

# THE PRIVATE ATTORNEY-GENERAL IN CHINA: POTENTIAL AND PITFALLS

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## I. INTRODUCTION

When governments pass laws imposing duties, they generally expect to achieve some public policy goal through compliance. But why will a person on whom the duty is imposed comply? An enforcement system is often necessary.<sup>1</sup> Someone needs to monitor violations and do something about them.

No enforcement system is perfect or cost-free. Leaving monitoring and enforcement entirely in the hands of state officials has a number of costs and benefits. On the benefit side, there may be a value in discretionary enforcement under centralized control. Decentralized enforcement by non-experts may be erratic, unpredictable, and destabilizing. On the cost side, a central bureaucracy has limited information and limited resources. It cannot know of all violations, and it cannot pursue all the violations that it knows about. It must be selective. Such selectivity can also invite corruption.

Leaving enforcement solely in the hands of government agencies may lead to under-enforcement. Such under-enforcement occurs when the social benefit of enforcement would exceed the total social cost, but the social benefit cannot be captured by the enforcing agency as a way of recouping its costs. It may not be capturable by government at all (for example, the social benefit of clean air). As a result, the enforcement does not take place.

One solution to the problem of under-enforcement caused by limited information and resources on the part of government agencies is to enlist the aid of non-governmental parties, who have different sources of

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A note on citations: in order to avoid any ambiguity, authors' surnames in citations are always given last, regardless of the language in the original source or author's nationality.

1. There are, of course, many reasons that people obey the law outside the scope of a Chicago School comparison of the economic costs and benefits of compliance. I claim only that the question of enforcement mechanisms cannot be overlooked.

information, and to give them incentives to monitor and engage in enforcement actions. The goal in these circumstances is not to protect private rights or citizens' rights as such; without the public-policy purpose, one might not even want to give them rights at all. But in order to achieve the public-policy goal of effective monitoring and enforcement, the state enacts a structure of incentives (which may or may not include legal rights to sue in court) designed to mobilize citizens and other entities (companies, non-profit organizations, etc.) to engage in activities that will result in greater enforcement of the legal obligations of certain regulated parties, with the desired result of increased social welfare. The shorthand term for such an institution (at least where it includes the right to sue in court) is the "private attorney-general"<sup>2</sup> ("PAG").

Something akin to PAG litigation has already been seen in China. For example, Wang Hai has become virtually synonymous with consumer rights because he has sued many companies for defective products or false advertising under the double damages provision of China's Consumer Rights and Interests Protection Law.<sup>3</sup> Assuming that such litigation has had the effect of improving the quality of consumer products, it is not, of course, obvious that the drafters of the law had any intention of achieving this public-policy goal through private litigation. They may not have been thinking in such social-engineering terms. But the fact that Wang Hai's *modus operandi* has garnered significant social support from those who have no particular ties to him personally suggests that many see a social benefit in his actions.

This Essay is a preliminary attempt to think about the viability of a PAG approach to law enforcement in China and in so doing to gain a better understanding of Chinese political-legal culture. At first glance, to be sure, the prospects are not promising. The notion that private citizens should be involved in law enforcement for public goals does not find a ready home in either traditional or post-1949 Chinese political culture. The state jealously guards its control over the machinery of coercion.

At the same time, however, a close study of particular legal institutions might reveal that the PAG approach—or at least certain elements of it—

2. The phrase was coined by Judge Frank in his opinion in *Associated Industries of New York State v. Ickes*, 134 F.2d 694, 704 (2d Cir. 1943).

3. See Xiaofeizhe quanyi baohu fa [Consumer Rights and Interests Protection Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 31, 1993, effective Jan. 1, 1994), art. 49 [hereinafter Consumer Protection Law]. See also Lixin Yang, "Wang Hai xianxiang" de minfa sikao—lun xiaofeizhe quanyi baohu zhong de chengfaxing peichangjin [A Civil Law Analysis of the "Wang Hai Phenomenon"—A Discussion of Punitive Damages in Consumer Protection] (Dec. 9, 2003), <http://www.wanghai.net/article.aspx?articleid=3005>.

exists in unexpected places, and that some kind of decentralized law enforcement is possible at least in certain realms.

For the purposes of this Essay, it is important to distinguish the concept of PAG litigation from that of public interest litigation. As I use the term, PAG litigation overlaps with public interest litigation, but the two are quite distinguishable. Public interest litigation encompasses any use of the courts to promote what the litigant believes is the public interest. The litigant's personal interest could be vanishingly small, and his or her beliefs may not be shared by state officials or a majority of the public. A typical Chinese example would be the famous "¥1.20 lawsuit" brought by Qiu Jiandong to recover excessive long-distance calling charges.<sup>4</sup>

By PAG litigation, on the other hand, I mean litigation in which the plaintiff is specifically encouraged via a state-approved incentive structure to engage in litigation in order to advance the state's public-policy goals.

