute the value of their claims. But unlike class actions, "borrowing" has not been recognized as a problem with a procedural protection of "sub-classing" in multistate actions.

B. Steal

"Stealing" is another type of agency problem that exists by virtue of the class action squared structure of multistate actions. Stealing in the context of multistate actions occurs when leading AGs allocate greater portions of a multistate settlement to their respective states, regardless of the acuteness of injury experienced in their states, to the detriment of other participating states that have experienced greater harm. Greater settlement amounts for leading AGs not only brings more money to their home states, but also increases reputational gains that may help leading AGs win future elections.[285] Even though leading AGs are not compensated like class counsel, they may be tempted to steal in multistate actions to benefit their own states at the expense of other participating states. This temptation is like how class counsel is tempted to sell out the class for attorneys' fees in a settlement.[286]

Leading states negotiate settlements and may allocate a greater amount of the settlement to their own states. In fact, multistate settlements often name leading states and provide that those leading states will designate the amounts allocated to each participating state. For example, the Target multistate settlement provided that the leading states, Illinois and Connecticut, had the authority to designate the amounts to be received by each participating state.[287] Similarly, the Neiman Marcus multistate settlement names Illi-

283 *See* Coffee, *Class Action Accountability*, *supra* note 7, at 387–88.

284 *See id.*

285 AGs frequently tout their leadership roles in multistate actions in their press releases. *See, e.g.*, Illinois Target Press Release, *supra* note 107.

286 *See* Lemos & Minzner, *supra* note 37, at 856 (stating that just because public attorneys are not directly compensated does not mean that they don't have a financial interest in the action).

287 *See* Target Assurance of Voluntary Compliance para. 29 (May 8, 2017), https://ag.ny.gov/sites/default/files/nyag_target_settlement.pdf ("Each of the Attorneys General agrees that the Illinois Attorney General and Connecticut Attorney General have the

nois and Connecticut as the "lead states of the multistate investigation" and provides that those leading states will submit the settlement amounts for each participating state to Neiman Marcus.[288] Leading AGs have the ability to increase the overall amount of a settlement by inviting other states to participate and then allocating a greater share of the settlement to their home states. This practice allows leading AGs to obtain a larger overall settlement than if they had brought the action alone. Broadening participation in multistate actions can increase not only the size of the pie in settlements, but also the size of leading states' share of the pie. Because significant portions of these settlements may go directly to AG offices, leading AGs may be particularly tempted to "steal."[289]

The allocations of several multistate settlements demonstrate this phenomenon. For example, the Target multistate investigation settled in 2017 for $18.5 million and included forty-seven states and the District of Columbia.[290] Illinois and Connecticut led the multistate action and received some of the highest allocations of the settlement. Illinois received $1.2 million of the settlement, second only to California, which received $1.4 million, but whose population almost triples the population of Illinois.[291] Connecticut received the fourth highest settlement amount, $1 million,[292] outranking many more populous participating states such as Florida, New York, and Pennsylvania.[293] Interestingly, the settlement did not discuss the number of impacted consumers in each state due to Target's data breach. Rather, when

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authority to designate such amount to be paid by TARGET to each Attorney General . . . .").

288 *See* Neiman Marcus Assurance of Voluntary Compliance para. 12 (Jan. 8, 2019), http://www.illinoisattorneygeneral.gov/pressroom/2019_01/AVC_Neiman_Marcus1-8-19.pdf.

289 *See* Lemos & Minzner, *supra* note 37, at 866 (discussing revolving funds to AG offices).

290 *See* Illinois Target Press Release, *supra* note 107.

291 *See id.*; Abrams, *supra* note 89; *State Population Census Estimates: 2013 Births, Deaths, Migration Totals*, *supra* note 273 (showing estimate of Illinois's 2013 population to be 12,882,135 and California's 38,332,521).

292 Illinois Target Press Release, *supra* note 107 (Illinois received $1.2 Million); Abrams, *supra* note 89 (California received $1.4 million); L.M. Sixel, *Texas to Get $1.1 Million from Target Data Breach Settlement*, HOUS. CHRON. (May 23, 2017), https://www.chron.com/business/bizfeed/article/Texas-to-get-1-1-million-from-Target-data-breach-11167883.php (Texas received $1.1 Million).

293 *See* CONN. ANN. REP., *supra* note 107, at 23; Malena Carollo, *Target Corp. Reaches $18.5 Million Settlement with 47 States over Data Breach*, TAMPA BAY TIMES (May 23, 2017), https://www.tampabay.com/news/business/retail/target-corp-reaches-185-million-settlement-with-47-states-over-data-breach/2324885/ (reporting that Florida received $928.963); New York Target Press Release, *supra* note 89 (New York received $635,000); Press Release, Pa. Off. of the Att'y Gen., Settlement Reached with Target Following Major Consumer Data Breach (May 23, 2017), https://www.attorneygeneral.gov/taking-action/press-releases/settlement-reached-with-target-following-major-consumer-data-breach/ (Pennsylvania received $469,000); *State Population Census Estimates: 2013 Births, Deaths, Migration Totals*, *supra* note 273.

asked about the settlement allocation, the New York AG's office stated that the settlement was allocated "'largely' based on each state's population size."[294] It appears that the most important factors in the amount each state was allocated in the settlement were leadership and population, without findings of how many state residents were impacted by the data breach.

Top 5 States: Target Multistate Settlement Allocations (Leading States Highlighted)

State	Allocation
California	$1.4 million
Illinois	$1.2 million
Texas	$1.1 million
Connecticut	$1 million
Florida	$928,963

Another example where leadership played an important role was in the multistate settlement with the ratings agency, Standard & Poor's (S&P). In 2015, the federal government and a multistate group settled an action with S&P for its ratings of toxic mortgage securities leading up to and during the Great Recession.[295] The total settlement was $1.375 billion, with $687.5 million to be divided among nineteen states and the District of Columbia.[296] The leading AGs in the action were Connecticut, Illinois, and Mississippi.[297] The allocation of the settlement was determined by agreement among the participating states.[298] Leading states received some of the highest allocations of the settlement. Illinois received the second highest settlement amount, $52.5 million, behind California, the participating state with the

294 *See* Abrams, *supra* note 89 (quoting New York AG Eric T. Schneiderman).

295 *See* Press Release, U.S. Dep't of Just., Justice Department and State Partners Secure $1.375 Billion Settlement with S&P for Defrauding Investors in the Lead Up to the Financial Crisis (Feb. 3, 2015) [hereinafter DOJ S&P Press Release], https://www.justice.gov/opa/pr/justice-department-and-state-partners-secure-1375-billion-settlement-sp-defrauding-investors.

296 *Id.*

297 *See* Press Release, Miss. Off. of the Att'y Gen., Attorney General Hood Helps Lead States to $1.375 Billion State-Federal Settlement with Standard & Poor's (Feb. 3, 2015) [hereinafter Mississippi S&P Press Release], https://web.archive.org/web/20170324221755/http://www.ago.state.ms.us/releases/attorney-general-hood-helps-lead-states-to-1-375-billion-state-federal-settlement-with-standard-poors/; Press Release, Ill. Off. of the Att'y Gen., Madigan, DOJ & States Announce $1.375 Billion Settlement with Standard & Poor's (Feb. 3, 2015) [hereinafter Illinois S&P Press Release], http://www.illinoisattorneygeneral.gov/pressroom/2015_02/20150203.html ("In 2012, Madigan was one of the first attorneys general in the country to file a lawsuit against S&P for its misconduct that contributed to the 2008 collapse."); Connecticut S&P Press Release, *supra* note 83 ("The settlement culminates a five-year effort led by Connecticut to hold S&P responsible for its role in the 2008 financial crisis.")

