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Study Disputes View Of Costly Surge In Class-Action Suits

By JONATHAN D. GLATER (NYT) 1678 words

A new study has concluded that both the average price of settling class-action lawsuits and the average fee paid to lawyers who bring them have held steady for a decade, even though companies have said the suits are driving up the cost of doing business, hurting the economy and lining lawyers' pockets.

The issue is a fiercely divisive one that has fueled a heated debate over whether to place limits on class-action lawsuits. Legislation to curb class actions is a priority of President Bush and many Republicans in Congress.

The two law school professors who conducted the study, which was not financed by corporations or by trial lawyers, expressed surprise themselves over the results. "We started out writing an article about fees," said Theodore Eisenberg, a law professor at Cornell and one author of the study, "but the shocking thing was that recoveries weren't up."

Senator Orrin G. Hatch, a Utah Republican and the chief sponsor of a bill that died in October in the Senate, has attacked the current system of class-action litigation as "jackpot justice, with attorneys collecting the windfall." Thomas J. Donohue, president and chief executive of the United States Chamber of Commerce, has complained that "companies spend millions of dollars each year to defend against class-action lawsuits -- money that should be used to expand, develop new products and create jobs."

But the new study undermines some of those criticisms. It covers the biggest sample to date of class-action cases, ranging from civil rights violations to securities fraud. Its results, published in a new law publication, the Journal of Empirical Legal Studies, and already circulating, will certainly be used by lawyers trying to head off such legislation.

"This empirical study comes out and says the system is working correctly," said David S. Casey Jr., president of the Association of Trial Lawyers of America, who was in Washington last week meeting with officials planning the body's legislative strategy for 2004. "I'm glad there are empirical studies being done," Mr. Casey said. "The whole effort by what I call the tort reform industry is based on myth and fabrication."

Those who advocate limiting class-action filings -- and changing the nation's tort laws more generally -- are dismissing the study's results. "I'm not sure that these findings end up meaning a lot," said Stan Anderson, executive vice president and chief legal officer of the United States Chamber of Commerce and chairman of the Class Action Coalition, a group of 100 companies supporting legislation to change rules governing class-action lawsuits. "You can't argue against

class actions per se or its efficacy. What we argue is very simple, that there are problem jurisdictions around the country."

Reliable data on the total number of class-action lawsuits filed or settled in a given year do not exist. Such data could bolster corporate defendants' arguments that even if the size of settlements is not increasing, the number of cases is rising. The number of suits filed in federal court has risen steadily, roughly doubling from 1997 to 2002, according to the Administrative Office of United States Courts. But state courts probably oversee the most class-action suits, and they produce the least data, said Nicholas M. Pace, a researcher at the Rand Institute for Civil Justice, which studies legal issues for the RAND Corporation.

"People will continue to research this thing for years -- and fight about it," Mr. Pace said.

In their article, Mr. Eisenberg and his co-author, Geoffrey P. Miller, a New York University law professor, write that if the effects of inflation are taken into account, then from 1993 through 2002, "contrary to popular belief, we find no robust evidence that either recoveries for plaintiffs or fees for their attorneys as a percentage of the class recovery increased."

According to the study, the average settlement over the 10-year period was \$100 million in inflation-adjusted 2002 dollars. It rose as high as \$274 million in 2000 -- a result of four settlements that year for more than \$1 billion each -- and fell as low as \$25 million in 1996. "The mean client recovery has not noticeably increased over the last decade," the professors wrote.

The study also found that "neither the mean nor the median level of fee awards has increased over time." The average fee rose as high as \$31 million in 2000, but exceeded \$10 million in only two other years. The professors also report that as one might expect, the larger a settlement, the smaller the percentage allocated to legal fees. For the largest 10 percent of settlements, which averaged \$929 million, lawyers received an average of 12 percent. For the smallest 10 percent, which averaged \$800,000, lawyers received nearly 30 percent. Fees were higher in cases that were more risky and were higher in federal court cases than in state courts.

"No real-dollar increase in the level of fee awards in major cases over the course of a decade is not the sort of fact we are accustomed to hearing," the professors wrote in the report.

Mr. Eisenberg and Mr. Miller spent several months reading about 400 state and federal court opinions describing class-action lawsuits. Mr. Eisenberg has used statistical analysis to examine where companies choose to file for bankruptcy protection and on trends in punitive damage awards; Mr. Miller has studied class-action litigation and legal fees. Each has served as a consultant to defense and plaintiffs' lawyers.

Their initial goal, both men said, was to find out how courts historically apportioned fees to help guide judges. The study is the most comprehensive to date and draws on original research that others have not attempted, according to people who have studied class-action litigation.

"The Eisenberg and Miller study is in many senses a real advance" because its authors read actual court cases to learn the provisions in settlement agreements, said Deborah R. Hensler, a law professor at Stanford who has also studied class actions.

"I'm not surprised by the findings in the Eisenberg and Miller study in most regards because they seem quite consistent with many of the patterns we found in our much smaller pattern of case studies," Ms. Hensler said.

Todd Foster, a senior consultant at NERA Economic Consulting, said that his firm also had not found an upward trend in settlement amounts.

There can be no doubt that some lawsuits are frivolous and that they do impose substantial costs on businesses, as other studies have found. A report released a few weeks ago by Tillinghast-Towers Perrin, a consulting firm that primarily serves insurance companies, concluded that tort litigation costs rose 13.3 percent in 2002, to \$233 billion, "which translates to \$809 per person."

Those results, which draw on data supplied by the insurance industry, proprietary data on medical malpractice claims and estimates of costs borne by self-insured companies, did not measure the same thing as the two law professors' study. The Tillinghast study covered all payments made or expected to be made, whether as a result of a jury verdict or a settlement, in a class action or individual lawsuit, said Russ Sutter, a principal at Tillinghast and the primary author. He added that the study did not have a political agenda. "It's our job just to keep score," he said.

A Bloomberg News study last week found that jury verdicts in the United States (as opposed to settlements) last year resulted in damage awards of \$13.8 billion against companies in just a subset of cases -- those involving suspected fraud -- up from less than \$1.5 billion in 2002.

Supporters of changes to the nation's tort laws, which govern civil litigation in personal injury cases, have numerous criticisms of the Eisenberg-Miller study.

Some jurisdictions are known for presiding over excessive settlements and jury verdicts, said Mr. Anderson of the Chamber of Commerce.

"Many states, we don't have problems with what happens," he said. Averaging outcomes in states where lawsuits result in large settlements with those in other states, he continued, may not show anything.

The article also relied on court opinions describing settlements, Mr. Anderson said, and those tend to be federal cases.

State court cases may be a major source of outsize settlements, he said. "It's a critical piece of information that wasn't there," he added.

Mr. Eisenberg responded that in the absence of published court opinions it is very difficult to learn about state court settlements.

Ms. Hensler, the Stanford law professor, said that one flaw in the study was that the amount of the settlement could be less than the amount actually received by plaintiffs, driving up the percentage paid to lawyers. The types of cases may also have changed over the last decade, she said. For example, smaller settlements might be reported more or less often. Mr. Eisenberg said that a larger study would be helpful, along with access to more detailed information on settlements. But critical facts are often sealed by the courts, he said. For now, he added, "there's no better data."