A further angle that needs to be explored is state-encouraged citizen participation in the enforcement of legal norms for the public benefit in ways other than through litigation. Understanding the entire range of alternatives improves our understanding of each individual alternative. This is particularly important in China, because of the government's traditional unwillingness to let the legal system out of its grasp and to give significant rights to individual citizens unfettered by various control mechanisms. Thus, even where the government can see a benefit in decentralized enforcement through PAG-like actions, it may be unwilling to allow them because of the perceived political risks of giving citizens too much control over the operation of the legal system. It may, however, be willing to allow citizen activism in other ways. This Essay does not, however, discuss this angle; it looks only (in Part II) at the PAG-relevant aspects of Chinese civil procedure, finding that while the system is on the whole unfriendly to PAG-type litigation, surprising exceptions exist. Part III concludes with some summarizing remarks and thoughts on Chinese political-legal culture.

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4. For a brief summary in English, see CHINA LABOUR BULLETIN, PUBLIC INTEREST LITIGATION IN CHINA: A NEW FORCE FOR SOCIAL JUSTICE 4 (2007), available at <http://tinyurl.com/4oefyn>. For a copy of the complaint and commentary, see Jiandong Qiu, "Yi kuai er" guansi zhi bu zhide da? Yilun fenfen huati xin [Was the "¥1.20 Lawsuit" Worth Bringing? A New Topic with Much Discussion] (June 24, 2006), <http://www.pubchn.com/articles/15.78.htm>.

## II. CIVIL PROCEDURE

### A. Punitive Damages

The enforcement of law through PAGs requires private litigation, and one of the most effective ways of encouraging private litigation is to allow plaintiffs to recover more than their actual damages, whether by way of punitive damages or through the application of a statutory formula. Chinese law generally does not allow punitive damages; a court may not impose such damages without specific statutory authority.<sup>5</sup> Such authority is rare. China's Consumer Protection Law, for instance, provides that when a merchant commits fraud in the provision of goods or services, the consumer may seek damages of twice the cost of the goods or services.<sup>6</sup> In addition, a 2003 Supreme People's Court interpretation provides for damages of a possibly punitive nature in certain types of housing disputes. When the seller of commodity housing (*shangpin fang*)<sup>7</sup> makes contract fulfillment impossible in some circumstances (for example, by selling to another buyer), he not only must return any amounts already deposited, but is also liable for up to twice the amount of the deposit in additional compensation.<sup>8</sup> It is not clear, however, whether such damages should really be viewed as punitive; the interpretation seems by implication to exclude expectation damages, which in a rapidly rising market might be much higher.

5. See Liming Wang, *Chengfaxing peichang yanjiu [A Study of Punitive Damages]*, ZHONGGUO SHEHUI KEXUE [SOCIAL SCIENCES IN CHINA], No. 4, 2000, at 119.

6. See Consumer Protection Law, *supra* note 3, art. 49 ("When business operators commit fraud in the course of providing merchandise or services, at the consumer's request, the compensation for damages should be augmented; the augmented compensation shall be double the amount of the price of the goods purchased or the fee for the service rendered.")

7. "Commodity housing" means housing that has been sold at a market price, and not (for example) as a subsidized benefit to employees and therefore subject to resale restrictions.

8. See Zuigao renmin fayuan guanyu shenli shangpinfang maimai hetong jiu fen anjian shiyong falü ruogan wenti [Supreme People's Court Explanation of Several Questions Regarding the Applicable Law in the Adjudication of Disputes over Purchase and Sale Contracts for Commodity Housing] (issued Apr. 28, 2003), 2003 (1-4) FALÜ QUANSHU 46 (P.R.C.), art. 8 [hereinafter SPC Housing Interpretation]. Although the provision cited here literally calls for *additional* compensation of up to twice the amount of the deposit (i.e., a total of three times the amount of the deposit), this may just be careless drafting; given that statutory multiples like this elsewhere in Chinese law typically make breachers liable for twice the amount of a deposit, that may be the intended amount here as well. The relevant language is as follows:

A buyer who is unable to obtain the premises may request cancellation of the contract and a return, with interest, of amounts already paid for purchase of the premises and compensation for losses; *he may also request* that the seller bear liability for compensation in an amount not exceeding twice the amount already paid for purchase of the premises.

*Id.* (emphasis added). There is a similar damages provision in article 9.

An interesting indirect way of allowing plaintiffs to recover more than their actual damages is to allow recovery for emotional damages (*jingshen sunhai*) and to interpret such damages expansively. Sometimes a court may grant them simply by redefining what counts as “actual damages.”<sup>9</sup> In other cases, however, the amount may be statutorily fixed, in which case the link to actual damages is broken, and it becomes a kind of liquidated or punitive damages. For example, Guangdong’s implementing measures for the Consumer Rights and Interests Protection Law provide that when merchants violate the dignity of consumers through such practices as body searches, they shall be liable for at least fifty thousand yuan in emotional damages.<sup>10</sup>

### B. Standing Requirements

Assuming parties have an incentive to sue, can they get into court? Standing requirements are, together with supra-compensatory damages, a key element in designing PAG enforcement. In the United States, legislatures can explicitly give standing to non-governmental parties; courts can also grant it when the legislature has been silent but there are strong policy reasons for allowing it as well as no reason to believe that the legislature specifically intended to forbid it. In China, the political position of courts makes the picture a little different. Far from granting standing when there is no clear legislative policy against it, Chinese courts are more likely to deny standing even when there is a clear legislative policy in favor of it.