298 *See* DOJ S&P Press Release, *supra* note 295.

largest population.[299] The third and fourth highest settlement allocations went to Connecticut ($36 million) and Mississippi ($33 million).[300] Connecticut and Mississippi had smaller populations than many other participating states in the multistate action. Nevertheless, their allocations exceeded larger population participating states such as Pennsylvania, North Carolina, New Jersey, and Washington.[301] Interestingly, many participating states received the exact same amount of the settlement. [302] For example, both Idaho and Pennsylvania received $21.5 million.[303] There were no findings included in the settlement that the states with larger allocations were more greatly impacted by S&P's ratings than states that received smaller portions of the settlement. For example, there were no findings that Mississippi experienced greater harm from S&P's ratings than other participating states. To the contrary, the Mississippi AG's press release specifically referred to leadership as the reason for its large settlement allocation. [304] The Connecticut AG's press release also alluded to the state's leadership with respect to its settlement allocation.[305]

299 *See* Dan Haar, *S&P Agrees to $1.4B Settlement of Deception Charges that Started in Connecticut*, HARTFORD COURANT (Feb. 3, 2015), https://www.courant.com/business/hc-haar-holder-jepsen-standard-poors-deception-20150203-column.html; Press Release, Cal. Off. of the Att'y Gen., Attorney General Kamala D. Harris Announces $210 Million Settlement with Standard & Poor's for Inflating Mortgage-Backed Securities Ratings (Feb. 3, 2015), https://oag.ca.gov/news/press-releases/attorney-general-kamala-d-harris-announces-210-million-settlement-standard-poor ("The State of California . . . will recover $210 million in damages.").

300 *See* Mississippi S&P Press Release, *supra* note 297; Illinois S&P Press Release, *supra* note 297.

301 *See* Standard & Poor's Settlement Agreement (Feb. 2, 2015), https://www.justice.gov/file/338701/download (listing each state's settlement amount); *State Population Census Estimates: 2013 Births, Deaths, Migration Totals*, *supra* note 273 (listing the state populations in 2013).

302 *See* DOJ S&P Press Release, *supra* note 295.

303 *Id.*

304 *See* Mississippi S&P Press Release, *supra* note 297 ("Mississippi will receive $33 million for its role as a Lead State in the 20-state coalition.").

305 *See* Connecticut S&P Press Release, *supra* note 83 ("Connecticut was the first state to sue S&P in 2010 and will receive $36million in the settlement, which will go to the state's general fund.").

Top States: S&P Multistate Settlement Allocations
(Leading States Highlighted)

State	Allocation
California	$210 million
Illinois	$52.5 million
Connecticut	$36 million
Mississippi	$33 million
Delaware	$25 million
Tennesee	$25 million

In certain instances, some states have disclosed the number of affected state residents in multistate settlements. For example, some AG offices' press releases have included the number of state residents who were affected by a data breach or faulty consumer product. Even when harm has been quantified, leadership appears to continue to play an important role in settlement allocation, at times an even more important role than the number of people harmed by the misconduct. Leading states continue to get some of the largest allocations of settlements, even if they are not the states that have the greatest numbers of affected residents.

For example, the ride-sharing company Uber was the subject of a multistate action when hackers gained access to Uber drivers' personal information.[306] Over six hundred thousand Uber drivers' personal information was exposed by the breach.[307] Instead of notifying states of the data breach as required by state data breach notification laws, Uber paid the hackers to keep the breach secret.[308] Ultimately, when the breach became public, Uber became the target of a multistate action and settled with fifty states and the District of Columbia for $148 million.[309] California, Illinois, Massachusetts, Maryland, New Jersey, and Ohio led the multistate action.[310] Several other

306 *See* Heather Somerville, *Uber to Pay $148 Million to Settle Data Breach Cover-Up with U.S. States*, Reuters (Sept. 26, 2018), https://www.reuters.com/article/us-uber-databreach/uber-settles-for-148-million-with-50-us-states-over-2016-data-breach-idUSKCN1M62AJ.

307 *Id.*

308 *Id.*

309 *Id.*

310 *See* Press Release, Cal. Off. of the Att'y Gen., California Attorney General Becerra, San Francisco District Attorney Gascón Announce $148 Million Settlement with Uber over 2016 Data Breach and Cover-Up (Sept. 26, 2018) [hereinafter California Uber Press Release], https://oag.ca.gov/news/press-releases/california-attorney-general-becerra-san-francisco-district-attorney-gasc%C3%B3n; Press Release, Ill. Off. of the Att'y Gen., Attorney General Madigan Leads $148 Million Settlement with Uber Over 2016 Data Breach (Sept. 26, 2018) [hereinafter Illinois Uber Press Release], https://illinoisattorneygeneral.gov/pressroom/2018_09/20180926b.html; Press Release, Mass. Off. of the Att'y Gen., AG Healey Leads Multistate Coalition in Reaching $148 Million Settlement with Uber over Nationwide Data Breach (Sept. 26, 2018) [hereinafter Massachusetts Uber Press Release], https://www.mass.gov/news/ag-healey-leads-multistate-coalition-in-reaching-148-million-settlement-with-uber-over; Press Release, Md. Off. of the Att'y Gen., Attorney General Frosh

states such as New York, Connecticut, Missouri, Pennsylvania, and Washington played a leading role by being "early movers," instigating investigations and actions.[311] Many of the highest allocations of the settlement reflected leadership, whether in leading the multistate group or being an "early mover" before joining the multistate action. For example, the top ten highest settlement allocations went to California, Illinois, Florida, Massachusetts, Texas, Washington, Pennsylvania, Ohio, New York, and Connecticut.[312] Eight of the ten states with the highest allocations either led the multistate action or were early movers that joined the multistate action. In fact, AGs referred to their leading roles in their press releases as a reason for their states' settlement allocations.[313] The other two states in the top ten of the

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Announces $148 Million Settlement with Uber over Data Breach (Sept. 26, 2018), https://www.marylandattorneygeneral.gov/press/2018/092618.pdf; Press Release, N.J. Off. of the Att'y Gen., AG Grewal Announces Historic Settlement Resolving Uber Data Breach (Sept. 26, 2018), https://nj.gov/oag/newsreleases18/pr20180926a.html; Press Release, Ohio Off. of the Att'y Gen., Attorney General DeWine Announces $148 Million Multistate Settlement with Uber (Sept. 26, 2018) [hereinafter Ohio Uber Press Release], https://www.ohioattorneygeneral.gov/Media/News-Releases/September-2018/Attorney-General-DeWine-Announces-$148-Million-Mul.

311 *See* New York Uber Press Release, *supra* note 86; Press Release, Conn. Off. of the Att'y Gen., Connecticut Joins $148M Settlement with Uber over Delayed Data Breach Reporting (Sept. 26, 2018) [hereinafter Connecticut Uber Press Release], https://portal.ct.gov/AG/Press-Releases-Archived/2018-Press-Releases/Connecticut-Joins-148M-Settlement-with-Uber-over-Delayed-Data-Breach-Reporting; Press Release, Pa. Off. of the Att'y Gen., Attorney General Josh Shapiro Reaches Settlement with Uber for Data Breach Involving 13,500 Drivers in PA (Sept. 26, 2018) [hereinafter Pennsylvania Uber Press Release], https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-reaches-settlement-with-uber-for-data-breach-involving-13500-drivers-in-pa/; Press Release, Wash. State Off. of the Att'y Gen., AG Ferguson: Uber to Pay $2.2 Million to Washington Drivers over 2016 Data Breach (Sept. 26, 2018) [hereinafter Washington Uber Press Release], https://www.atg.wa.gov/news/news-releases/ag-ferguson-uber-pay-22-million-washington-drivers-over-2016-data-breach; *see also* Hamza Shaban, *Uber Is Sued over Massive Data Breach After Paying Hackers to Keep Quiet*, WASH. POST (Nov. 24, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/24/uber-is-sued-over-massive-data-breach-after-paying-hackers-to-keep-quiet/.

