abstract. class action lawyers do not merely represent clients, they also make law, an observation explored by kobayashi and ribstein in “class action lawyers as lawmakers.” kobayashi and ribstein observe that a class action lawyer’s inability to internalize all the benefits of her innovation may lead to underinvestment in lawmaking, which they describe as a public good. but privileged groups may produce public goods, and where production of the good also enhances the probability that a supplier of the good will be compensated for her production, as may be the case in the selection of counsel in class action suits, there can even be overproduction. moreover, if there is underinvestment in class action lawmaking, a more general, and potentially greater, cause is inherent in every contingent-fee lawyer-client relationship, namely that the lawyer bears the full cost of litigation but must share the benefits, if any, with the client.
Introduction

Class action lawsuits are complicated enterprises driven by plaintiff lawyers whose work product can serve as a basis for de facto lawmaking in the litigation for which the work is prepared and in future, similar cases. This is an observation made in an important article, Class Action Lawyers as Lawmakers, written by Bruce Kobyashi and the late (and great) Larry Ribstein.¹

As Kobayashi and Ribstein explain, “[j]udges and legislators alone may lack adequate incentives to engage in efficient lawmaking.”² The authors note that, by contrast, private lawyers “are the primary consumers of law and accordingly have a significant stake in the content of legal rules.”³ Nevertheless, Kobayashi and Ribstein observe, the lawyers’ incentives are imperfect. “The problem is that law is a public good, so that lawyers face a significant free-rider problem in investing time and other resources in law-creation.”⁴

The free-rider problem that Kobayashi and Ribstein identify is, in their view, particularly acute in the case of class action lawsuits. Class action complaints, Kobayashi and Ribstein note, require “extensive development of facts and legal theories” and class action pleadings, therefore, “can play an important role in setting the stage both for the trial and for any ultimate appeal,” where courts may adopt in whole or in part the lawyers’ proposed findings and conclusions, an event the authors believe is particularly likely in a class action suit, given the inherent

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² Id. at 734.
³ Id.
⁴ Id.
complexity and amount that is frequently at stake.\textsuperscript{5} “Even if such cases settle quickly, these complaints can develop facts and legal theories that can be used in subsequent cases [and thus] have significant lawmaking potential.” Despite the importance of these pleadings, and despite the remuneration available to lead counsel in a class action suit, Kobayashi and Ribstein conclude that “lawyers creating class action complaints may invest a socially suboptimal amount of resources because they do not internalize all of the pleadings’ potential lawmaking benefits.”\textsuperscript{6}

Although Kobayashi and Ribstein recognize that the problem they identify is present in any private litigation, where future litigants “are free to use any publicly disclosed facts, litigation documents or precedents,”\textsuperscript{7} they see a special impediment to optimal lawmaking in class action suits, particularly securities law suits:

In a class action, the complaint-drafter may be unable to capitalize on his efforts even in the current case. Plaintiffs’ lawyers often prepare class action complaints in effect “on spec,” without knowing who the court will ultimately select as counsel for the class. Once an initial or early complaint has been filed, other lawyers might copy and file it on behalf of other plaintiffs. This problem is exacerbated in federal securities fraud class actions governed by the Private Securities Litigation Reform Act (“PSLRA”), which requires filing a public notice upon the initial filing of a claim. One of these copycat lawyers might then be appointed lead counsel [and would then earn the class attorney’s fees]. This potential for appropriation of work product

\textsuperscript{5} Id. at 735.
\textsuperscript{6} Id. at 736.
\textsuperscript{7} Id.
further dilutes the lawyer’s incentives in preparing the complaint when compared to a lawyer who, prior to drafting the complaint, has negotiated with the client to receive compensation.\(^8\) (Emphasis added.)

