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# What Is a Reasonable Attorney Fee? An Empirical Study of Class Action Settlements

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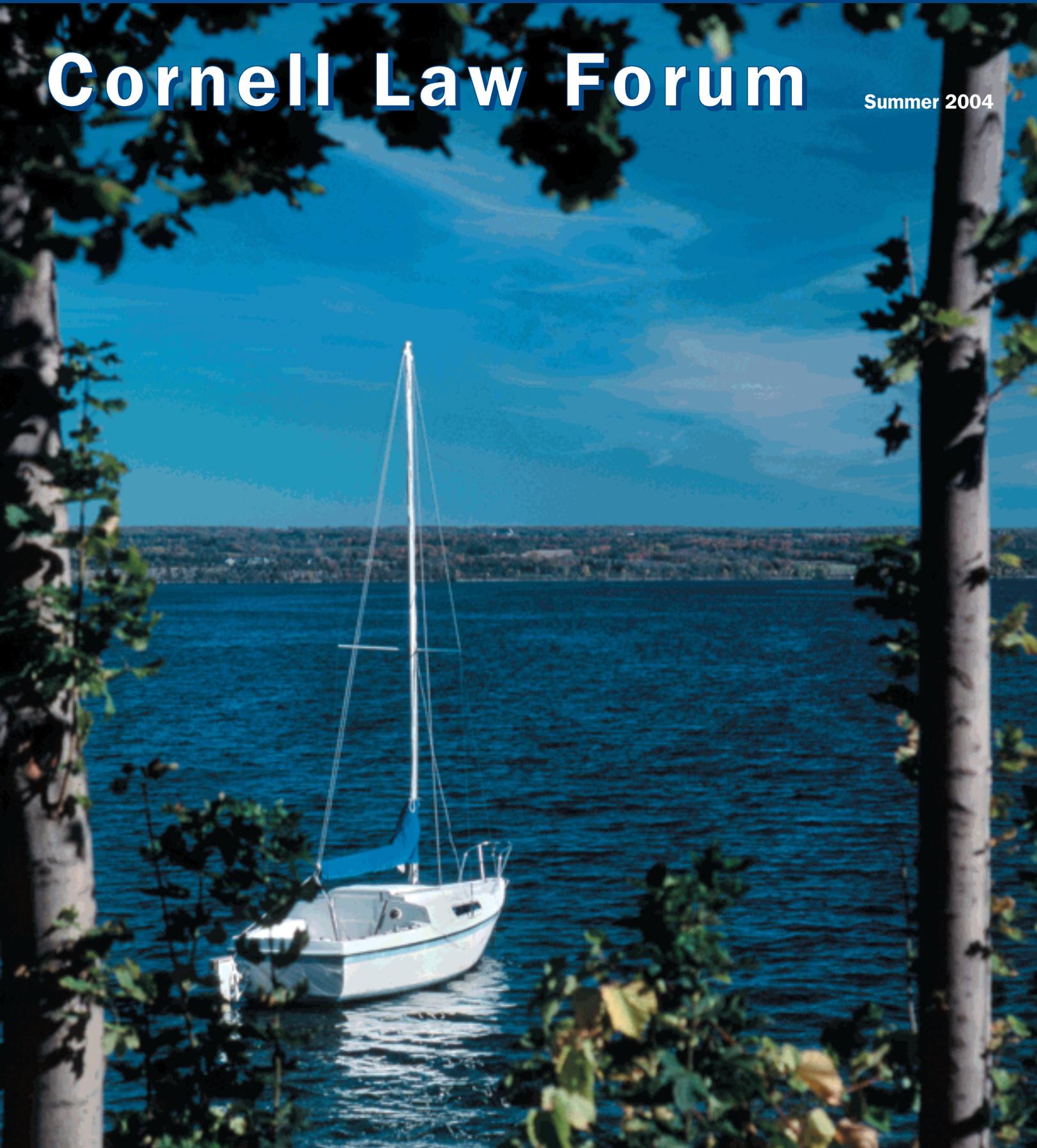
Reasonable Attorney Fees?  
by Professor Eisenberg

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New Associate Dean

# Cornell Law Forum

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Cover: *On Cayuga Lake*



# What Is a Reasonable Attorney Fee? An Empirical Study of Class Action Settlements

**Theodore Eisenberg and Geoffrey P. Miller**

*Editors' Note: This article is based on Theodore Eisenberg and Geoffrey P. Miller, "Attorney Fees in Class Action Settlements: An Empirical Study," 1 Journal of Empirical Legal Studies 27 (2004). The abridged version printed here is used with permission.*