A fundamental rule of Chinese civil procedure is that a party must have a direct relationship of interest with the matter being sued upon.<sup>11</sup> Sometimes this rule has been defined very narrowly. In one case, for example, the foreign party to a joint venture was denied standing to challenge a government agency’s revocation of the joint venture’s

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9. See, e.g., *Ma Litao su Anshan shi Tiedong qu fuwu gongsi Mengzhen meirongyuan meirong sunhai peichang ju fen an* [The Case of Ma Litao Suing Anshan City Tiedong District Service Company Mengzhen Beauty Parlor for Compensation for Damages to Appearance], Aug. 2, 2006, available at <http://tinyurl.com/32w5xn>. In this case, the plaintiff was compensated for emotional damages resulting from a botched beauty procedure.

10. See Guangdong sheng shishi Zhonghua Renmin Gongheguo xiaofeizhe quanyi baohu fa banfa [Measures of Guangdong Province for the Implementation of the Consumer Rights and Interests Protection Law of the People’s Republic of China] (promulgated by the Standing Comm. People’s Cong. Guangdong Province, Aug. 5, 1999, effective Aug. 30, 1999), Code of the People’s Republic of China, pt. 5, vol. 19, Guangdong No. 2, 42 (1999), art. 31, available at [http://law-lib.com/law/law\\_view.asp?id=34665](http://law-lib.com/law/law_view.asp?id=34665).

11. Minshi susong fa [Civil Procedure Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2007, effective Oct. 28, 2007), art. 108.

approval certificate because it was not technically the object of the action.<sup>12</sup> In other cases, although a public-law norm such as environmental law may be violated, the harm to individuals is considered too diffuse to justify the grant of standing, and only governmental regulators may undertake enforcement proceedings.<sup>13</sup>

For this reason, PAG litigation can be stymied by the absence of a specific grant of standing in relevant legislation; the courts are unlikely to grant it on their own. In some cases, however, traditional restrictive views of standing have been relaxed through statute or by courts. Article 7 of the Supreme People's Court's 2001 interpretation of the Marriage Law,<sup>14</sup> for example, provides that a suit to declare a marriage invalid may be brought by parties other than the husband or wife, including a "grassroots organization" (meaning a residents' committee, the work unit, the labor union to which one of the parties belongs, or perhaps the local women's federation) or relatives, depending on the asserted reason for invalidity.

Moreover, article 20 of the Labor Union Law<sup>15</sup> provides that the union may initiate arbitration and litigation proceedings when the employer violates a collective labor contract. This is not, of course, an ideal example; given that China's labor unions are state-controlled, it represents in a sense a centralization rather than the decentralization of standing normally associated with PAG litigation.

In the same way, courts across the country have recently begun allowing homeowners' committees (*yezhu weiyuanhui*) to act as plaintiffs in suits against property management companies (and perhaps others such

12. The case is described in Rong Zou, "Xingzheng susong de yuangao zige yanjiu" *xueshu taolunhui zongshu* [Summary of Proceedings at Conference on "Research on the Standing of Plaintiffs in Administrative Litigation"], FAXUE [LEGAL SCIENCE], No. 7, 1998, at 61. The Supreme People's Court subsequently addressed the issue in an interpretation, granting standing to parties in similar cases. See Zuigao renmin fayuan guanyu zhixing Zhonghua Renmin Gongheguo xingzheng susong fa ruogan wenti de jieshi [Supreme People's Court Interpretation on Several Questions in the Implementation of the Administrative Litigation Law of the People's Republic of China] (adopted Nov. 24, 1999), 2000 (1-6) FALŪ QUANSHU 2068 (P.R.C.), art. 15.

13. As in the United States, a concern for excessive litigation is behind restrictions on standing. See Jianguo Xiao, *Minshi susong zhong de siren zhifa* [Private Implementation of Law in Civil Procedure] 3-4 (2006) (unpublished paper, on file with author). In the United States, however, this concern stems largely from a fear of overburdening courts and a belief that the adversary system works best when both parties to litigation have a major interest in the outcome. In China, by contrast, I believe the concern stems more from a fear of the political consequences of citizen mobilization in cases involving public policy.

14. Zuigao renmin fayuan guanyu shiyong Zhonghua Renmin Gongheguo hunyin fa ruogan wenti de jieshi (yi) [Supreme People's Court Interpretation on Several Questions in the Application of the Marriage Law of the People's Republic of China (Part 1)] (issued by the Sup. People's Ct., Dec. 24, 2001) 2001 (7-12) FALŪ QUANSHU 7 (P.R.C.).

15. Gonghui fa [Labor Union Law] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 27, 2001, effective Oct. 27, 2001) 2001 (7-12) FALŪ QUANSHU 2313 (P.R.C.)

as developers) instead of requiring the individual homeowners to do so.<sup>16</sup> Homeowners' associations in China are not spontaneously organized NGOs; like labor unions, their existence is specifically provided for by law and they operate under state supervision. Therefore, although the law does not explicitly give them standing to sue, courts have been willing to do so, and indeed it almost follows necessarily from their legislated status as the party with whom the property management company should sign the management contract.<sup>17</sup>

Procuratorates in some areas have taken it upon themselves to assist parties such as consumers, laid-off workers, and migrant workers in bringing suit. This practice is called "supported litigation" (*zhichi qisu*) and is authorized under article 15 of the Civil Procedure Law.<sup>18</sup> This is not, however, quite the same as having standing, and in any case it is hard to see what activities are allowed by article 15 that would not be lawful even in its absence. Indeed, the origin and purpose of this article are somewhat obscure; Civil Procedure Law drafter Jiang Wei is reported to have said that it was intended to allow these groups to bring public interest litigation, but as noted above it does not actually grant standing, and it is apparently rarely used.<sup>19</sup>