The authors conclude that “the effect of this incentive problem may be underdevelopment of legal theories through case law as compared to a system in which the parties fully internalized the lawmaking benefits of class action pleadings.”\(^9\) (There is in this conclusion a standard assumption, which I also adopt throughout, that the client lacks the knowledge or ability to dictate the lawyers’ work product.) To the incentive problem, Kobayashi and Ribstein propose a solution. After considering, and rejecting, in part out of due process concerns, the grant of an intellectual property interest to the drafter of the initially filed class action complaint, Kobayashi and Ribstein propose instead that the drafter be granted a share of the attorneys’ fees should some other firm be selected as lead counsel. This would not be a perfect solution, the authors understand, but would, in their view, be a step in the right direction.

My goal here is not to quibble with the determination by Kobayashi and Ribstein that shared attorneys’ fees would mitigate an underinvestment in class-action pleadings, assuming that there is such underinvestment. Rather, I suggest that the possibility that there is no such underinvestment, and thus no consequent public goods problem. And I want to suggest that even if class action lawsuits give rise to a public goods problem with regard to the creation of law, that problem may

\(^8\) Id.

\(^9\) Id.
well be dwarfed by another agency cost generated not by the relationship between the public and the plaintiffs’ lawyers but by the relationship between the plaintiffs and the plaintiffs’ lawyers. Part I below offers an explanation of why the public goods problem that Kobyashi and Ribstein identify may not exist: primarily because there may be competition among plaintiffs lawyers for a lucrative appointment as class action lead counsel. Part II discusses, briefly, the agency cost generated by the narrow relationship between lawyer and client as contrasted with the cost generated by the broader relationship between the lawyer and society.

I. Public Goods and Privileged Groups

A classic public goods problem exists when one bears the cost, but garners only some of the benefit from production. Under some assumptions, Kobayashi and Ribstein describe a classic goods problem. Imagine, for example, that a lawyer who considers an investment in a class action pleading anticipates that the pleading would be copied entirely and costlessly by an arbitrarily large number of competitors who would then, along with the drafter, have the same (arbitrarily small) chance of ultimate appointment in the case. Were these the circumstances, no lawyer would not invest in the preparation of a complaint and the case would not be brought, even if meritorious.

Costless copying and free entry are not necessarily accurate assumptions, however. Imagine, for simplicity, that that there are only two law firms capable of competing for a class action suit and that one of them cannot cost effectively draft
(but can copy) a viable complaint, while the other possesses the ability to draft such a complaint.\textsuperscript{10}

Assume that the drafting cost to the more capable firm is $500,000 and that an award of the case to either firm would earn it an 80% chance of success (in judicial determination or settlement) and a contingent fee equal to 30% of a $12.5 million award. (Assume, again for simplicity, that a law firm awarded the case incurs no cost after the pleading is drafted.) That is, assume that, drafting cost aside, appointment as plaintiff’s counsel in the class action lawsuit is worth an expected $3 million to a law firm.\textsuperscript{11} And assume, for simplicity, that nothing but the content of a complaint affects the probability that a firm will be selected as lead counsel.\textsuperscript{12}

Under these assumptions, the firm capable of drafting competent pleadings on its own would have reason to invest in such pleadings even if the other firm would, by copying the filed complaint, have an equal chance of assignment as the

\textsuperscript{10} A simpler version of this illustration would have one firm with an opportunity to draft and submit a complaint while another firm could choose either to copy that complaint or draft a superior one at greater expense. The more complicated and perhaps more contrived assumptions made for the purposes of this illustration are designed to avoidance of a caveat to the prediction that a privileged group will produce a public good. The caveat is that when multiple members of the group would privately benefit from production, there is a possibility that each will refrain in hope that one of the others will not. This problem, recognized in the standard account, see Olson (1965), is beyond the scope of this discussion, which does not, in any case, include an assertion that the conditions are always present for the provision of socially desirable legal pleadings.

\textsuperscript{11} Here and hereafter, whenever an expected value calculation is made it is assumed that all relevant parties are risk neutral.

\textsuperscript{12} In fact, an incompetent firm incapable of original drafting would not likely have an equal chance at appointment as lead counsel, as even an imperfectly informed court might screen such a firm in the selection process. Cf. Kobayashi & Ribstein (2007) (describing the screening of incompetent counsel as a purpose of the PSLRA). And it is unlikely, of course, that such a firm, once appointed, would have the same prospects for victory as the competent firm. But these are simplifying assumptions that motivate the free-rider problem at issue, and are thus conservative as used here. See also note 17 below.
class action’s lead counsel. Specifically, the more capable drafting firm would expect from drafting a complaint: $0.5(0.8(0.3(12.5 \text{ million}))) - 0.5 \text{ million} = 1 \text{ million}.

