Competing Model of Plaintiff Class Action Bar Forthcoming

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Readers of *MassTortDefense* are mostly from the defense bar, and are always thinking about what the other side is thinking about.

Visiting Professor Ratner of Harvard Law School is trying to give us a new view of plaintiff class action attorneys. Since he practiced with Lieff Cabraser Heimann & Bernstein, readers can soon decide for themselves whether his view is descriptive or wishful thinking. See Ratner, Morris, A New Model of Plaintiffs' Class Action Attorneys (2011). Review of Litigation, Forthcoming.

According to the author, this article offers a new model for conceptualizing plaintiffs' class action attorneys, and thus for understanding principal-agent problems in class action litigation. It responds to the work of Professor John C. Coffee, Jr., who, in a series of influential articles, demonstrated that principal-agent problems may be acute in class action litigation because class members lack the information or financial incentive to monitor class counsel; class counsel is thus free to pursue his own interests at the expense of the class members. But what are those interests, and how do they diverge from the class members' interests? Professor Coffee provided one answer to this sub-set of questions, presenting an account of class counsel and the precise parameters of his disloyalty corresponding with three descriptive assertions: that class counsel is either a solo practitioner or in a small firm; that he is predominantly interested in maximizing his law firm profit; and he capably pursues his fee-maximizing goal by investing his time in cases based on confident predictions about expected fees.

In this article, the author offers a competing conception of the dominant class action attorneys and firms; he argues that the leading firms today are relatively large and internally complex; law firm structural complexity creates diverse incentives other than maximization of law firm profit; and class counsel invest time in cases for complex reasons other than the effect on expected fees, particularly because fees are notoriously difficult to predict. Modeling class counsel to recognize this complexity has three virtues, he claims: it better reflects the actual characteristics of the most significant class action attorneys, and hence is a more accurate descriptive tool; as such, it enables a more precise understanding of the extent and nature of agency or loyalty problems; and thus, finally, it provides a more solid basis for needed reforms. In particular, this new model, the author asserts, sheds insight on the importance of direct versus incentive-based regulation to manage agency costs in class actions. In light of the diverse incentives this new model reveals, direct regulation of outcomes by trial courts using enhanced final approval standards should be a central part of any package of reforms to manage agency costs in class litigation, argues the author.

We are looking forward to seeing the arguments.