This review of the relaxed requirements for standing reveals an interesting theme: when the rules are relaxed, they are relaxed in favor of moving standing upward, so to speak, *from* citizens and toward the state (or some quasi-state or state-controlled body), rather than downward *to* citizens from a state agency. Instead of the private citizen stepping into the

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16. See Xiao, *supra* note 13 (reporting that the first such case occurred in Beijing when the homeowner's committee of the Meili Yuan complex sued the property management company). The history of the case, which went through appeal and re-trial, is reported in *Beijing yezhu wuyefei "tao jia huan jia" quanguo shouci shengsu* [First Victory in China for Beijing Homeowners in Management Fee "Negotiation"], ZHONGGUO SHANGBAO [CHINA COM. NEWS], Aug. 29, 2006, <http://house.focus.cn/msgview/20/61/634006.html>.

17. See Wuye guanli tiaoli [Regulations on the Administration of (Residential) Property Management] (issued by St. Council, Aug. 26, 2007) LAW INFO CHINA, also available at [http://www.law-lib.com/law/law\\_view.asp?id=213726](http://www.law-lib.com/law/law_view.asp?id=213726) (P.R.C.), art. 15.

18. Article 15 reads in its entirety:

With respect to acts that damage the civil law rights and interests of the state, the collective or individuals, [state] organs, social groups, enterprises and institutions may support the damaged unit or individual in bringing suit in the people's court.

19. See Hongliang Wang, Xiaofeizhe susong moshi de xuanze yu goujian [The Selection and Structuring of the Model of Consumer Litigation] (unpublished paper, on file with author). The institution of supported litigation is described and criticized in Qi Wang, *Minshi susong fa jiben yuanze ruogan wenti de sikao* [Thoughts on Several Problems in the Basic Principles of the Civil Procedure Law], HAINAN DAXUE XUEBAO (RENWEN SHEHUI KEXUE BAN) [HAINAN U. ACAD. BULL. (HUMANITIES & SOC. SCI. EDITION)], June 2003, at 131.

shoes of the attorney-general, we find the attorney-general stepping into the shoes of the private citizen.

### C. Group Litigation

Group litigation in China has been extensively discussed in both Chinese<sup>20</sup> and English,<sup>21</sup> so I will add only a few points here. As is well known, legal rights may go unvindicated if the cost of suing is higher than the expected benefit. Yet there can be a significant social benefit in vindicating those rights if they are held by a large number of people. The legal system can help by providing a way to aggregate claims and otherwise lower the unit cost of litigation.

China does not have true class actions in the American sense, in which unknown parties identified solely by some abstract definition (for example, “all those who flew on X Airways between April 15, 1993, and July 23, 1998”) can be bound by the results of a lawsuit of which they were unaware. The Civil Procedure Law does, however, provide for various types of group litigation in which parties can bring similar claims in a single action, thus saving on legal and other costs.<sup>22</sup>

Despite the existence of these provisions on paper, in practice the Chinese courts—and the political-legal system as a whole—do not as a rule welcome group litigation. In part this is simply due to the incentive structure facing judges: one of the indices on which they are graded professionally is the number of cases they hear.<sup>23</sup> Thus, judges have an incentive to break up multi-plaintiff suits. More importantly, courts do not wish to get involved in the large-scale social issues often implicated in group litigation, and the government, wary as always of any association or organization not under its control, wishes to keep the citizenry as atomized as possible.

As a result, group litigation faces many obstacles. In some cases, local courts have simply been directly instructed by superior courts not to accept such lawsuits at all.<sup>24</sup> In particular subject-matter areas such as securities

20. See, e.g., YU FAN, JITI SUSONG WENTI YANJIU [STUDIES IN PROBLEMS OF GROUP LITIGATION] (2005).

21. See, e.g., Benjamin Liebman, Note, *Class Action Litigation in China*, 111 HARV. L. REV. 1523 (1998).

22. See Civil Procedure Law, *supra* note 11, arts. 53–55.

23. See Wang, *supra* note 19, at 5; *Daqing Lianyi suopei anjian nan tuijin* [*Daqing Lianyi Case Seeking Compensation Is Pushed Ahead with Difficulty*], NANFANG ZHOUMO [SOUTHERN WEEKEND], Aug. 15, 2003, <http://news1.jrj.can.cn/news/2003-08-15/000000623924.html>.

24. I was informed in 2006 by a Chinese law professor specializing in civil procedure that the Shanghai Higher-Level People’s Court had instructed all lower courts in Shanghai not to accept suits

litigation, the Supreme People's Court has issued instructions to lower courts strictly limiting the claims that litigants may make under the Securities Law as well as the procedures pursuant to which they may bring them. These instructions state that claims may be brought as individual suits or multi-plaintiff suits, but not as representative actions under article 54 of the Civil Procedure Law.<sup>25</sup> The Supreme People's Court has also tried to push such suits down to the lowest level possible in order to prevent plaintiff groups from physically taking their cases to provincial capitals (if appeal lies with a Higher-Level People's Court) or to Beijing (if appeal lies with the Supreme People's Court), again underscoring the political sensitivity of group litigation.<sup>26</sup> And courts will often require the plaintiffs wishing to litigate together to separate their claims into subgroups. In recent mass shareholder litigation against the Daqing Lianyi Company, for example, the Harbin Intermediate-Level People's Court insisted that the original group of 381 plaintiffs split up into smaller groups of ten to twenty people. This ruling had nothing to do with the characteristics of their claims, since the court left it up to the plaintiffs to group themselves.<sup>27</sup>

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with ten or more plaintiffs.