This result is, of course, inconsistent with a market driven by robust competition. And the discussion here is a mere thought experiment, not an empirical analysis of the class action lawsuit industry.\textsuperscript{13} Still, that competition might not drive all profit from appointment as class action lead counsel does not seem an unduly strong assumption particularly given the oft reported extraordinary, perhaps criminal, measures some law firms take to garner such appointment.\textsuperscript{14}

The story of the more capable law firm in this illustration, preserving despite victimization by a free rider, is not a novel one. Long ago, Mancur Olson described a “privileged” group as one that includes at least one member in whose private interest it is to provide a public good for the group.\textsuperscript{15} In the above illustration, the more capable drafting law firm has such a private interest and the class action complaint will be filed.

This said, it is not the case that the production of class action complaint implies the production of a sufficient class action complaint. The above illustration implicitly assumes that the characteristics of a complaint are fixed, but that assumption importantly deviates from reality. Indeed, Kobayashi and Ribstein do not deny that a class action complaint will be filed; they contend only that the

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\textsuperscript{13} Beyond the simplifying assumptions used here for the sake of illustration, the competition among lawyers for appointment as lead counsel in a class action lawsuit is beyond the scope of this essay. For an analysis of such competition, see, e.g., Fisch (2003); see also, e.g., Kobayashi & Ribstein (2007).

\textsuperscript{14} See, e.g., Kobayashi & Ribstein (2007) (describing, though criticizing, a criminal case against a leading class action plaintiffs’ law firm).

\textsuperscript{15} See Olson (1965).
lawmaking qualities of such complaints will be socially suboptimal. Just as the member of a privileged group might build only a rickety bridge over a river if the builder cannot exclude others without charge, the drafters of a class action complaint might not gather every relevant fact or refine every legal argument if the drafter cannot be exclude other lawyers from benefit without charge.

Whether there will be underinvestment in the quantity or quality of a public good, here pleadings, as compared to the socially optimal amount—known as a Lindahl Equilibrium—may depend on whether the distribution of costs and benefits of or from production of the good is continuous or discontinuous. If such distributions are continuous, then some underproduction may be expected because in equilibrium the marginal private benefit of the good from the next dollar spent to produce the good will be less than the marginal social benefit. If there are discontinuities, however, the equilibrium even in the production of a public good may be socially optimal. This would be so if a producer who internalized the benefits of a public good’s production would choose not to invest more than a producer who did not because an increased investment would yield no increased benefit, to anyone, at the margin.

Imagine a merchant who replaces a bulb in a public fixture and illuminates not only her own shop, but those of her neighbors. Having purchased and installed the bulb, a modest further expenditure would shed no additional light. The merchant might erect a second lamppost, but the cost of doing so could well exceed the benefit to her and her neighbors combined.
The production of a class action complaint is unlikely to resemble the installation of a light bulb. Every dollar invested in the development of a lawsuit may improve the quality and value of class action pleadings. And so Kobayashi and Ribstein may be correct that free-riding on class action complaints yields insufficient class action lawmaking, this despite the prospect that the plaintiffs’ lawyers compose a privileged group. But Kobayashi and Ribstein are not necessarily correct. Indeed, under certain conditions, class action lawyers might overinvest in lawmaking.

The theoretical possibility that class action plaintiffs’ lawyers might not underinvest, and might overinvest, in their pleadings, despite free-riding, turns on the possibility that investment in a complaint can do double work for the lawyers. Investment in a complaint might enhance both the prospect of the lawsuit’s success (and thus its lawmaking function) and the prospect that the drafting lawyer will be appointed lead counsel.