Determining an appropriate fee is a difficult task facing trial court judges in class action litigation. But courts rarely rely on empirical research to assess a fee's reasonableness, due, at least in part, to the relative paucity of available information. Existing empirical studies of attorney fees in class action cases are limited in scope, and generally do not control for important variables. To help fill this gap, we analyzed data from all state and federal class actions with reported fee decisions from 1993 to 2002 in which the fee and class recovery could be determined with reasonable confidence.

We find that the level of client recovery is by far the most important determinant of the attorney fee amount. A scaling effect exists, with fees constituting a lower percent of the client's recovery as the client's recovery increases. The relation between fees and recovery is remarkably regular, and can be observed both in cases in which no fee-shifting statute applies, and in cases in which the plaintiff had a right to seek reimbursement under a fee-shifting statute. The presence of high risk is associated with higher fees, as is the presence of the case in federal rather than state court. Contrary to popular belief, we find no solid evidence that attorney fees increased during the period studied.



## I. The Legal Background

When a class action settles, class counsel is generally entitled to a fee award, either under a fee-shifting statute,<sup>1</sup> or through application of the common fund doctrine.<sup>2</sup> The amount paid to class counsel must be approved by the court. With respect to fee-shifting statutes and awards of fees under the common fund rule, the fees is to be paid by the defendant, which does not have the ability to control the reasonableness of class counsel's fee demands. Without judicial supervision, counsel could make unreasonable fee requests. In the case of fees from a common fund, counsel's request for compensation creates a direct conflict of interest with the class. Because class members are dispersed, disorganized, and typically have a relatively small stake in the outcome of the litigation, the class cannot protect itself against an unreasonable fee request. Again, court protection is required to prevent counsel from enriching themselves at the

expense of the class. Class and derivative actions also present the specter that counsel will “sell out” the class or the shareholders by agreeing to a low recovery in exchange for a generous fee.

## Court protection is required to prevent counsel from enriching themselves at the expense of the class.

Many courts have adopted one of two methodologies for determining fees: the lodestar method, or the percentage method. Under the lodestar method, courts multiply the reasonable number of hours expended by counsel by a reasonable hourly rate, and then adjust the product for various factors.<sup>3</sup> The lodestar method has numerous flaws, however. Courts cannot easily determine either reasonable hours or a reasonable hourly rate, and there are few protections against counsel exaggerating either or both figures. The calculation thus involves the courts in time-consuming and mind-numbing bean counting, and risks transforming the fee determination into a collateral lawsuit. Standards for determining any multiplier for the lodestar are unclear and potentially arbitrary, and the method creates a perverse incentive for counsel to waste time in order to run up the bill once a victory of some sort appears reasonably certain.

The percentage method of fee calculation fares better along these dimensions. Under this method,

which resembles the contingency fee in individual tort cases, the court multiplies the amount recovered on behalf of the class by a percentage factor. The percentage method is easy to calculate, does not involve the court in fee audits, and does not create incentives to waste time. Although generally preferable to the lodestar method in cases where it can be used, the percentage method is also imperfect. In some cases (for example, actions for injunctive relief, or cases involving non-pecuniary relief, such as hard-to-value coupons) the amount recovered may be difficult or impossible to quantify. Determining the proper percentage may be difficult, especially when the case is unusual in dimension (very large or very small), or especially difficult or risky. The percentage method provides an incentive for counsel to settle early in order to avoid expending low-return hours. And, unless adjusted for risk, the percentage method tends to over-compensate counsel in easy cases where the probability of recovery is high. Perhaps in recogni-

**Table 1. Fee Percent Summary by Legal Regime and Case Category**

Category	Non-fee-shifting cases				Fee-shifting cases			
	Mean	Median	Std. dev.	N	Mean	Median	Std. dev.	N
Antitrust	21.4	23.3	9.9	36	-	-	-	-
Civil Rights	37.0	37.0	1.4	2	26.1	31.3	17.3	7
Consumer	16.2	13.0	10.6	52	55.2	51.8	20.2	18
Corporate	20.4	20.0	11.5	15	-	-	-	-
Employment	25.3	23.4	9.6	7	37.5	31.8	21.7	16
ERISA/ Pension	22.0	24.0	7.8	7	24.4	16.2	26.4	15
Mass Tort	18.3	18.7	7.0	7	-	-	-	-
Securities	24.1	25.0	8.9	142	-	-	-	-
Tax Refund	13.1	11.5	9.7	6	-	-	-	-
Tort	17.9	19.6	9.2	10	-	-	-	-
Other	24.8	27.5	8.1	19	22.5	23.0	20.4	3
Total	21.9	23.2	9.9	303	37.5	33.0	25.9	59

