

Prepared by the Class Action Coalition

*The Class Action Fairness Act of 2003*

## **The Eisenberg/Miller Attorneys' Fee Study: What It Fails To Tell Us**

NYU Law Professors Theodore Eisenberg and Geoffrey P. Miller have released a “working paper” purporting to analyze trends in the amount of attorneys’ fees awarded by courts in certified class actions.<sup>1</sup> The paper deals primarily with overall fee trends over the past decade. The paper’s major “conclusion” is the obvious proposition that the most dominant factor in determining the fee level in a given case is the amount of the plaintiffs’ recovery. However, the paper also suggests that attorneys’ fees are not increasing and that contrary to the prevailing wisdom, federal courts are more generous than their state court counterparts when it comes to rewarding class counsel.

There are several methodological problems with the study, however, that indicate that there is no basis for these findings.

- **First, as the study notes, a large component of the federal court class action docket consists of securities cases, which typically result in higher awards to class counsel (often in the 30 percent range).** This makes sense because class counsel in securities cases are selected by the court, take on a high risk of no return, and are often the most superior class counsel, all of which make it likely that a court would award them higher fees. Moreover, higher fees make sense in the securities context, since as noted above, the “face” value of such settlements is far more reflective of their “real” value to class members than the “face” value of many settlements approved by state courts.
- **Second, the study is methodologically flawed because it relies in large part on published class action decisions.** While many federal trial court class settlement rulings are published, state trial court decisions generally are not, particularly decisions from the state trial courts most prone to class action abuses. Thus, while the federal court sample may have been representative of federal court settlements, which do indeed typically result in less than a 30 percent recovery for attorneys, the state court sampling could not have been representative of the numerous “sweetheart” deals that are reached in places like Madison County, Illinois and Jefferson County, Texas. Indeed, the state court sample would likely have included only cases that were appealed, since state court appeals are more likely to be published. In this regard, it is worth noting that the study never says how many state court cases were considered versus how many federal court cases were considered, a critical piece of information that is inexplicably missing from the article.

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<sup>1</sup> See Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, Working Paper #CLB 03-23, New York University Center for Law and Business (2003) (to be published in 1 *Journal of Empirical Legal Studies* (2004)).

- **Third, the study lumps all state court jurisdictions together rather than consider separately decisions from the “magnet courts” that are the key source of the class action problem.** By lumping state courts together and focusing primarily on “published” decisions, the study minimizes the effect of outlier courts where the worst class action abuses are occurring. Specifically, a major problem with the current system is that a handful of magnet courts allow huge attorneys’ fees and leave the plaintiffs with little more than dollar-off coupons. Supporters of class action reform have never suggested that this occurs in every state court; rather, these abuses only occur in *certain* courts. By looking only at averages and trends derived from an unscientific survey of state court class actions, the study necessarily misses the outlandish and abusive settlements that plague the current system.
- **Fourth, the study does not consider the “real” value of class action settlements; instead, it takes the settlements at face value.** The study’s authors do not read between the lines of class action settlements or consider what class members actually received in considering how much a settlement was worth for purposes of their study. Instead, they just assume a settlement is worth what it says it’s worth. Thus, under their approach, the Blockbuster settlement (purported to be worth \$450 million) would be worth the same as a settlement in which thousands of class members were sent checks totaling \$450 million. In addition to the obvious problem that coupons are not really worth their face value, the other problem with this approach is that a state court settlement may purport to offer millions of dollars when in fact the real value of a settlement is negligible because of numerous obstacles that discourage class members from claiming their minuscule share of even a cash settlement. This is a particular problem when comparing federal court and state court settlements because in federal court cases (particularly securities cases), the relief frequently is a mailed check and the class member does not have to do anything to get it. In contrast, a large percentage of the value in state court settlements is never recovered, because the class members must spend more money (*e.g.*, redeem coupons) or take other steps in order to recover. In short, in state court cases, the relief actually recovered by class members is often far less than what was “advertised” in the settlement proposal. The authors essentially assume away this problem – the key problem with state court class action settlements.