In the illustration above, it was assumed that a law firm copying a class action complaint could do so costlessly and in the process achieve equal footing with the drafting firm in the likelihood of appointment as lead counsel. This was a simplifying assumption, and perhaps a strong one. It might be more realistic to assume that mere copying is not entirely effective and that the copying law firm must, despite copying, make a significant expenditure in drafting its own pleadings. Assume now, therefore, that copying merely reduces the cost of drafting, say by 20% (though there is nothing special about this particular level of reduction). For convenience, assume as above that there are two law firms in competition to be
appointed lead counsel and that one is uniquely positioned to file an initial complaint on spec; that is, assume that one firm has the capability to do original, cost effective drafting while the other does not, but can in a cost effective manner copy the core of another firm’s complaint, then supplement with its own material.

Now imagine that each law firm must choose one of three levels of investment if it is to file a complaint with the court: a low investment, of $250,000 for the initial drafting lawyer, of $200,000 for the copying lawyer; will produce a Low Quality Complaint; a moderate investment of $500,000 for the initial drafting lawyer, of $400,000 for the copying lawyer, will produce a Moderate Quality Complaint; and a high investment, of $750,000 for the initial drafting lawyer, of $600,000 for the copying lawyer, will produce a High Quality Complaint. (As noted above, actual investment and quality levels are likely to be continuous, but for current purposes nothing turns on the simplifying assumption that the possible investment levels are discrete.) In addition, for simplicity, assume that if the copying lawyer can copy a complaint of any quality level, he can then file a complaint, at lower cost than his rival, of any quality level, even a higher level than the complaint copied; that is, imagine that the copying lawyer’s savings, including savings that permit him to file at all, come from copying the core of a complaint, which is assumed to be common among the quality levels.¹⁶

¹⁶ A richer illustration could allow unlimited variation of the drafters’ costs of initial drafting or copying at various or continuous quality levels and could permit multiple lawyers, rather than just one, to file an initial complaint. The simplifying assumptions used here are intended to provide simple exposition, without loss of generality, and to overcome a possible impediment to the production of any complaint, given its nature as a public good, even in a privileged group, an impediment described in note Error! Bookmark not defined. None of these assumptions are critical to the arguments made here at least because it is not contended that such production will occur in all events.
Assume also that a higher quality complaint has a higher probability of success against the defendant, but that that there is a diminishing marginal return to the quality of a complaint. Specifically, assume that while if there is no investment in a complaint, and thus no complaint, there is no chance of success, the probability of success is 60% for a Low Quality Complaint, 80% for a Moderate Quality Complaint, and to 85% for a High Quality Complaint. (It is assumed, for simplicity, that the less capable drafting lawyer, the one who can file a complaint only after copying, is at no disadvantage in the litigation once appointed as compared to the more capable drafter.)

Initially, let’s establish a benchmark for the investment an initial drafting capable law firm would make in a class action complaint were there no competition for the appointment as lead counsel. To do this, start with the same assumption as used in the prior illustration, that success against the defendant (by judicial decree or settlement) yields a contingent fee equal to 30% of a $12.5 million award. (Assume, again for simplicity, that the plaintiffs’ lawyer incurs no cost after a pleading is drafted.) Thus, a Low Quality Complaint would yield the plaintiffs’ lawyer an expected return of $0.6(0.3($12.5 million)) - $0.25 million = $2 million; a Moderate Quality Complaint would yield the plaintiffs’ lawyer an expected return of 0.8(0.3($12.5 million)) - $0.5 million = $2.5 million; a High Quality Complaint would yield the plaintiffs’ lawyer an expected return of 0.85(0.3($12.5 million)) - $0.75 million = $2.44 million. So, absent competition, a plaintiffs’ lawyer would choose a moderate investment in a complaint, and thus in lawmaking.
Now let’s introduce competition for appointment as class action lead counsel and let’s assume that the investment in a complaint affects not only the probability of success against the defendant but also the probability that a lawyer is to be selected by the court as lead counsel. Assume that competing complaints at the same level of quality have an equal probability of yielding an appointment. Assume also that a higher quality complaint gives a lawyer a better chance of appointment, but not a certainty of appointment (because, let’s assume, courts imperfectly distinguish complaints); and assume that the advantage in probability of appointment, like the advantage in probability of success against the defendant given appointment, diminishes for any fixed differential as the quality of the competing complaints increases. Specifically, assume that while a Moderate Quality Complaint has a 90% chance of selection over a Low Quality Complaint, a High Quality Complaint has only an 80% chance of selection over a Moderate Quality Complaint. For completeness, assume that a High Quality Complaint has a 98% chance of selection over a Low Quality Complaint (and assume that any complaint is certain to yield appointment if it competes with no complaint).\footnote{The assumption that the quality of a complaint affects the probability that a lawyer is awarded a case is a key assumption for the argument made here. At the roundtable discussion referenced in the initial footnote above, Robert Bone questioned the extent to which this assumption is sound. I have no empirical basis to support this assumption, which I simply take as implied by the Kobayashi and Ribstein article on which this paper is based. Kobayashi and Ribstein are concerned that the copying of complaints is a form of freeriding in the contest for appointment of lead counsel. If the quality of the complaint were irrelevant to this contest, copying the complaint would serve no purpose. In any case, the assumption here is that the quality of a complaint matters, not that such quality alone matters. The process of observing the highest quality complaint is described above as “imperfect;” such imperfection can be viewed to encompass the relevance of factors other than the quality of a complaint. See also note 12 above.}