*Source: Reported class action settlements with fee awards, 1993-2002.*

**Table 2. Fee Percent Summary by Fee Method and Legal Regime**

Fee method	Non-fee-shifting cases				Fee-shifting cases			
	Mean	Median	Std. dev.	N	Mean	Median	Std. dev.	N
Percent	22.3	24.0	9.9	197	26.7	30.0	14.1	17
Mixed percent/lodestar	22.9	25.0	9.0	68	24.3	23.0	10.8	9
Pure lodestar	17.2	16.5	10.5	38	46.6	50.1	28.4	33

Source: Reported class action settlements with fee awards, 1993-2002.

tion that both the lodestar and percentage methods imperfectly estimate a reasonable fee, some courts adopt a blended approach that checks the percentage method for reasonableness against a lodestar calculation.

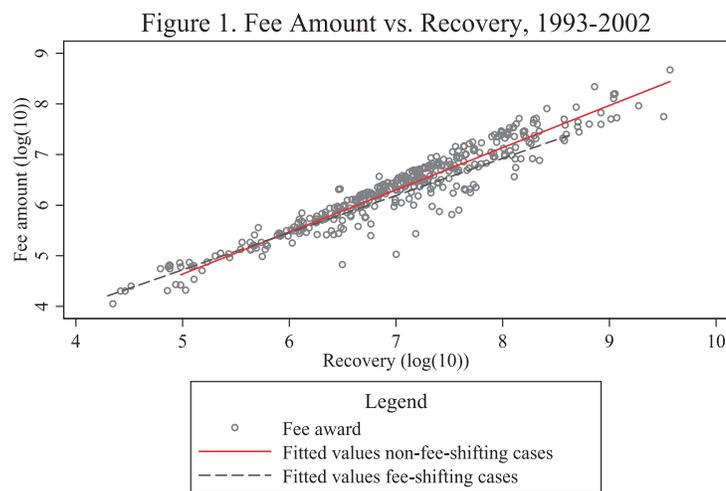
Regardless of the methodology used, courts could benefit from reviewing empirical evidence on the amounts awarded in analogous cases. Courts in this setting engage in a process of appraisal, and any appraisal can properly take account of comparable transactions. In fact, courts frequently cite prior court precedents in which fees have been awarded. But courts almost never examine empirical research that could potentially provide more systematic and statistically controlled information about awards.

## II. Data and Empirical Results

To assess the factors that influence fees, we assembled a comprehensive database of published cases. We searched the WESTLAW “All Cases” database. Then we checked those searches’ results against a search of the LEXIS “Mega” database using the same search terms. We also compiled lists of citations in the cases found with these search requests, and included any additional cases meeting the basic search criteria. We further checked the list against the *CCH Federal Securities* and *Trade Regulation Reporters*. We sometimes gathered additional information about case characteristics from other sources. These searches yielded an initial list of 449 cases. Two of the most important variables for our purposes were fees and client recoveries. The fee was ascertainable in 417 class action cases. The client recovery was usually available from the opinion, and a useable figure was coded in 370 cases. The coding of these and other variables is explained in more detail elsewhere.<sup>4</sup>

We discuss fee award levels separately in relation to four major influences: legal regime (fee-shifting or

not), case category, client recovery level, and time. Table 1 summarizes fees as a percent of recoveries by fee-shifting status and case category. The “Total” row shows substantial differences between fee-shifting and non-fee-shifting cases, and the higher fee percents in fee-shifting cases. The table also breaks down case categories in which counsel fees are awarded in class action cases. Securities law class actions tend to dominate, comprising over 40 percent of non-fee-shifting cases. But other categories, including anti-trust and consumer cases, contribute substantial numbers of cases. Securities cases also tend to have high award percentages (though not the highest), but this result is not statistically significant when one controls for other factors. In non-fee-shifting cases,



Source: Reported Class Action Settlements with Fee Awards

the axiomatic one-third fee is inaccurate; a fee of 20 to 25 percent of the recovery better describes reality.

