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## Classing up the Agency

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# Classing up the Agency

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In previous jots, I have highlighted articles that addressed not the why of procedure but the how. Although other forms of legal scholarship are valuable, I have always had a soft spot for legal scholarship that provides guidance for judges and policymakers on how best to set up legal procedures.

It should therefore come as no surprise that a recent piece that I like lots is not a journal article, but a government report that addresses the problem of mass litigation in administrative agencies. The report discusses, and recommends, the use of class action and similar procedures in administrative adjudicatory proceedings that involve numerous claimants against one or a few defendants. Unlike a law journal article—which, like a message in a bottle, may float out to sea never reaching its intended audience—this report not only directly addresses policymakers, but they actually read and implemented it.

The report is the result of a law journal article serendipitously reaching its intended recipient. It is the brainchild of Adam Zimmerman and Michael Sant’Ambrogio, who published an article in 2012 proposing the use of class action and similar aggregate litigation procedures in administrative adjudication (an article that I liked lots in a different forum). The article caught the attention of the Administrative Conference of the United States (ACUS), an independent federal agency focusing on improving administrative processes. ACUS then asked Zimmerman and Sant’Ambrogio to study the use of aggregate procedures in federal agencies and make recommendations. This report is the result of that study.

Zimmerman and Sant’Ambrogio’s law review article is akin to a doctor making an initial diagnosis. Here, that initial diagnosis concerned the problem of numerous claims against a common defendant. Even with the more streamlined procedures of administrative adjudication, it can be difficult for claimants to finance and litigate given the costs. In contrast, a defending party can spread its costs on common issues across all of the numerous claims, thereby reducing the cost for each claim. As a result, the defendant invests more in common issues because it has more at stake. The report offers several vivid examples – providers and hospital claims against Medicare, EEOC claims of discrimination on behalf of thousands of employees against a single employer, or vaccine defect claims against large pharmaceutical companies made in the National Vaccine Injury Compensation Program.

But the report goes beyond diagnosis, looking more like an exhaustive physical examination and treatment plan.

One important contribution is cataloguing class action and similar aggregate procedures already in use by some agencies, although the vast majority of agencies historically have not utilized or developed such procedures. In general, class actions and similar aggregate procedures alleviate the problem of “asymmetrical stakes” between the numerous plaintiffs and the defendant, by incentivizing third parties such as the class attorney to make proper investments in common issues and by streamlining procedures through the use of statistical sampling and bellwether trials. The different procedures developed at these few agencies are a testament to the ingenuity of administrators, who saw the failure to address aggregate procedures in the Administrative Procedures Act (APA) as an invitation to innovate procedures on their own.

For example, in the National Vaccine Injury Compensation Program, which displaced the existing tort system with an administrative procedure for defect claims, vaccine claims filed against manufacturers were initially adjudicated one claim at a time. This obviously overwhelmed the small office of eight adjudicators charged with adjudicating the claims. But this “small office” ingenuously used its “inherent authority to use ‘specialized knowledge’ to resolve common scientific issues in a consistent and informed way,” thereby streamlining individual claim adjudication. It also used “omnibus proceedings” which “loosely resemble multidistrict litigation, bellwether hearing procedures, and creative case-management techniques” to ensure adequate public input and investment on the resolution of these common issues. The Office of Medicare Hearings and Appeals not only utilized similar aggregate procedures, but instituted a “statistical sampling initiative” to deal with overpayments to avoid deciding such issues on a claim-by-claim basis.

In June 2016, the Administrative Conference, relying on the report, adopted a series of recommendations that are careful and sensible, reading like a greatest hits of best practices in dealing with high volume claims with common issues against a single party. They include defining when aggregate procedures should be used and what principles should apply in limiting these procedures. The recommendations urge agencies to “encourage[e] adjudicators and parties” to help identify common issues in cases that would benefit from aggregate procedures. They also ask agencies to ensure that all procedures are proposed and adopted publicly and transparently. These recommendations have since been published in the Federal Register, and have already been influential. For example, the Department of Education recently proposed class action rules for student loan forgiveness claims against predatory and insolvent for-profit colleges.

The legal academy is often chastised for not addressing the problems of policymakers. I do not think that legal scholarship should solely address current problems, and JOTWELL does an extraordinary job of highlighting successful scholarship achieving a variety of objectives. But the criticism itself is also overstated, because it ignores the good work done by scholars who assist with legal reform. This report is a great example of legal scholars and policymakers working together to solve important problems.

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