312 *See* Nick Lucchesi, *Uber's $148M Settlement: The Legal Reason Many Drivers Won't See a Dime*, INVERSE (Sept. 28, 2018), https://www.inverse.com/article/49355-uber-s-148-million-settlement-reveals-how-states-choose-not-to-pay-drivers (listing each state's settlement amount); California Uber Press Release, *supra* note 310; Illinois Uber Press Release, *supra* note 310; Massachusetts Uber Press Release, *supra* note 310; Press Release, Tex. Off. of the Att'y Gen., AG Paxton Reaches $148 Million Settlement with Uber for Data Breach (Sept. 26, 2018), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-reaches-148-million-settlement-uber-data-breach; Washington Uber Press Release, *supra* note 311; Pennsylvania Uber Press Release, *supra* note 311; Ohio Uber Press Release, *supra* note 310; New York Uber Press Release, *supra* note 86; Connecticut Uber Press Release, *supra* note 311; *Florida to Get $8.2M of $148M Uber Data Breach Settlement*, ASSOCIATED PRESS (Sept. 26, 2018), https://apnews.com/ae3050ebaf234db49b78335d1eb09e92.

313 *See, e.g.*, Ohio Uber Press Release, *supra* note 310 ("As a co-lead state in the multistate investigation that led to the settlement, Ohio will receive $5,585,868 of the total settlement."); Washington Uber Press Release, *supra* note 311 ("Washington received a larger

settlement allocations were Florida and Texas, high population states. Many participating states provided compensation from the settlement to Uber drivers, most commonly $100 per driver.[314]

TOP 10 STATES: UBER SETTLEMENT ALLOCATIONS
(LEADING OR "EARLY MOVER" STATES HIGHLIGHTED)

State	**Allocation**
California	$26 million
Illinois	$8.5 million
Florida	$8.2 million
Massachusetts	$7.1 million
Texas	$6.4 million
Washington	$5.8 million
Pennsylvania	$5.7 million
Ohio	$5.6 million
New York	$5.1 million
Connecticut	$4.5 million

In office press releases, a handful of AGs who participated in the Uber settlement provided an approximate number of drivers who were affected by the breach. These disclosures support the assertion that leadership in the multistate action was an important factor in settlement allocation, notwithstanding the number of affected state residents. For example, both Ohio and Colorado disclosed the same number of affected Uber drivers—12,000 drivers in each state.[315] Ohio was a leading state, but Colorado was not.[316] Ohio received $5.5 million and Colorado received $2.1 million of the multistate settlement.[317] This means that Ohio received more than twice as much as Colorado in the settlement, even though they had the same number of affected drivers.

The importance of leadership holds true, even when there were more affected Uber drivers in other states. Take again the example of Ohio, a

share of the nationwide $148 million settlement because Ferguson sued Uber in November of 2017 . . . . Washington was one of just a small number of states that sued Uber over its conduct related to the data breach prior to the multistate resolution.").

314 *See* Lucchesi, *supra* note 312 (listing seventeen states that are providing compensation to Uber drivers).

315 *See* Ohio Uber Press Release, *supra* note 310; Press Release, Colo. Off. of the Att'y Gen., Attorney General Cynthia H. Coffman Announces $148 Million Multi-State Settlement with Uber over Data Breach (Sept. 26, 2018) [hereinafter Colorado Uber Press Release], https://stopfraudcolorado.gov/about-consumer-protection/press-releases/2018-09-26-000000/ag-coffman-uber-data-breach.html.

316 *See supra* note 310 and accompanying text.

317 *See* Ohio Uber Press Release, *supra* note 310; Colorado Uber Press Release, *supra* note 315.

leading state in the Uber settlement that received $5.5 million and had 12,000 affected Uber drivers. In comparison, North Carolina had about 15,600 affected drivers and received nearly $3.7 million, and Virginia had 19,335 affected drivers and received $2.9 million.[318] This means that Virginia received about half as much as Ohio in the settlement, even though Virginia had about forty percent more affected drivers.

The Neiman Marcus multistate settlement is another example of where leadership played an important role in the settlement, even when a greater number of people were affected in other participating states. Neiman Marcus experienced a data breach in 2014 where 370,000 cardholders' information was compromised, with 9200 cards used fraudulently as a result of the breach.[319] Illinois and Connecticut led the multistate action.[320] The total settlement amount was $1.5 million, and forty-three states and the District of Columbia participated in the settlement.[321] The highest settlement allocations went to Illinois and Connecticut, with Illinois receiving $124,000 and Connecticut receiving $102,000.[322] Indeed, Connecticut referred to its leadership role in conjunction with its settlement allocation.[323] The states receiving the next three highest settlement amounts were Texas ($95,000), New York ($58,000), and New Jersey ($57,000).[324] About half of participat-

318 *See* Lauren Ohnesorge, *Nearly 16,000 NC Uber Drivers Can Get a Piece of the $148M Settlement*, TRIANGLE BUS. J. (Sept. 26, 2018), https://www.bizjournals.com/triangle/news/2018/09/26/nearly-16-000-nc-uber-drivers-can-get-a-piece-of.html; Press Release, Va. Off. of the Att'y Gen., Attorney General Herring Reaches $148 Million Settlement with Uber over Data Breach (Sept. 26, 2018), https://www.oag.state.va.us/media-center/news-releases/1276-september-26-2018-herring-reaches-148-million-settlement-with-uber-over-data-breach.

319 *See* Press Release, Ill. Off. of the Att'y Gen., Attorney General Madigan Announces $1.5 Million Settlement with Neiman Marcus (Jan. 8, 2019) [hereinafter Illinois Neiman Press Release], http://www.illinoisattorneygeneral.gov/pressroom/2019_01/20190108.html.

320 *See id.* Maryland AG's Office stated that Maryland sat on the executive committee but was not listed in the settlement as a lead state. The settlement allocation for Maryland has not been made publicly available. *See* Neiman Marcus Assurance of Voluntary Compliance, *supra* note 288; Press Release, Md. Off. of the Att'y Gen., Attorney General Frosh Announces Settlement with Neiman Marcus over 2013 Data Breach (Jan. 8, 2019), http://www.marylandattorneygeneral.gov/press/2019/010819.pdf.

321 *See* Illinois Neiman Press Release, *supra* note 319.

322 *See id.*; 2018–2019 CONN. ATT'Y GEN. ANN. REP. 28 [hereinafter Conn. AG Annual Report].

323 *See* Conn. AG Annual Report, *supra* note 322, at 28. ("The Department served in a leadership role in the investigation, and received $102,144.91 as part of the settlement.").