Descriptive statistics about the fee percent awarded, now broken down by the court's method of computing fees, appear in Table 2. Consistent with Table 1, Table 2 shows higher percentage awards in fee-shifting cases. It also shows that the lodestar method differs in its effect depending on the degree to which it dominates. In non-fee-shifting cases, the pure percent method and the mixed method (in which both percent and lodestar play a role) yield quite similar fee percents. The data indicate that the pure lodestar method tends to reduce the fee percent.

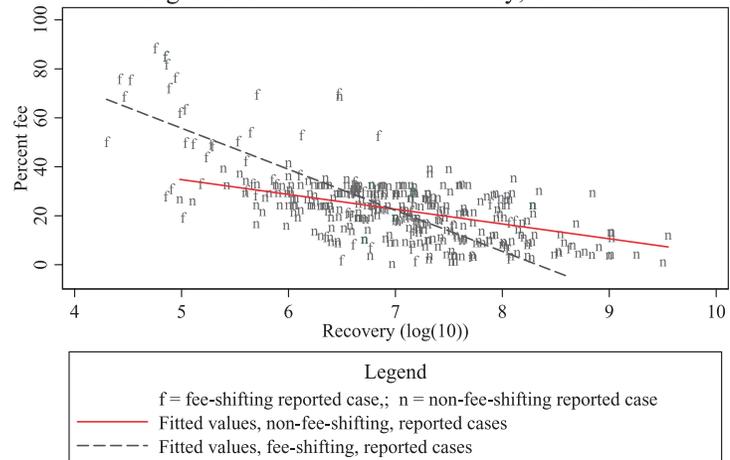
The pattern shifts in fee-shifting cases. Now the pure lodestar method tends to increase awards compared to the other methods which may be employed in the settlement context.

Figure 1 shows the strong correlation between the fee amount and the client recovery. Each small circle represents a case's fee amount and client recovery in the published opinion data. As the client recovery increases, so does the fee. This is not, in itself, particularly noteworthy. The surprising feature of the pattern is how tight the relation is. To the extent cases depart from the pattern, they tend to do so by having low fee amounts. That is, the data points most distant from the central pattern tend to lie below, not above, the pattern.

In addition to the scatterplot of individual award-recovery points, Figure 1 contains two lines. Each line represents the best-fitting regression line for a set of data. The solid line represents the best-fitting regression line for non-fee-shifting cases. The line represented by dashes represents the best-fitting regression line for fee-shifting cases. These one-variable regression models explain 89 percent of the variance in non-fee-shifting reported cases, and 90 percent of the variance in fee-shifting reported cases. Also reasonably impressive is the similarity of the fee-shifting and non-fee-shifting regression lines (slopes of 0.83 for non-fee-shifting cases, and 0.74 for fee-shifting cases). No obvious theoretical reason exists to predict this close fit between the results in both the fee-shifting and non-fee-shifting regimes. The fact that fees



Figure 2. Fee Percent vs. Recovery, 1993-2002



Source: Reported class action settlements with fee awards

and recovery correlate so closely across the two regimes suggests that courts may be engaging in an intuitive approach that awards fees in relation to class recovery, regardless of the formal methodology being used to calculate the fee.

The relation between the fee percent (in contrast to the fee amount) and client recovery is also of interest. Figure 2 explores this relation. Like Figure 1, the figure combines a scatterplot of individual cases with separate best-fitting regression lines for fee-shifting and non-fee-shifting cases. In addition, the figure separately identifies fee-shifting reported cases, designated with an "f," and non-fee-shifting reported cases, designated with an "n."

Two major points emerge from the figure. First, the data reveal a scale effect. As client recovery increases, the fee percent decreases. The regression lines share a substantially negative correlation with the size of the client's recovery. The simple regression models explain substantially less of the fee percent than

they did of the fee level. In non-fee-shifting cases, the model explains 25 percent of the variance; in fee-shifting cases, it explains 57 percent of the variance. Second, fee-shifting cases dominate in the upper left quadrant of the figure—corresponding to low-recovery, high-fee percent cases. They are scarce in the high client-recovery range of cases.