25. See *Zuigao renmin fayuan guanyu she zhengquan minshi peichang anjian zan bu yu shouli de tongzhi* [Supreme People's Court Notice on Temporarily Not Accepting Securities Cases Involving Civil Suits for Damages] (issued Sept. 21, 2001), [http://www.law-lib.com/law/law\\_view.asp?id=16373](http://www.law-lib.com/law/law_view.asp?id=16373) (P.R.C.); see also *Zuigao renmin fayuan guanyu shouli zhengquan shichang yin xujia chenshu yinfa de minshi qinquan jiufen anjian youguan wenti de tongzhi* [Supreme People's Court Notice on Issues Relating to the Acceptance of Civil Cases in Tort Arising out of False Representations in Securities Markets] (issued Jan. 15, 2002) 2002 (1-6) FALŪ QUANSHU 16 (P.R.C.); *Zuigao renmin fayuan guanyu shenli zhengquan shichang yin xujia chenshu yinfa de minshi peichang anjian de ruogan guiding* [Supreme People's Court Several Provisions on the Adjudication of Civil Suits for Damages Arising out of False Representations in Securities Markets] (issued Jan. 9, 2003) 2003 (1-4) FALŪ QUANSHU 42 (P.R.C.). A judicial document issued to courts internally some time after a nationwide meeting on civil adjudication in May 2007 has apparently now broadened the scope of permissible claims to include market manipulation and insider trading, but other procedural hurdles established by the aforementioned documents still apply. See Peixin Luo, *Qianzhi chengxu quliu kunjing* [Difficulties over Whether to Eliminate or Keep the Precondition Procedure], *CAIJING* [FIN. & ECON.], Sept. 17, 2007, at 28; Xiaofeng Wu, *Neimu jiaoyi, caozong shichang minshi peichang anjian hu zhi yu chu* [Civil Compensation Cases for Insider Trading and Market Manipulation About to Appear], *FAZHI RIBAO* [LEGAL DAILY], Nov. 18, 2007, <http://npc.people.com.cn/GB/6543957.html>.

26. See *Zuigao renmin fayuan guanyu renmin fayuan shouli gongtong susong anjian wenti de tongzhi* [Supreme People's Court Notice on the Question of the Acceptance by People's Courts of Joint Litigation Cases] (issued Dec. 30, 2005) 2006 (1-4) FALŪ QUANSHU 1765 (P.R.C.) ("In joint litigation in which one or both parties consist of many persons, the case shall be accepted by the Basic-Level People's Court. When the accepting court believes that it is not appropriate to accept the case as one of joint litigation, it may accept [cases] separately.")

27. See *Daqing Lianyi Case Seeking Compensation Is Pushed Ahead with Difficulty*, *supra* note 23.

Restrictions have also been placed on group litigation even before the plaintiffs get to court. In March 2006, for example, the All-China Lawyers Association—a government-controlled body that, together with the national Ministry of Justice and its local-government counterparts, oversees lawyers in China—issued a regulation entitled *Guidance Opinion on the Undertaking by Lawyers of Mass Cases*, which applies to all suits with ten or more plaintiffs.<sup>28</sup> Under the Guidance Opinion (in effect, a mandatory rule), Chinese lawyers are subject to the following requirements, among others:

- They must report immediately to local (state-controlled) lawyers associations, government bodies, and judicial administrative bodies when they take mass cases, “accept supervision and guidance” from these bodies, and keep them informed when they discover problems that might “intensify” disputes.
- They must be careful in their dealings with media, not “stir up” news, and be very cautious in their contacts with foreign organizations and media.
- At the conclusion of the case, they must report again to the local lawyers association.

In short, a mechanism for aggregating claims exists under law, but is at the moment not readily available for policy reasons.

Although individual judges often have an incentive to maximize their caseload, courts as a whole may be more sensitive to considerations of judicial economy. Such considerations may be behind the appearance of a court-initiated procedural innovation called “test suits”<sup>29</sup> (*shiyanxing susong*). This term describes a practice whereby a court faced with a number of similar—even identical—claims will pick one case to be fully litigated, and then apply the judgment to all the other cases.<sup>30</sup> Obviously,

28. All-China Lawyers Ass’n, *Guanyu lüshi banli quntixing anjian zhidao yijian* [Guiding Opinion on the Handling by Lawyers of Mass Cases] (passed and put into trial implementation Mar. 20, 2006), available at <http://www.acla.org.cn/pages/2006-5-15/s34852.html>. For an English-language news report, see *Warning to Lawyers Handling Protest Suits—New Rules from Government-Controlled All-China Lawyers Association Demand Lawyers to Be Wary of Foreign Media Contact*, S. CHINA MORNING POST (Hong Kong), May 19, 2006.