324 *See* Press Release, Tex. Off. of the Att'y Gen., AG Paxton Announces $1.5 Million Settlement with Neiman Marcus over Data Breach (Jan. 8, 2019), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-announces-15-million-settlement-neiman-marcus-over-data-breach; Press Release, N.Y. State Off. of the Att'y Gen., Attorney General James Announces $1.5M Settlement with Retailer Neiman Marcus over Data Breach (Jan. 8, 2019), https://ag.ny.gov/press-release/2019/attorney-general-james-announces-15m-settlement-retailer-neiman-marcus-over-data; Press Release, N.J. Off. of the Att'y Gen., AG Grewal: Neiman Marcus Agrees to Improve Cybersecurity, Pay $1.5 Million Penalty After

ing AGs disclosed the number of affected cardholders in their press releases. Again, leadership appears to play a stronger role in settlement allocation than the number of affected people in each state. Even though Connecticut had 3000 affected card holders, it received a significantly higher settlement, $102,000, than states with much higher numbers of affected card holders, such as Texas with 65,644 cardholders ($95,000), New York with 27,600 cardholders ($58,000), and New Jersey with 17,000 cardholders ($57,000).[325]

TOP 5 STATES: NEIMAN MARCUS MULTISTATE SETTLEMENT (LEADING STATES HIGHLIGHTED)

State	**Allocation**
Illinois	$124,000
Connecticut	$102,000
Texas	$95,000
New York	$58,000
New Jersey	$57,000

Stealing is a problem because it allows leading states to allocate more money to their own states at the expense of other participating states, even when more harm may be experienced in other states. Stealing also can lead to underdeterrence of corporate misconduct. If leadership is a deciding factor in settlement allocations, the settlement may not properly account for the harm created by corporate misconduct, particularly if the amount of harm is a less important factor, or not ascertained at all, in participating states. This leads to underdeterrence because corporations can settle for less than the harm they have inflicted. Corporations that enter into multistate settlements can still get the benefit of settling with every state at the same time at a lower cost than if the corporation had to settle with each state individually for the amount of harm created. Like class counsel in private class actions, leading AGs can strike "sweetheart settlements" where leading AGs allocate the largest portions of the settlement to themselves, to the detriment of participating states and their residents. Similarly, class action "sweetheart settlements" underdeter future misconduct by paying off class counsel to agree to settlements that do not reflect the harm created by misconduct, while also providing the corporation the benefit of settling with a large number of states at the same time. As public enforcement settlements are increasingly including public compensation, both compensation and deterrence are important to consider when multistate settlements are allocated. Stealing threatens to undermine both goals of enforcement.

It could be argued that leading states deserve a greater amount of the settlement because they have invested resources in leading the multistate

Breach of Payment Card Data (Jan. 8, 2019), https://www.nj.gov/oag/newsreleases19/pr20190108a.html.

325 *See supra* notes 319–24.

action. Other participating states have been able to, in essence, "free ride" on leading AGs' investment of resources in the action.[326] If leading states do not have the incentive of a greater portion of the settlement, they might not bring action at all, to the detriment of all participating states. However, AGs may be incentivized to lead without stealing.

Leading AGs are often from populous states that may be able to demonstrate the greatest injury and therefore still receive the largest allocations of the settlements. It may also be possible to incentivize AGs through providing attorneys' fees as part of settlements.[327] Attorneys' fees could more accurately reflect the amount of investment in the action as opposed to providing the state a larger portion of the settlement. Attorneys' fees could also have the benefit of going directly to the AGs office as opposed to the state treasury and could further motivate AGs to lead multistate actions. Furthermore, leading AGs may also receive reputational benefits from leading, even if their states do not receive the largest allocations of the settlement. For example, leading AGs may be able to shape corporate reforms and other injunctive relief that they could tout while campaigning for reelection.

In light of stealing, AGs in participating states need to weigh whether their states and their residents are better off "opting out" of multistate action by pursuing action alone. In class actions, class members with high value claims are likely to get a larger recovery by pursuing the action alone, than if their claims are "diluted" by other class members with lower value claims. Similarly, individual states can "opt out" of multistate action and potentially receive a better settlement than the allocation they would have received in the multistate settlement.

For example, there was a multistate action against General Motors (GM) based on GM's failure to disclosure its faulty ignition switches.[328] Every state and the District of Columbia participated in the multistate settlement, with the exception of Arizona.[329] The total multistate settlement was $120 million, and the action was led by a Multistate Executive Committee comprised of Connecticut, Florida, Maryland, Michigan, New Jersey, Ohio, Penn-

326 *See* Dishman, *supra* note 35, at 429.

327 Some multistate actions provided attorneys' fees to leading states including the National Mortgage Settlement and the PHH Settlement. *See National Mortgage Settlement Summary*, NAT'L CONF. OF STATE LEGISLATURES (Sept. 4, 2013), https://www.ncsl.org/research/financial-services-and-commerce/national-mortgage-settlement-summary.aspx (Executive Committee received $10M); Consent Judgment at para. 7, Alabama v. PHH Mortg. Corp., No. 1:18-cv-00009 (filed in D.D.C. May 10, 2018) (investigating AGs received $5 million).

328 *See* Press Release, Tex. Off. of the Att'y Gen., AG Paxton Reaches $120 Million Settlement with General Motors Company over Defective Ignition Switch (Oct. 19, 2017) [hereinafter Texas GM Press Release], https://www.texasattorneygeneral.gov/news/releases/ag-paxton-reaches-120-million-settlement-general-motors-company-over-defective-ignition-switch.

329 *See id.*; Agreed Final Consent Judgment at 1, State v. Gen. Motors, No. D-1-GN-17-005853 (filed in Tex. Dist. Ct. Oct. 19, 2017) (not including Arizona as a signatory).

sylvania, South Carolina, and Texas.[330] Under the settlement, the Multistate Executive Committee was responsible to communicate each state's settlement allocation to GM and such amounts were "in the sole discretion" of the Executive Committee.[331] Of the top ten settlement allocations among the states, eight state AGs were on the Multistate Executive Committee, including Texas, Ohio, Florida, South Carolina, Pennsylvania, Michigan, New Jersey, and Connecticut.[332]

Arizona had participated in the multistate investigation, but decided to "opt out" of the multistate settlement and instead settle separately with GM.[333] Arizona settled with GM for a maximum of $7.28 million, with $6.28 million set aside for affected Arizona consumers and an additional $1 million for the state.[334] The Arizona AG claimed that if Arizona had participated in the multistate settlement, Arizona's allocation would have been approximately $2 million, which is less than thirty percent of the total amount of GM's separate settlement with Arizona.[335] The Arizona settlement also provided consumer compensation of at least $200 per affected consumer.[336] In contrast, the multistate settlement did not provide consumer compensation.[337] Arizona was able to negotiate separately one of the highest amounts

330 Agreed Final Consent Judgment paras. 1.2, 14, *supra* note 329.

331 *See id.* para. 7.1.