The hypothesis that attorney fees are increasing over time finds little support in our data. Figure 3 shows the essential facts. Neither the mean nor the median level of fee awards has increased over time, either for non-fee-shifting or fee-shifting cases. In one sense, this should come as no surprise. The fee level is fundamentally linked to the client's recovery, and client recoveries have not increased over time.<sup>5</sup> In another sense, the result is intriguing. 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. Impressions of fees as ever-increasing need greater empirical support than has been offered to date.

We explored the relation to fee awards of the above and other factors in regression models that account for multiple factors.<sup>6</sup> The models confirm that the overwhelming determinant of fee amounts is the amount of the recovery for the class. This is not a surprising result for common fund cases, given that fees in many such cases are determined as a percent of the class recovery. In fee-shifting cases, however, gross recovery for the class is also a significant determinant, even though—in theory, at least—court-awarded fees in such cases are not necessarily a function of the amount of class recovery.

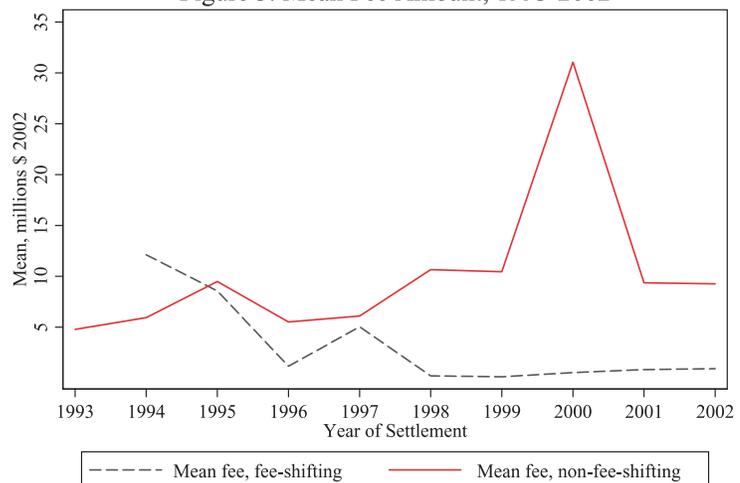
Regression analysis also confirms other key findings, and supports additional findings. Regression models show that the scaling effect suggested in Figure 2 (decrease of the fee as a percentage of class recovery as the class recovery increases) survives controlling for other factors. Risk influences fee awards in the expected manner. When courts men-

tion risk in a way that we interpret as reflecting high risk, or when we could otherwise confidently code risk as high, there is a significant association with both

## The hypothesis that attorney fees are increasing over time finds little support in our data.

the fee level and the fee percent. Cases we interpret as being low-risk, on the other hand, are associated with lower fees. We find little evidence that fees as a percent of the recovery are higher in state court class actions than in federal court actions. If anything, the opposite is true. This federal-state difference is a bit surprising in light of the business community's support for legislation shifting more class action cases from state to federal court. Regression analysis also confirms the simple story of Figure 3. We find no robust evidence of an increase in fees over time. We

Figure 3. Mean Fee Amount, 1993-2002



**Table 3. Fee Percent at Deciles of Client Recoveries**

Client recovery decile	Recovery range in decile (\$ millions)	Mean recovery in decile (\$ millions)	Mean fee percent	Median fee percent	Standard dev., fee percent
Less than 10%	< 1.4	0.8	29.5	30.0	5.9
10 to 20%	1.4 to 3.1	2.3	26.5	25.0	10.9
20 to 30%	3.1 to 5.2	4.3	25.0	29.4	7.9
30 to 40%	5.2 to 9.7	7.2	25.6	26.0	7.0
40 to 50%	9.7 to 15	12.0	22.7	22.4	8.4
50 to 60%	15 to 22	18.8	22.0	24.5	8.6
60 to 70%	22 to 38	30.4	19.0	19.0	9.9
70 to 80%	38 to 79	53.7	16.9	15.5	10.2
80 to 90%	79 to 190	122.2	17.6	15.0	9.2
Greater than 90%	> 190	929.1	12.0	10.1	8.1

*Note: Client recovery amounts are in millions of inflation-adjusted \$2002*

*Source: Reported class action settlements with fee awards.*

also find no evidence that the presence of soft relief, such as coupons, influences fee levels.