29. The term for “test” (实验) is often written in Chinese as the almost homonymous (only the tones are different) “experiment” (试验).

30. See generally Fuhua Wang, *Daibiaoren susong zhi tidai gaige* [Substitute Reforms in Representative Litigation], SHANGHAI JIAOTONG DAXUE XUEBAO (ZHEXUE SHEHUI KEXUE) [J. SHANGHAI JIAOTONG U. (PHIL. & SOC. SCI. EDITION)], No. 5, 2006, at 19, 22–23. A high-profile case involving this practice was heard by Beijing’s Chaoyang District Basic-Level People’s Court in 2006.

this practice raises procedural concerns: parties in other cases may lose the chance to litigate precisely the issue of whether their case is in fact similar, and it is not clear whether principles such as adequacy of representation guide courts in selecting the test case. Nevertheless, this technique does offer low-cost resolution of disputes, even if at the cost of full due process.

#### *D. Collection of Evidence*

Evidence-collection procedures under Chinese law have a special bearing on PAG litigation because private parties are particularly disadvantaged relative to government organs. In many jurisdictions, of course, administrative agencies have special investigative powers relevant to their mission. What makes China special is the state's obsession with control over information and suspicion of any sort of information-gathering undertaken by private parties, not excepting information gathered for litigation purposes.

This obsession has both official and unofficial or customary manifestations. At the official level, various regulations prohibit private information-gathering. Private investigative agencies are simply prohibited outright.<sup>31</sup> Social and market research by foreign organizations is also strictly controlled.<sup>32</sup>

On the unofficial level, government agencies holding information are reluctant to share it even when the information is supposed to be public. Offices of the State Administration of Industry and Commerce, for example, typically allow only qualified Chinese attorneys to view company registration records, even though such records are supposed to be public. Land and real estate administration offices have guarded their ostensibly public records so jealously that the 2007 Property Law contains a specific provision requiring them to be made available to interested parties.<sup>33</sup>

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That case involved residents of a housing estate suing the developer for breach of contract. See Yixin Song, *Yunyong "shiyaxing susong" fangfa hejie minshi peichang an* [*The Use of "Experimental Litigation" to Achieve Settlement in Civil Compensation Cases*] (Dec. 15, 2006), <http://blog.p5w.net/user1/songyx/archives/2006/8241.html>.

31. See Gonganbu guanyu jinzhi kaishe "siren zhentansuo" xingzhi de minjian jigou de tongzhi [Notice of the Ministry of Public Security on Prohibiting the Establishment of Private Organizations of a "Private Investigator" Nature] (issued Sept. 7, 1993), 1993 FALÜ QUANSHU 816 (P.R.C.).

32. See Shewai diaocha guanli banfa [Measures on the Administration of Foreign-Related Investigations] (adopted by the State Statistical Bureau, Oct. 13, 2004) 2004 (9-12) FALÜ QUANSHU 1613 (P.R.C.).

33. See Wuquan fa [Property Law] (promulgated by the Nat'l People's Cong., Mar. 16, 2007, effective Oct. 1, 2007), [http://www.law-lib.com/law/law\\_view.asp?id=193400](http://www.law-lib.com/law/law_view.asp?id=193400) (P.R.C.), art. 18.

Obtaining information from institutions other than regulatory agencies involves special difficulties because so many such institutions—enterprises, universities, hospitals, research institutes, and labor unions—are connected in some way with the state and thus in a position politically superior to that of the private litigant. In some cases they are able to resist demands for information from other government agencies outside their own bureaucratic hierarchy; even more, then, can they resist demands from private litigants.

China's Civil Procedure Law does address the needs of private parties to collect evidence. Article 50 states that parties have the right to "collect" (*shouji*) and present evidence. Interestingly, only attorneys or other litigation agents are given the right to "investigate" (*diaocha*). Whatever the intended difference, if any, between these terms, the significance of these provisions is not that they give the parties or their attorneys any special evidence-gathering powers. The Civil Procedure Law provides no institutional support for such activities. What these provisions really do is provide a justification—needed because of the default bias against information-gathering—for evidence-gathering activities. They do not, as a practical matter, do more. Although the courts are supposed to assist litigants in collecting evidence when the litigants for various reasons cannot do so on their own,<sup>34</sup> apparently such assistance is in practice rarely forthcoming.<sup>35</sup> Intriguingly, some courts in Shanghai<sup>36</sup> and Beijing<sup>37</sup> have allowed lawyers to apply for an "investigation order" (*diaocha ling*), but this experiment does not seem to have been successful. According to a recent report, no consequences seem to follow if the subjects of the order simply refuse to honor it.<sup>38</sup>

In short, the imbalance in information-gathering ability between the private attorney-general and the public one, so to speak, is much greater in China than in other jurisdictions.

34. See Civil Procedure Law, *supra* note 11, art. 64.

35. See Xiao, *supra* note 13.

36. See Shanghai fayuan diaochaling shishi guize [Implementation Rules for Investigation Orders in Shanghai Courts] (effective June 13, 2001), [http://www.bokee.net/companymodule/weblog\\_viewEntry.do?id=739787](http://www.bokee.net/companymodule/weblog_viewEntry.do?id=739787); Jianyi gajin diaochaling zhidu [A Proposal for the Reform and Improvement of the System of Investigation], RENMIN FAYUAN BAO [PEOPLE'S CT. NEWS], May 1, 2005, <http://oldfyb.chinacourt.org/public/detail.php?id=82417>.