332 *See* Texas GM Press Release, *supra* note 328 (allocation of $7.3 million); 2017 Ohio Att'y Gen. Consumer Prot. Ann. Rep. 8 (allocation of $6.2 million); Press Release, Fla. Off. of the Att'y Gen., $120 Million Settlement Reached with General Motors for Defective Ignition Switch (Oct. 19, 2017), https://web.archive.org/web/20171023091118/http://www.myfloridalegal.com/newsrel.nsf/newsreleases/00A5F10BEC4453F2852581BE0057B9B3 (allocation of $6 million); Press Release, S.C. Off. of the Att'y Gen., Attorney General Alan Wilson Reaches $120 Million Settlement with GM over Defective Ignition Switches, (Oct. 20, 2017) http://www.scag.gov/archives/33636 (allocation $5 million); Press Release, Pa. Off. of the Att'y Gen., Attorney General Josh Shapiro Reaches Settlement with General Motors over Defective Ignition Switches (Oct. 19, 2017), https://www.attorneygeneral.gov/taking-action/press-releases/attorney-general-josh-shapiro-reaches-settlement-with-general-motors-over-defective-ignition-switches/ (allocation of $4.7 million); Press Release, Mich. Off. of the Att'y Gen., Schuette: Michigan to Receive More than $4 Million from General Motors over Faulty Ignition Switches (Oct. 19, 2017) [hereinafter Michigan GM Press Release], https://www.michigan.gov/ag/0,4534,7-359—450199—,00.html (allocation of $4.2 million); Press Release, N.J. Off. of the Att'y Gen., Attorney General Porrino: New Jersey to Receive $4.1 Million from Multi-State Settlement with GM over Deadly Defect (Oct. 19, 2017), https://nj.gov/oag/newsreleases17/pr20171019a.html (allocation of $4.1 million); Press Release, Conn. Off. of Att'y Gen., Conn. Joins $120 Million Settlement with General Motors over Defective Ignition Switch (Oct. 19, 2017) https://portal.ct.gov/AG/Press-Releases-Archived/2017-Press-Releases/Conn-Joins-$120M-Settlement-with—General-Motors-over-Defective-Ignition-Switch (allocation $3.2 million).

333 *See* Arizona GM Press Release, *supra* note 72.

334 *See* Consent Decree at 7, 9, Arizona *ex rel.* Brnovich v. Gen. Motors, No. CV2014-014090 (filed in Ariz. Sup. Ct. Mar. 6, 2018).

335 Arizona GM Press Release, *supra* note 72.

336 *Id.*

337 Agreed Final Consent Judgment at 14, *supra* note 329.

that states participating in the multistate settlement received, even though Arizona had considerably fewer affected consumers than other states participating in the multistate action. For example, Arizona had 33,000 affected consumers and negotiated $7.28 million, whereas Michigan had 600,000 affected consumers and received $4.29 million under the multistate settlement.[338]

Other states have opted out of multistate settlements and pursued action alone. For example, Oklahoma was the only state that did not participate in the National Mortgage Settlement. The National Mortgage Settlement arose from mortgage abuses leading up to and during the Great Recession. It included the five largest U.S. mortgage servicers and settled for a total of $29 billion.[339] Oklahoma was the only state to settle separately. Oklahoma claimed that it received additional settlement benefits by settling separately, such as its residents being paid first, that other states did not receive in the multistate settlement.[340]

The question of whether to participate in multistate settlement or opt out and pursue action alone is a critical question for states pursuing recoveries from the opioid epidemic.[341] In light of its devastating effects, the amount of a state's settlement could have a large impact on the state and its affected residents. A multistate group has been investigating several pharmaceuticals companies, but certain states have decided to pursue action alone. For example, Oklahoma pursued Purdue Pharmaceutical in a sepa-

338 Arizona GM Press Release, *supra* note 72; Michigan GM Press Release, *supra* note 332.

339 *See supra* note 20 and accompanying text.

340 Oklahoma was the only state not to join the settlement, choosing to settle separately with the five servicers for $18.6 million. Okla. Off. of the Att'y Gen., *Oklahoma Mortgage Settlement Fact Sheet*, OKLA. DIGITAL PRAIRIE (Feb. 9, 2012), https://digitalprairie.ok.gov/digital/collection/stgovpub/id/136442/rec/2. Oklahoma claims it did not join the federal settlement because the federal settlement

> implement[ed] housing policy through mortgage reduction for homeowners unharmed by deceptive banking practices, and simply not paying their mortgages. . . . The federal government added these features to regulate the industry through litigation instead of legislation. . . . [T]he added features are outside the scope of authority of attorneys general.

Id. The Oklahoma AG claims that the separate settlement "will provide greater compensation at a faster pace than the federal agreement." *Id.*; *see also* Letter from Att'ys Gen. E. Scott Pruitt, Jon Bruning, and Luther Strange to Att'y Gen. Tom Miller (Mar. 16, 2011) (on file with author) (stating concerns that the term sheet for the national mortgage settlement "has morphed into an attempt to establish an overarching regulatory scheme that fundamentally restructures the mortgage loan industry in the United States"); Steve Olafson, *Oklahoma Mortgage Fraud Victims Receive First Settlement Checks*, REUTERS (Oct. 15, 2012), https://www.reuters.com/article/us-usa-oklahoma-mortgage-compensation/oklahoma-mortgage-fraud-victims-receive-first-settlement-checks-idUSBRE89F01Q20121016.

341 *See* Lawson, *supra* note 257 (commenting that it is "rare" for so many states, including states with leadership roles, to have pulled out of the multistate opioid action in favor of pursuing their own actions).

rate action and was the first to settle with Purdue for $270 million.[342] Several other states have opted to bring action independently against pharmaceutical companies that produce opioids.[343]

Stealing is a phenomenon that thrives with little oversight. It encourages settlements that are not based on the harm that has occurred in each state. In prioritizing leadership, states may neglect to even inquire into the amount of harm that has resulted from corporate misconduct. This not only results in undercompensating affected state residents, but also underdeterring future corporate misconduct. Stealing in multistate settlements means that AGs should consider whether opting out may be in the best interest of their states.

IV. Increased Monitoring in Multistate Actions

Agency costs persist when there is a lack of monitoring, and class action squared agency problems are no exception. Reducing class action squared problems, like borrowing and stealing, requires that AGs' clients have greater ability to monitor their behavior in multistate actions. An AG's clients are the state residents and the state as a political entity.[344] Increasing the ability of state residents and the state clients to monitor their AGs reduces agency costs like borrowing and stealing. Increased monitoring can come through increased transparency for voters, legislative oversight, and judicial scrutiny. To be sure, increased oversight in any particular area is not a comprehensive "fix" for agency problems in multistate actions. Rather, considering a combination of reforms to increase accountability through democratic, legislative, and judicial means offers alternatives for reducing agency problems in multistate actions.

A. *Increased Voter Monitoring*

Increased voter monitoring is a means of reducing class action squared problems. Voter monitoring of AG behavior in parens patriae actions is problematic, but it is made even more difficult in the context of multistate actions.[345] For example, voters lack the ability to effectively monitor stealing in multistate actions. Because of the lack of voter monitoring, participating

342 *See* Lenny Bernstein & Katie Zezima, *Purdue Pharma, State of Oklahoma Reach Settlement in Landmark Opioid Lawsuit*, Wash. Post (Mar. 26, 2019), https://www.washingtonpost.com/national/health-science/purdue-pharma-state-of-oklahoma-reach-settlement-in-landmark-opioid-lawsuit/2019/03/26/69aa5cda-4f11-11e9-a3f7-78b7525a8d5f_story.html.

343 *See* Complaint at para. 1, Alabama v. Purdue Pharma, Inc., No. 1:18-op-45236 (filed in M.D. Ala. Feb. 6, 2018); Tina Bellon, *U.S. State Lawsuits Against Purdue Pharma over Opioid Epidemic Mount*, Reuters (May 15, 2018), https://www.reuters.com/article/us-usa-opioids-litigation/u-s-state-lawsuits-against-purdue-pharma-over-opioid-epidemic-mount-idUSKCN1IG2WU.

344 *See* Marshall, *supra* note 29, at 2454, 2462–63.

345 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 514–15 (discussing how AG elections are not an effective means of client monitoring).

AGs are not held accountable for settlement allocations, and they do not have to monitor leading AGs' behavior.