Focusing on a subset of the data—those cases with a computable lodestar amount reported—suggests that, in comparison to the client recovery, the lodestar fares poorly as a cost-effective way of calculating the fee, especially in non-fee-shifting cases. Models using the client recovery are more efficient in explaining fee awards. Producing a client-recovery-based fee requires less effort than producing a lodestar fee, since the lodestar requires judicial scrutiny of hours and determination of hourly rates.

### **III. A Practical Application— A Table to Check on Fee Awards**

Our study may assist courts in evaluating requests for attorney fees in class action cases. Because our study finds an overwhelming correlation between class recovery and attorney fees, the court can initially examine these two variables in cases in which the size of class recovery can be estimated. The court can compare the fee request in a given case with average awards in cases of similar magnitude. If the request is relatively close to average awards in cases with similar

characteristics, the court may feel a degree of confidence in approving the award. If the request is significantly higher than amounts awarded in past cases, the court should inquire further. The methodology is more appropriate for non-fee-shifting cases, in which, as Table 1 shows, the range of fee award percents varies less than in fee-shifting cases. Accordingly, we use only non-fee-shifting cases in the following analysis.

To provide numerical guidance, we divide the client recoveries in our published opinion data by decile, assigning approximately 10 percent of the cases to one of ten ordered groups. For each client recovery decile, we compute the mean and median fee percents as well as the standard deviation for the published opinion data set. Since the deciles contain approximately equal numbers of cases, each fee percent computation is based on similarly-sized samples. Table 3 reports the results.

The table's first column identifies each decile. The second column shows the range of client recovery for the decile—for example, less than \$1.4 million in the first decile. The next column shows the mean client recovery within the decile. For example, in the 30 to 40 percent decile, the mean client recovery was \$7.2

million (with a range of \$5.2 to \$9.7 million). The next three columns show the summary statistics for the fee percent within each client recovery decile.

With respect to fee percents, Table 3 shows, for example, that the mean fee percent in the lowest client-recovery decile in the decided cases data was 29.5, the median was 30.0, and the standard deviation was 5.9. In the highest decile of recovery, the mean client recovery was \$929 million. The mean fee percent was 12.0 percent, with a median of 10.1 percent, and a standard deviation of 8.1 percent. Clearly, a substantial scaling effect is at work.

Our suggestion is that fee requests which fall within one standard deviation above or below the mean should be viewed as generally reasonable, and should be approved by the court unless other reasons are presented to question the fee. Fee requests which fall within one to two standard deviations above or below the mean should be viewed as potentially reasonable, but in need of affirmative justification. Fee requests falling more than two standard deviations above or below the mean should be viewed as presumptively unreasonable; attorneys seeking fees above this amount should be required to come forward with compelling reasons to support their request.

To illustrate how a court could use this information, suppose class counsel requests a fee of \$12 million, equal to 40 percent of a recovery of \$30 million. Because this is more than two standard deviations above the mean fee award percent at this recovery level, the court should presumptively disapprove the request unless powerful reasons counsel in favor of approval. In evaluating the fee according to this methodology, the court could appropriately take into account factors such as case type and risk, which this study has shown tend to influence the amount of the fee.

#### IV. Conclusion

The single most important factor determining the fee in class action cases is the size of the client's recovery. As a percent of client recovery, fees tend to fall noticeably below the widely-quoted one-third level, ranging from about 30 percent in the smallest cases down to about 10 percent in the largest cases. We find no robust evidence that attorney fees in common fund cases have increased over the ten-year period studied. Fees tend to be higher in federal court than in state court cases. Fees as a percentage of the recovery tend to be higher in high-risk cases than in other cases. We find no evidence that either soft relief included in the estimated benefit for the class, or soft relief that is not included in the estimated benefit, has any upward or downward effect on the fee award.

We find robust evidence of a scaling effect. The percent of the recovery that goes to attorneys decreases as the size of the recovery increases. This effect can be interpreted as supporting the underlying theory for class actions. As similar cases are aggregated, the efficiency gains yield an increased net return to clients.

1. Fee-shifting statutes provide that defendants must pay the reasonable attorneys' fees of prevailing plaintiffs. E.g., 42 U.S.C. § 1988(b) (2000).
2. See *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 259 (1975).
3. E.g., *Gisbrecht v. Barnhart*, 535 U.S. 789 (2002).
4. Theodore Eisenberg and Geoffrey P. Miller, "Attorney Fees in Class Action Settlements: An Empirical Study," 1 *Journal of Legal Studies* 27 (2004).
5. *Id.*
6. *Id.*



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