Next consider what level of investment will be adopted by the competing lawyers. If the lawyer able to draft without copying files a High Quality Complaint,
she can expect the copying lawyer do the same. To see why, consider the copying (and thus lower cost) lawyer’s expected payoff if each lawyer files a High Quality Complaint and thus has an equal likelihood of appointment as lead counsel. The lawsuit would, given the quality of the complaint, have an 85% chance of success against the defendant regardless of which lawyer was appointed, so the copying lawyer’s expected payoff would be: 

\[ 0.5(0.85(0.3(\$12.5 \text{ million}))) - 0.6 \text{ million} = \$1 \text{ million}. \]

If the copying lawyer instead filed a Moderate Quality Complaint, his expected payoff, given his much lower likelihood of appointment and lower probability of success against the defendant if appointed, would be only: 

\[ 0.2(0.8 (0.3(\$12.5 \text{ million}))) - 0.4 \text{ million} = \$0.2 \text{ million}. \]

And if the copying lawyer filed a Low Quality Complaint, his expected payoff, given his miniscule likelihood of appointment and lower probability of success against the defendant given appointment, would be: 

\[ 0.02(0.6 (0.3(\$12.5 \text{ million}))) - 0.2 \text{ million} = \text{negative \$0.16 million}. \]

Thus, given, the first-moving lawyer’s decision to invest in a High Quality Complaint, the only equilibrium is for each lawyer to do so.

The question remains whether the more capable lawyer would choose to file no complaint, a Low Quality Complaint, or a Moderate Quality Complaint. The answer is no.

Where the more capable, first-moving lawyer files a High Quality Complaint, her expected payoff, given, as just shown, that the copying lawyer will also file such a complaint, is \$850,000; i.e., \$150,000 less than the \$1 million expected payoff to

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\(^{18}\) An implicit assumption of this calculation is that despite a court’s presumably erroneous appointment of the lawyer who drafted a lower quality complaint, the litigation process would ultimately treat the complaint as one of lower quality. Nothing turns on this simplifying assumption.
the copying lawyer, described just above, a difference that reflects the difference between the cost of an originally drafted High Quality Complaint and a copied one. If the more capable lawyer instead filed a Moderate Quality Complaint, the copying lawyer would choose a High Quality Complaint and an expected payoff of $0.8\times0.85(0.3(12.5\text{ million})) - 0.6\text{ million} = 1.95\text{ million}, rather than a Moderate Quality Complaint and an expected payoff of $0.5\times0.8(0.3(12.5\text{ million})) - 0.4\text{ million} = 1.1\text{ million}. And the copying lawyer would choose a High Quality complaint and the expected payoff of $1.95\text{ million} over a Low Quality Complaint and an expected payoff of $0.2\text{ million} = 0.025\text{ million}. Thus, if the more capable lawyer filed a Moderate Quality Complaint, it would expect to face off against the copying Lawyer’s High Quality Complaint and would expect a return of $100,000, or $100,000 less than the expected return of the copying lawyer who filed a Moderate Quality Complaint against the more capable lawyer’s High Quality Complaint, a difference that, again, reflects the difference in drafting costs without and with copying. Thus, the first-moving lawyer would choose a High Quality Complaint over a Moderate Quality Complaint.