One reason it is difficult for voters to monitor stealing in multistate actions is that the data about settlement allocations are not easily accessible to the public. Multistate settlement documents most often do not disclose the breakdown among all participating states. In order to find out how the settlement is allocated, it is often necessary to consult each state's press release, court filings, or even contact the AG's office. Often press release headlines include the amount of the global settlement, but the state's allocation of the settlement is buried in the body of press release, if that information is provided at all. For voters to be informed about stealing, they would need to compile the settlement amounts for each participating state and compare them to see how their AG performed vis-à-vis other states. Needless to say, this is a time-consuming process that few, if any, voters, would undertake.[346] This makes it difficult for voters to be well-informed about the settlements their AGs enter into, and it also makes it difficult for political challengers to call into question the AG's enforcement history.[347] The AG offices that provide their state voters the most information about settlement allocations are likely to be leading or high population states that are already receiving the highest allocations of the settlement.[348]

The difficulty for voters to monitor settlements may make AGs indifferent to stealing in multistate actions. AGs that participate in multistate actions, but do not lead them, get the benefit of getting a portion of the settlement with little investment of their office's resources. These AGs can leverage reputational gains in settlements by publicizing the larger global settlement amount and then not disclosing the amount that the state actually received or how the settlement allocation compares with other states' allocations. Because participating AGs know it is difficult for their voters to monitor and they are receiving reputational gains at little cost to their offices, AGs may not object to leading states stealing.

Voters would have a greater ability to monitor their AGs' behavior in multistate actions if there were greater transparency about settlements. The democratic process is an important channel to monitor AGs because most of them are democratically elected.[349] AGs are often sensitive to voter opinion because many AGs seek reelection or election to a "higher office."[350] Even though voting is not a good substitute for client monitoring in individual parens patriae actions, voters can monitor overall AG enforcement records through elections. Performance in a series of high-profile multistate actions

346 Just ask my research assistant who spent many hours visiting every AG's website to collect information about settlement allocations. Thanks again to Brandon Bourg.

347 *See* Lemos & Minzner, *supra* note 37, at 875–76.

348 For example, some AGs will provide information in the press release if their state received the highest allocation of the settlement. *See, e.g.*, New York Target Press Release, *supra* note 89; California Target Press Release, *supra* note 89.

349 Provost, *Aspiring Governor*, *supra* note 40, at 599.

350 *Id.* at 597.

creates an enforcement record for which voters are positioned to hold AGs accountable. Increasing transparency about multistate settlements would allow voters to be better informed about their AG's enforcement record.

If voters were informed about their AG's settlement track record, they could better exercise their votes to monitor their AG's behavior in multistate actions. If voters are satisfied with the settlements their AGs are negotiating in multistate actions, they can vote to reelect the AG. But if voters think that their AG is underperforming, perhaps due to class action squared problems, they can vote for another candidate. If AGs know that settlement information will be easily accessible to voters, they may be more likely to object to borrowing and stealing. Furthermore, future political opponents would have access to the information and could give voters more meaningful choices about the direction of future state enforcement.

Increasing transparency in multistate settlements could be relatively simple. Multistate settlements could include a breakdown of the settlement allocations for each state as an appendix to the settlement. Settlements are generally made public, but only a few multistate settlements include a state-by-state breakdown. For example, both the National Mortgage Settlement and Wells Fargo multistate settlements provided an appendix with the settlement breakdowns by state.[351] Including a breakdown in the settlement document would be a low-cost and simple means of providing the information to the public. AGs typically include a copy of the settlement with their press releases on their websites, and this information could easily be disseminated under current practices. If the information was consolidated and publicly available, voters would then have a source of information about each multistate settlement to judge the performance of their AG.

More specifically, increasing the transparency of settlement information would reduce the class action squared problems of borrowing and stealing. For example, in the case of borrowing, if states with strong consumer protection or data privacy laws were routinely receiving small portions of the settlement, and voters were aware of the low settlement amounts, AGs may more strenuously object to settlement allocations based on state population. Rather, AGs may insist that the strength of their laws be taken into consideration when allocating the settlement. AGs may also consider opting out if they have particularly strong causes of action because of the strength of their state laws. AGs may change their behavior about borrowing if their state voters have more information about how the settlement is allocated in relation to the strength of their state laws.

Increased settlement transparency will also decrease stealing because voters would have the ability to better monitor their AGs. AGs may much more closely police stealing if they represent a state where the harm is high, but the settlement is low because their voters will be able to make compari-

351 *See, e.g.*, Consent Judgment at B-1, *supra* note 95. Wells Fargo Settlement Agreement at A1–A3, Pa. Off. of the Att'y Gen., (Dec. 28, 2018), https://www.attorneygeneral.gov/wp-content/uploads/2018/12/Wells-Fargo-Multistate-Settlement-Agreement-12-28-18.pdf.

sons between the states. AGs may be more likely to challenge allocations based on leadership and instead insist that greater attention be focused on the harm that occurred in each state. If states are compensated to a greater degree based on harm, it may be that leadership in multistate actions shifts to states that are the most harmed as opposed to states that have the most resources to expend on leadership. A shift in leadership may mean that corporations will have to pay higher settlements if the leading states are also the most harmed because they may have greater incentive to demand higher settlements. A greater attention to harm in each state would also likely more optimally deter future corporate misconduct. If corporations were forced to pay settlements based on harm experienced in each state, then corporations would better internalize the cost of fraud and be better deterred in the future.

Increased voter monitoring may not be by itself enough to hold AGs accountable in multistate actions. The problem with voter oversight is that voters will not have the opportunity to monitor settlements on an individual basis, but only periodically during an election cycle on an AG's collective enforcement record.[352] That being said, increased transparency still allows voters some ability to incrementally monitor their AGs between elections. If voters have better information about multistate settlements, they can contact their AGs' offices and voice their opinions. Even if voters' opinions could not undo a settlement that was already finalized, AGs could adjust their behavior in the future based on voter feedback. For example, AGs could opt out of future multistate actions or demand a greater portion of a multistate settlement. AGs would be able to get an indication prior to elections of voters' reactions to their participation in multistate actions.

AGs could also consider providing opportunities for notice and comment on multistate settlements. For example, the Federal Trade Commission is required to put its proposed settlements up for notice and comment for a particular amount of time and allow the public to comment on the settlement before the settlement is finalized.[353] In multistate actions, each AG could put a proposed settlement on his or her website, including the amounts of settlement for each state. Notice and comment procedures would give voters greater opportunity to monitor their AGs on an individual settlement basis. It may also inform an AG's decision as to whether to opt out of the multistate settlement.

AGs may be more likely to opt out of multistate actions if their voters have the ability to exercise more oversight. On more high-profile multistate actions, it is more likely that AGs will opt out of multistate action when they have pressure from voters. When the public is monitoring AG behavior more closely, AGs may consider opting out more frequently because the public cares more deeply about settlements in high-profile incidents. Increased transparency about settlements in multistate actions allows voters to hold

352 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 521.

353 *See Federal Register Notices*, FTC, https://www.ftc.gov/policy/federal-register-notices (last visited Sept. 21, 2020).

their AGs more accountable and, thus, reduce agency costs in multistate settlements.

B. Increased Legislative Oversight

Increased legislative oversight would also reduce class action squared problems. In addition to state residents, the AG's client is also the state.[354] Certain state officials and state entities are empowered to act on behalf of the state, including the AG. However, allowing the AG to have the dual role of "speaking for the state" as the principal and representing the state as the agent creates an environment for agency costs to arise. Similarly, in the context of class actions, class counsel has a dual role, simultaneously being the agent representing the class and also being the largest stakeholder in the class, due to her interest in her attorneys' fees.[355]

In order to remedy this problem, the state legislature can step in to act as the "state client" in monitoring AG behavior in multistate actions through its legislative oversight capabilities. Increasing legislative oversight would better ensure that the state's interests were being served in multistate actions. Furthermore, since state legislators are also elected, legislative oversight provides another avenue of democratic accountability.