37. See Beijing lüshi shouci nadao diaochaling [Beijing Lawyer Obtains Investigation Order for the First Time], BEIJING YULE XINBAO [BEIJING RECREATION NEWS], July 29, 2004, <http://www.china.com.cn/chinese/law/621886.htm>.

38. See Lüshi diaochaling pin zao "neibu guiding" zu'ai [Lawyers' Investigation Orders Frequently Encounter the Obstacle of "Internal Rules"], XINWEN CHENBAO [MORNING NEWS], Mar. 29, 2003, <http://www.law-star.com/cac/30007068.htm>.

### E. Legal Costs

In addition to allowing multiple damages, a legal system can encourage PAG litigation through the award of attorneys' fees and other costs to the plaintiff (usually although not necessarily contingent upon victory). In China, as in the United States, the general rule is that parties bear their own attorney's fees. Such fees and court costs are not considered within the realm of compensable damages.<sup>39</sup>

Nevertheless, there are some exceptions to this general principle. The 1993 Law Against Unfair Competition provides that plaintiffs may recover reasonable expenses of investigating the infringing act,<sup>40</sup> which might include certain legal fees. The issue was clarified somewhat with a judicial explanation of a set of 2001 Supreme People's Court rules on patent litigation.<sup>41</sup> The rules provide that reasonable expenses incurred in investigating and stopping the violation can be considered part of damages and made compensable.<sup>42</sup> A subsequent judicial explanation states that although such expenses do not include attorney's fees incurred in the course of litigation, they could include attorney's fees incurred in the course of investigating and stopping the violation.<sup>43</sup>

By 2002, the Supreme People's Court was prepared to be more specific and more generous. A Supreme People's Court interpretation concerning trademark litigation allows the recovery of attorney's fees and other costs associated with pursuing an action for trademark infringement.<sup>44</sup> Another interpretation allows similar recovery in copyright litigation.<sup>45</sup>

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39. See generally Saihong Gong, *Guanyu liushi feiyong you baisu dangshiren fudan de tantao—yi minshi susong wei zhongxin* [An Inquiry into the Bearing of Attorneys' Fees by the Losing Party—Centering Around Civil Litigation], BEIJING HUAGONG DAXUE XUEBAO (SHEHUI KEXUE BAN) [J. BEIJING U. CHEMICAL ENGINEERING (SOC. SCI. EDITION)], No. 3, 2005, at 1.

40. See Fan buzhengdang jingzheng fa [Law on Unfair Competition] (promulgated by the Standing Comm. Nat'l People's cong., Sept. 2, 1993, effective Sept. 2, 1993) 1993 FALÜ QUANSHU 959 (P.R.C.), art. 20 ("The amount of compensation shall be the profits obtained by the infringer during the infringement period that are attributable to the infringement; [the infringer] should also bear the reasonable expenses of the damaged operator incurred in the course of investigating the [infringing] operator's acts of unfair competition that damaged its lawful rights and interests.").

41. Zuigao renmin fayuan guanyu shenli zhuanli jiufen anjian shiyong falü wenti de ruogan guiding [Several Rules of the Supreme People's Court on Questions of the Application of Law in the Adjudication of Patent Disputes] (issued by the Sup. People's Ct., June 22, 2001) 2001 (1-6) FALÜ QUANSHU 100 (P.R.C.).

42. See *id.* art. 22.

43. See Zuigao renmin fayuan minshi shenpan disanting [Third Civil Adjudication Chamber of the Supreme People's Court], *Ruhe lijie Zuigao Renmin Fayuan guanyu Zhuanli Fa (2001) fa shi zi di 21 hao sifa jieshi* (22) [How to Understand the Supreme People's Court's Fa Shi Zi No. 21 (2001) Judicial Interpretation of the Patent Law (Part 22)], <http://www.yawin.cn/list/zscqlist.asp?id=322>.

44. See Zuigao renmin fayuan guanyu shenli shangbiao minshi jiufen anjian shiyong falü ruogan wenti de jieshi [Interpretation of the Supreme People's Court Regarding Several Questions on the

Even in the absence of specific statutory authorization, courts have on occasion shown hospitality to fee-shifting in favor of winning plaintiffs, at least in consumer cases.<sup>46</sup> And in 2001, the Shanghai Higher-Level People's Court issued a notice specifically providing that in personal injury cases, attorneys' fees could be considered in the calculation of losses.<sup>47</sup>

Another way of encouraging PAG litigation is through the mechanism of contingency fees. This allows entrepreneurial lawyers to assume the risk of such litigation—something they are generally better placed than ordinary citizen plaintiffs to do, since they are repeat players and may, with their expertise, be more able to assess the probabilities of success. Traditionally, contingency fees have not been allowed. Over the past several years, however, they came to be accepted in practice despite the formal prohibition. Finally, in 2006, a regulation issued jointly by the State Development and Reform Commission and the Ministry of Justice

Application of Law in the Adjudication of Civil Dispute Cases Involving Trademarks] (issued Oct. 12, 2002) 2002 (7–12) FALŪ QUANSHU 33 (P.R.C.), art. 17.