A similar numerical analysis of this illustration would reveal that the more capable drafting, first-moving lawyer would choose a High Quality Complaint over a Low Quality Complaint as well. The reason should be straightforward by now even without further recitation of the numbers. Given a substantial reduction in the likelihood of appointment when a lawyer files a complaint of a lower quality than her opponent, each lawyer has an incentive to file a higher quality complaint than she would were she not to risk losing the appointment. In this illustration,
means that both the first-moving lawyer and the copying lawyer will invest in and file a High Quality Complaint even though a capable drafting lawyer who faced no competition would invest in and file only a Moderate Quality Complaint.

In this simple illustration, the lawyers are mutually driven to the highest quality complaint possible. This is an artifact of the illustration’s simplicity. If an increasing number of quality levels were added, the diminishing increase in the probability of appointment given a fixed quality differential, already part of the illustration, would eventually limit the quality of the filed complaints in equilibrium to a level below the maximum. Even an arms race has a finish line. Nonetheless, the illustration suggests a possibility that the competition of lawyers for appointment as class action lead counsel may, under some assumptions, yield an investment in pleadings that exceeds the investment a lawyer would make absent such competition.

An implication of this observation is that the lead-counsel contest Kobayashi and Ribstein decry as a source of underinvestment in class action pleadings, and thus in lawmaking, may also be a source of overinvestment in those pleadings and, and thus in lawmaking. It is not clear which effect will dominate. In this regard, it is worth noting that in the illustration just above, just the first-moving lawyer’s investment in her complaint exceeded the benchmark investment for a lawyer who did not need to compete for an appointment; the investment of the two lawyers combined was that much higher. Thus, it is possible that competition for appointment may yield more investment in lawmaking, even by just the lead counsel, not less, even if there is some free-riding on filed pleadings and even if the
quality of those pleadings vary. Moreover, while the above results are undoubtedly driven by the values chosen for the illustration, the numbers chosen do not seem implausible, at least not as relative to one another.

In general, the illustration is more robust than the simplifying assumptions might make it seem. For instance, the assumption that one law firm must file first, and that only two law plaintiffs’ law firms exist in the marketplace can be relaxed without significant alteration of the results. To be sure, when these assumptions are relaxed, there may be a case where no law firm files a complaint in the hope that another will, and, as already noted, if there is enough competition for an appointment free-riding could eliminate the possibility that any firm would file a complaint. The claim here is not that competition will invariably yield greater investment in pleadings than the no-competition benchmark; the claim is that it might, at least in principle.

This is not to say that investment in pleadings beyond the no-competition benchmark is necessarily overinvestment from a social welfare perspective. The focus here has been on how the competition for lead counsel appointment influences the investment in a particular case, and the described effects of copying have been limited to the appointments contest. But as Kobayashi and Ribstein observe, and as noted above in the introduction to this essay, copying can lead to free-rider problems not only within a lawsuit but between law suits. So any net overinvestment in pleadings as compared to the benchmark investment of a lawyer

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19 See notes Error! Bookmark not defined. and 16.
who faced no competition might usefully mitigate the underinvestment inherent in that benchmark.

Moreover, true socially optimal investment in a class action complaint depends on a number factors such as the accuracy of the litigation process, the relationship between the size of an award (or settlement) to be won and the harm done by the defendant, the probability that a defendant’s transgression will be detected, and the prospect of alternative means of achieving a defendant's compliance with a social directive, means such as regulation. And these may only be some among many other considerations.