State legislatures are in a good position to consider the interests of the state. Legislatures have powers to make state law and allocate state budgets. Legislatures also have committees that are structured to provide oversight functions. In many instances, the AG may already be accustomed to appearing before legislative committees to report on issues or lobby the legislature for more funds. While individual voters may not have the time or resources to dig deeply into an AG's enforcement record, the legislature has institutional capacity to consider the AG's performance in enforcement actions. Legislatures may also have a deeper understanding of state laws and the policy trade-offs involved in the making of state law.

Legislatures also have a greater incentive to monitor on behalf of the state than individual voters since the state is a larger recipient of settlement funds than any individual voter. Most settlement funds are directed to the state in one form or another, whether it be to the state treasury or specific state enforcement efforts, or to advance policy objectives.[356] Because state legislatures allocate the state budget and consider state revenue, the legislature may be most motivated to consider the interests of the state in multistate settlements.

There are simple means to have meaningful legislative oversight of AGs in multistate settlements. AGs may file periodic reports that include information about enforcement settlements and state allocations of the settlement. AGs may also be required to testify before committees about their enforcement record as it relates to multistate actions. Legislatures may also consider

354 *See About NAAG*, *supra* note 33.

355 *See* Coffee, *Private Attorney General*, *supra* note 125, at 230–31.

356 *See, e.g.*, *National Mortgage Settlement Summary*, *supra* note 327.

passing legislation to allow AGs to keep a portion of settlements as part of their office budgets to incentivize AGs to maximize the amount they seek for the state.[357]

Increasing legislative oversight would reduce class action squared problems. To the extent that the legislature thinks that the AG is "borrowing" and sidestepping state law, the legislature would have the opportunity to comment on the AG's actions. AGs would also have the opportunity to speak directly to the legislature about strengthening particular state laws based on the AG's experience in multistate actions. Legislatures could also monitor the amount of settlements provided to the state and direct how the settlements are expended by the state. By providing more oversight of settlements and how the funds are directed, AGs may be less likely to be complicit about stealing, knowing that the legislatures will be asking questions about the settlement amounts.

Legislatures may also pass resolutions calling upon AGs to opt out of multistate action as a means to manage class action squared problems. For example, in the context of the multistate investigation concerning the opioid epidemic, the Utah State Legislature passed a resolution calling on the AG to bring action alone, despite the fact that the Utah AG was already participating in the multistate investigation.[358] Specifically, the Utah legislature passed a resolution calling upon the AG to "immediately and publicly commit to directly filing suit against prescription opioid manufacturers, *instead of joining a suit with other plaintiffs*, in order to seek the maximum award for damages from prescription opioid manufacturers for the citizens of the state."[359] Implicit in this resolution was the legislature's assumption that their state residents would receive greater "damages" if Utah acted alone, instead of with other states. This may be because it would prevent "stealing" by leading states in a multistate action. Ultimately the Utah AG acquiesced to the state legislature and brought action alone against Purdue Pharmaceutical.[360] Legislatures can put significant pressure on AGs to monitor their behavior in multistate actions to reduce agency costs.

That being said, problems may arise when there is increased legislative involvement in an AG's enforcement agenda. Legislatures might infringe on enforcement discretion. AGs traditionally have had considerable discretion in enforcement. This discretion is important in allowing AGs to make tradeoffs about how to deploy enforcement resources and advance the state's policy objectives. It also may increase the polarization of enforcement decisions if the majority of the legislature is a different political party than the AG.

357 *See* Lemos & Minzner, *supra* note 37, at 856.

358 Ben Winslow, *Utah's Attorney General Says a Lawsuit over Opioids Is Drafted, But He's Not Filing It Yet*, FOX 13 SALT LAKE CITY (Mar. 23, 2018), https://fox13now.com/2018/03/23/utahs-attorney-general-says-a-lawsuit-over-opioids-is-drafted-but-hes-not-filing-it-yet/.

359 H.J.R. Res. 12, 2018 Gen. Sess. (Utah 2018) (emphasis added).

360 *See Utah Announces Major Lawsuit Against Opioid Manufacturer Purdue Pharma*, UTAH OFF. OF THE ATT'Y GEN., https://attorneygeneral.utah.gov/utah-announces-lawsuit-against-purdue-pharma/ (Jan. 18, 2020).

The legislature could deprive the AG of resources or pass laws restricting the AG's powers based on positions that AGs took in enforcement actions. For example, state legislatures have flexed their muscles with both their legislative power and power of the purse to "rein in" AGs who have taken positions in litigation contrary to the views of the state legislature.[361] Furthermore, many state legislatures only meet for a small part of the year and cannot monitor the AG on a settlement-by-settlement basis. This means that the AG's discretion would be preserved, but it also means that the legislature may not be able to weigh in on a particular settlement until it is too late. These limitations make it likely that other forms of monitoring will need to work in conjunction with legislative oversight to address class action squared problems.

C. *Increased Judicial Scrutiny*

Increased judicial scrutiny is another avenue of reducing class action squared problems. There is currently little, if any, judicial oversight of multistate settlements. Multistate settlements often do not require any judicial approval.[362] When settlements are filed with the court, they are generally perfunctorily approved.[363] Judicial hesitancy to scrutinize multistate settlements may be due to the court's deference to the judgment of an elected representative and assumption that the democratic process will act as a check on inadequate settlements.[364] But as described above, this assumption about voters' ability to act as a check on adequate settlements may be faulty due to the lack of transparency in settlements. The lack of judicial scrutiny is in contrast to class action settlements that require court approval, and where it is assumed that class members lack the ability to monitor class counsel. But if voters do not have the information to act as a check on inadequate settlements, then the judiciary may need to take a stronger role in approving multistate settlements.

Unlike voter or legislative oversight, judicial oversight can monitor settlements on a settlement-by-settlement basis. Courts are institutionally experienced in considering and approving settlements and have expertise in

361 *See* Molly Beck & Patrick Marley, *Republican-Controlled Wisconsin Legislature Clears Measures Weakening Incoming Democratic Governor, Attorney General*, USA TODAY (Dec. 5, 2018), https://www.usatoday.com/story/news/politics/2018/12/05/wisconsin-gop-scale-back-democratic-power/2212625002/; Jonathan Oosting & Beth LeBlanc, *GOP Moves to Dilute Power of Governor, AG, Secretary of State*, DETROIT NEWS (Dec. 5, 2018), https://www.detroitnews.com/story/news/local/michigan/2018/11/29/bill-would-allow-legislators-intercede-any-court-case-involving-state/2150818002/. Legislatures have also expanded AGs' powers to allow them to circumvent the governor to bring litigation on behalf of the state. *See* Associated Press, *Maryland Lawmakers Expand Attorney General's Powers, Cite Trump Concerns*, WALL ST. J. (Feb. 16, 2017), https://www.wsj.com/articles/maryland-lawmakers-expand-attorney-generals-powers-cite-trump-concerns-1487214202.

362 *See* Cox, *supra* note 14, 2355.

363 *See id.*

364 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 510.

analyzing legal actions and the trade-offs made in litigation and settlement. For example, judicial scrutiny has been used to address agency costs in the context of class actions. Courts have applied scrutiny at class certification and settlement approval to align the interests of class counsel with the class.[365] This judicial oversight holds counsel accountable to the court for the settlements that they negotiate on behalf of the class.