45. See *Zuigao renmin fayuan guanyu shenli zhuzuoquan minshi jiu fen anjian shiyong falü ruogan wenti de jieshi* [Interpretation of the Supreme People's Court Regarding Several Questions on the Application of Law in the Adjudication of Civil Dispute Cases Involving Copyright] (issued Oct. 12, 2002) 2002 (7–12) FALŪ QUANSHU 30 (P.R.C.).

46. See, e.g., *Zhao Su su Nanjing shi qiche lianhe maoyi gongsi xiaoshou jiamao Beijing jipuche yaoqiu an xiaofa jiabei peichang sunshi an* [The Case of Zhao Su Suing the Nanjing Automobile United Trading Company for Double Damages Under the Consumer Protection Law for Selling a Fake Beijing Jeep], in XIAOFEIZHE QUANYI ANJIAN [CASES OF CONSUMER RIGHTS] 2–59 (China Law Publishing House, 2005) (2000 case); *Zhou Miaobin su Ningde diqu dianxinju deng chanpin qinquan sunhai peichang an* [The Case of Zhou Miaobin Suing Ningde Region Electricity Bureau and Others for Damages in Product Liability], in XIAOFEIZHE QUANYI ANJIAN [CASES OF CONSUMER RIGHTS], *supra*, at 2–161 (2000 case involving a consumer seeking damages for injuries from exploding telephone equipment); *Zhang Jieting su Ribenguo Fengtian qiche gufen youxian gongsi* [Zhang Jieting Sues Toyota Automobile Corporation of Japan], CHINALAWEDU.COM, [http://www.chinalawedu.com/news/1900/20/2003/7/gr1093171434117300228135\\_6298.htm](http://www.chinalawedu.com/news/1900/20/2003/7/gr1093171434117300228135_6298.htm) (1996 case involving a consumer suing car manufacturer for airbag failure); *Yang Ligeng su Beijing Meitian wangying kemaoyouxian gongsi chengdan weiyue zeren an* [The Case of Yang Ligeng Suing Beijing Meitian Wangying Science and Trade Company for Breach of Contract], *discussed in Guanyu liushi feiyong you baisu dangshiren fudan de tantao* [Discussion Regarding Having the Losing Party Be Responsible for the Attorney's Fee], NMGLAWYER.COM, <http://nmglawyer.com/Article/5529.html> (2001 case involving a consumer suing a digital photograph print service for failure to provide service after payment); *Zhongguo yinhang Shanting fenlichu su Xincheng gongsi changhuan jiekuan an* [The Case of the Shanting Office of the Bank of China Suing Xincheng Company for the Repayment of Debt], *discussed in Gong, supra* note 39, at 4 (2002 case; text of original judgment not available) (debtor agreed in court mediation to pay debt as well as creditor bank's collection costs, including attorney's fees). See also the several cases cited in Changxin Zhao, *Qianxi liushifei zhuanfu zhidu* [A Brief Analysis of Attorney Fee-Shifting], SHIWU [PRACTICALITY], Aug. 2, 2006, <http://www.acla.org.cn/pages/2006-8-2/p44277.html>.

47. See Zhao, *supra* note 46 (citing Shanghai shi gaoji renmin fayuan [Shanghai Higher-Level People's Court], *Guanyu yinfa guanyu minshi anjian shenli de jidian juti yijian de tongzhi* [Notice on the Issuance of "Some Specific Suggestions on the Adjudication of Civil Cases"] (2000)) ("Attorney's fees are in the nature of a property interest, and can in principle be considered a loss.").

allowed contingency fees (not to exceed thirty percent) except in specific cases such as unpaid wages, spousal support, inheritance, and marriage.<sup>48</sup> Interestingly, the list of prohibited cases includes multi-plaintiff lawsuits, underscoring once again the state's particular concern with, and desire to discourage, this type of litigation.

### III. CONCLUSION

In this review of civil procedure law as it relates to PAG-type actions, certain themes stand out. First, many of the ostensibly strict rules of Chinese civil procedure have been eroded by exceptions created by courts or lawmakers in particular cases or types of cases. Thus, it is a weak argument to say that a particular reform cannot be undertaken because it violates some sacred principle of civil procedure. Such principles are routinely violated already.

Second, in some cases the relaxation of restrictive rules has not been in a PAG-favorable direction. Instead of rules being relaxed to allow citizens to bring actions that would otherwise have to be brought by the state, we find rules being relaxed to allow the state (or state-affiliated organizations) to bring actions that would otherwise have to be brought by citizens.

Third, we find that despite this trend in some areas, there has been real and substantial movement in a PAG-favorable direction in other areas such as legal fees. One may speculate—and it is only speculation—that this is connected to the growing political influence of the legal profession.

There is no reason to think that the Chinese state is less hostile than before to private parties using the coercive machinery of the state in an unsupervised way for anything other than the settlement of private disputes with no broader social significance, even when such use might serve public-policy goals. If anything, the system has become more restrictive in recent years as the state's concern with social unrest has grown. But while PAG-type litigation is strategically on the defensive, it appears that carefully planned tactical advances remain possible.

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48. See *Lüshi fuwu shoufei guanli banfa* [Measures on Fees for Lawyers' Services] (issued by the Nat'l Dev. & Reform Comm'n & the Ministry of Justice, Apr. 13, 2006), 2006 (1-4) *FALÜ QUANSHU* 392 (P.R.C.).