So it is not easy to say whether competition among lawyers, including the copying of work product, yields too much or too little investment and lawmaking. Suffice it to say, that the matter may be more complicated than a conclusion of underinvestment based on the mere observation that free-riding occurs.

II. **Lawyers and Agency Cost**

To further explore class action lawyers’ lawmaking as a public good, assume for the sake of argument, as may well be the case, that free-riding on class action pleadings, and perhaps on plaintiffs’ lawyers activities more generally, yields underinvestment in those pleadings and thus in class action lawyers’ lawmaking. That is, despite the arguments made in the prior section, let’s accept as a premise the conclusions of Kobayashi and Ribstein. But now, let’s re-imagine the nature of lawyers’ lawmaking as a public good.
Free-riding and the consequent underproduction of public goods can be characterized as little more than simple agency cost writ large. A public good is underproduced because the supplier of the good—the agent—bears the cost of production but does not internalize the benefits to society as a whole—the principal. If the principal could somehow make the agent more faithful, production of the public good (whether a roadway or law) could be made socially optimal. Specifically in the case of lawyers as lawmakers, the class action lawsuit may, as noted, present an example of a public good, where the agent-supplier, the lawyer, underserves her principal, the public at large.

A re-characterization of lawyers' insufficient production of law as a simple agency cost does not, of course, detract from the point that there may be a cost. But a plausible reaction to the observation that lawyers' lawmaking suffers from an agency cost is to shrug. This is so because there is a more prominent principal than society that the agent-lawyer may well underserve, her own client. Putting entirely to one side the class action lawsuit as lawmaking (at least putting to one side the suit as lawmaking beyond the case), one might have a significant concern about shirking or other misbehavior at the client's expense by the contingent-fee lawyer, who bears the cost of litigation but shares with the client any return. This narrower agency cost, driven by lawyers who may receive (or may be permitted to receive) only a small fraction of a lawsuit's total recovery, may well dwarf any cost from the underproduction of more general lawmaking; the result may well be defendants who proceed with too much freedom from the consequences of the harms they cause. (To be sure, in a class action, where the client may be a significant swath of
society, one might consider service to the client as service to society, but then to
describe a lawyers’ inadequate representation as the underproduction of
lawmaking, rather than merely disservice to a client, gilds the lily.)

Where the important cause of underinvestment in class action suits is simply
discrepancy between who bears the costs and who reaps the benefits of the suit,
then the best solution may be to address that discrepancy directly. Mitch Polinsky
and Dan Rubinfeld have proposed, for example, that a class action fund be
established (and paid for by the class action lawyers) through which the lawyers
could be reimbursed for some of their costs so that the percentage of the litigation
expense they bear is the same as the percentage of the recovery they receive when a
lawsuit prevails.20 Such an approach might do more good than a rule that protected
a lawyer’s work product from subsequent, uncompensated use by other lawyers.

In an important sense, this observation cannot be fairly characterized as a
criticism of Kobayashi and Ribstein. They do not overlook the significance of lawyer-
client agency cost. Rather they have another objective in mind, another topic to
discuss. Still, there is here, I think, an analog in the intense media coverage not long
ago of the fact that dolphins were sometimes trapped and killed in tuna nets
dragged behind boats; the purpose of the nets were to catch a maximum quantity of
fish. With all the attention on the dolphins, one wondered why, other than a bias for
the more exotic creature, no one seemed to care about all the tuna caught and killed
in the same nets. This section, then, is a reminder to remember the tuna.

Conclusion

The characterization of class action lawsuits as an exercise in lawyers’ lawmaking is interesting and useful. But underinvestment in such lawmaking as a result of free-riding among plaintiffs’ lawyers may not be the entire story. At least where competition does not drive all profit out of an appointment as class action lead counsel, what competition there is may induce a sort of arms race to obtain the appointment, with the possible result an overinvestment in the lawsuit, and thus in lawmaking. Moreover, when one considers the problem of class action lawyer underproduction, the most prominent source of such underproduction may not be free-riding but rather the conflict of interest between the client and a contingent fee plaintiffs’ lawyer, who bears the full cost of a lawsuit but does not garner all the benefits.
References