While procedures exist for judicial scrutiny in class actions, similar procedures do not exist in the context of AG actions. Courts do not vet AGs for adequate representation and only in some contexts are AG settlements subject to court approval. Courts could use the same procedural mechanisms in Rule 23 to increase judicial monitoring in AG actions, and in particular multistate actions.[366] But the concept of adequate representation is illusive, particularly in the context of public representation. Even in the class action context, where courts have long been required to consider the adequacy of representation, the concept is undertheorized, and class action scholars disagree over what it means and how best to achieve it.[367]

It is even more difficult to make assessments about the adequacy of an elected AG. For example, courts could scrutinize the adequacy of an AG's representation at the outset of an action, including making a searching review of her experience, knowledge, and office resources.[368] Courts, however, are hesitant to question the adequacy of public representation, instead preferring to assume adequate representation in the public context.[369] This assumption protects courts from the awkward position of potentially declaring the AG inadequate when she has been elected by the people, especially since the court is not empowered to appoint another lawyer to take the AG's stead.

In the context of multistate actions, courts could evaluate whether an AG leading a multistate action "fairly and adequately" represented the class

365 *See supra* subsection I.B.1.

366 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 546 (noting judicial inquiry into the adequacy of representation "is to ensure the attorney general's 'loyalty' to the members of the *parens patriae* group").

367 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 543 ("The concept of adequate representation is undertheorized even in the class action context, and class action scholars disagree over just what adequate representation means and how best to secure it."); David Marcus, *Making Adequacy More Adequate*, 88 Tex. L. Rev. See Also 137, 138 (2009) ("Given its importance, it is remarkable that the adequacy concept has little doctrinal or theoretical coherence."); Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 Tex. L. Rev. 1137, 1137–38 (2009) ("Despite the allure of the principle, we have very little sense of what adequate representation means, how we can measure it, or how we can guarantee it.").

368 *See* Lemos, *Aggregate Litigation*, *supra* note 9, at 542–43 ("Rather than assuming that public representation is always constitutionally adequate, courts could undertake a meaningful inquiry into whether the attorney general has both the resources and the incentives to pursue the relevant claims vigorously.").

369 *See id.* at 543 ("The key reform is that courts would abandon the simplistic view that the attorney general's status as an elected representative of the state's citizens automatically translates into adequate representative of a subgroup of citizens in an adjudicative context.").

of states participating in a multistate action. Courts could consider what leading AGs did in pursuing the investigation and negotiating the settlement. But again, that puts the court in the difficult position of coming between voters and their elected AG. Courts would be hard pressed to declare an elected AG inadequate. Further, it is unlikely the court has the ability to appoint another AG to lead multistate action. Overall, courts are in a poor position to evaluate the adequacy of representation by AGs on either layer of "class action" in multistate actions.

Another avenue to increase judicial monitoring is for courts to more closely scrutinize settlements negotiated by AGs. Like their class action counterparts, multistate actions against corporate defendants are almost always settled.[370] Some multistate settlements already require court approval.[371] Courts could consider the presence of agency problems in evaluating multistate settlements, such as whether leading states are stealing from participating states or whether borrowing is occurring. Courts could also make inquiries about the strength of the state law or the number of injured state residents that may make AGs consider those factors at the outset of settlement. Increased judicial scrutiny could monitor AGs' behavior during the negotiation of a settlement and thus reduce agency costs in multistate actions.

Increased judicial scrutiny of settlements is more palatable than courts directly evaluating the adequacy of AG representation. However, reforms that require enhanced judicial scrutiny of multistate settlements are also problematic. In the class action context, it has been recognized that judicial oversight "of the settlement's adequacy has proved to be a weak reed on which to rely."[372] And courts have been criticized for their approval of no recovery and coupon settlements as "fair, reasonable, and adequate."[373] Courts may favor settlements for judicial economy, and requiring courts to be more searching of settlements, especially when they cannot rely on the adversarial process to challenge the settlement, may be a tall order. Furthermore, not all multistate settlements require court approval. If courts did provide additional scrutiny of multistate settlements, the parties could evade such review by structuring their settlements like private parties as to not require court approval.[374] Courts reviewing multistate settlements would be

370 *Id.* at 498.

371 Cox, *supra* note 14, at 2378 ("Some enforcement actions face review by a court; others do not."). Examples of multistate settlements that require court approval are consent decrees and Assurances of Discontinuance (AODs) in states that require such court approval. Examples of multistate settlements that were consent decrees include the Master Settlement Agreement with tobacco manufacturers, and an example of a settlement of AOD includes the Target data breach multistate settlement. *See supra* notes 19, 87.

372 *See* Coffee, *Private Attorney General*, *supra* note 125, at 237.

373 *See* Hillary A. Sale, *Judges Who Settle*, 89 WASH. U. L. REV. 377, 391 (2011); *supra* note 6 and accompanying text (providing an example of coupon settlements).

374 For example, multistate actions can settle pursuant to prelitigation settlement agreements or seek voluntary dismissal under Federal Rule of Civil Procedure 41(a)(1)(A)(ii). *See* FED. R. CIV. P. 41(a)(1)(A)(ii); Cox, *supra* note 14, at 2355. For exam-

called upon to second guess the policy choices and trade-offs of elected AGs.[375]

Nevertheless, judicial scrutiny could be an important part of an overall series of reforms to reduce agency costs. Judicial oversight has the benefit of providing oversight of individual settlements, while other forms of monitoring would likely consider settlements in the aggregate. If AGs knew that they faced enhanced judicial scrutiny at the time of settlement, it would change their behavior in negotiating the settlement. AGs would do greater factfinding to satisfy the judge that the settlement was "fair, reasonable, and adequate" on behalf of the state and its residents, while they currently aren't required to take those factors into consideration.[376] Furthermore, enhanced judicial scrutiny would also increase transparency about settlement allocations because presumably settlements would be the subject of public court filings and hearings. While increased judicial scrutiny may not by itself be enough to monitor AGs in multistate settlements, judicial oversight could be one of many reforms, including increased voter monitoring and legislative oversight, to reduce class action squared problems.

Conclusion

With the increasing trend of multistate action and decline of the class action comes the opportunity to assess the potential for agency costs in multistate actions. Multistate actions are a form of class action squared because they share similarities with class actions on two distinct levels. Class action squared brings with it an entirely new set of agency problems such as borrowing and stealing, that could not occur if AGs brought action alone. Increased voter monitoring, legislative oversight, and judicial scrutiny are potential reforms to address these unique class action squared problems.

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ple, multistate settlements may occur as settlement agreements prior to litigation, such as settlements of multistate actions with the RMBS Working Group. *See, e.g.*, Dishman, *supra* note 35, at 468–69. The S&P multistate settlement prompted a voluntary dismissal of the litigation that did not require court approval. *See* Joint Stipulation for Dismissal of Action Pursuant to Federal Rule of Civil Procedure 41(a)(1)(A)(ii), United States v. McGraw Hill Co., No. 2:13-cv-00779 (filed in C.D. Cal. Feb. 4, 2015).

375 *See* Coffee, *Class Action Accountability*, *supra* note 7 at 438 ("Although many reforms are possible and could succeed, only one is sure to fail: reliance on trial court scrutiny of the settlement."); Lemos, *Aggregate Litigation*, *supra* note 9, at 543 ("[I]t puts courts in the unenviable position of second-guessing the attorney general's choices with respect to policy tradeoffs and other matters in which judges are unlikely to be expert.").

376 Fed. R. Civ. P. 23(e)(2).