

Court Congestion as an Explanation for Rising Attorney Fees

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Abstract: A judge facing exogenous constraints on his pecuniary income has an incentive to reduce his workload to increase his private welfare. In the face of a large caseload, this incentive will induce judges to attempt to terminate some cases as quickly as possible. In class action cases, failing to grant an attorney's fee request will delay termination. This conflict is likely to lead judges to authorize higher fees as court congestion increases. Increasing congestion in the federal courts then might play a role in explaining the upward trend that exists in class action attorney fees. Using Eisenberg and Miller's class action settlement data, we show that attorney fees are significantly and positively related to the congestion level of the court hearing the case. This effect explains some, but not all, of the significantly positive trend observed in the data.

I. Introduction

Posner (1993) was the first scholar to develop a rational actor model of judicial behavior. Recognizing that individual Article III judges have effectively no control over their financial incomes, Posner argues that judges are likely to work significantly less than comparable individuals in private practice. That is, because the returns to diligence are relatively low for judges, judges are likely to choose a relatively high level of leisure in their utility maximization problem all other things equal.¹

In the class action context, settlements are likely to be attractive to judges since a settlement will reduce the judge's workload, and it is unlikely that the approval of any given settlement will lower any of the other arguments in the judge's utility function. During the approval process, if a judge rejects the class action attorney's fee request, termination will be delayed. The marginal cost of this kind of delay is likely to increase as the judge's court grows more congested.

¹ Posner also includes a number of other arguments in the judge's utility function in addition to income (assumed to be given exogenously) and leisure. These include prestige, popularity, reputation, and avoiding reversal.

It should come as no surprise then when conventional wisdom observes that both court congestion levels and attorney fees in class action cases are on an upward trajectory. Indeed, the rational actor model of judicial behavior suggests a causal link between the two. Though there may be other explanations for increasing attorney fees as well, such as increasing subversion of the class action mechanism through which the suits become vehicles for attorney enrichment, while providing little benefit for the ostensible clients (Olson, 2003).

However, while it seems fairly clear that congestion levels have risen in U.S. federal courts, recent research by Eisenberg and Miller (2004) casts some doubt on the conventional wisdom regarding attorney fees. In their sample of class action settlements, which spans 1993-2002, they report that there is no robust evidence of an upward trend in attorney fees.

After correcting some econometric peculiarities in the original Eisenberg and Miller analysis, we do find robust evidence of a significant upward trend in attorney fees. We then merge their data with congestion data from the Federal Judicial Center to examine the relationship between congestion and fees. We find that there is a significantly positive relationship between congestion and fees, though it does not fully explain the upward time trend that is apparent in the data. This result lends support to the Posner leisure hypothesis.

We provide an exposition of this hypothesis in section II of this paper. We then discuss the Eisenberg and Miller dataset in section III, describing the shortcomings of their original analysis and presenting evidence of an upward trend in attorney fees. Section IV examines the effect of congestion on the attorney fees in the dataset and

discusses whether the results generalize beyond the Eisenberg and Miller dataset.

Section V concludes.

II. Judicial Behavior

As Posner (1993) describes it, he posits a very simple model of judicial behavior. The decision to become or remain a judge is dependent on the relative magnitude of the individual's expected utility as a judge and as a lawyer. By assumption, the individual earns a higher income as a lawyer but consumes less leisure and gets less psychic income from prestige and reputation. Posner assumes that only the leisure variable is a choice variable for most judges.

There are a number of different mechanisms through which judges are able to increase their leisure. Posner (1993) mentions allowing court queues to grow by expending less time and effort on the cases at hand. Taking this strategy to an extreme might not be optimal since an expanding queue could induce legislators to increase the size of the judiciary, leading to a decrease in judicial prestige. Though this concern will be attenuated a bit given the public good nature of judicial prestige, social pressures within the judiciary and society more broadly might constrain a judge's ability to allow queues to grow ever longer.

An alternate strategy might involve seeking to terminate cases as quickly as possible conditional on not making the types of mistakes that are likely to lead to reversal or public condemnation, which would decrease utility in Posner's model through the prestige and reputation arguments. Expediting termination in this way helps to limit the court queue, saving that resource for cases that are less easily terminated. This strategy

allows for a lower expenditure of effort or, conversely, greater consumption of leisure subject to the relevant constraints.

In this maximization problem, the shadow price of additional slack in the queue constraint grows as court congestion increases. That is, as the queue resource becomes increasingly scarce because of increased court congestion, the incentive to terminate cases quickly grows. This relationship suggests that we should find a positive relationship between court congestion measures and judicial expediency all other things equal. **DO WE NEED TO WRITE OUT THE MAXIMAND OR IS IT SELF-EVIDENT THAT THIS IS TRUE?**

As discussed above, one mechanism through which judges can expedite class action settlements is by giving attorney fee requests less scrutiny. From the plaintiff attorney's perspective, lower levels of scrutiny will translate into higher fee requests. Given the diffuse nature of the plaintiff class's interests, there will be little pressure to reign in the fee request from the class itself.

III. The Eisenberg and Miller Settlement Data

Data problems have significantly hampered empirical research regarding litigation. For cases decided at trial, existing datasets are far from comprehensive, especially at the state level. Data on cases that settle before trial are even more incomplete, and since most cases are settled before trial, this data problem is particularly acute. Class action settlements, however, may prove to be an exception to this general dearth of data, since court approval of the settlement terms is required.

Regarding attorney fees in class action litigation most existing research has been limited in its scope, focusing on only a few courts (e.g., Willging, Hooper, and Niemic, 1996) or substantive areas (e.g., Lynk, 1994). Eisenberg and Miller (2004) took a large step forward in this regard by developing and analyzing what they consider to be a comprehensive dataset of class action settlements that spans both state and federal courts, as well as multiple litigation fields. Their study represents the most comprehensive analysis of the determinants of attorney fees in class action settlements. Contrary to the conventional wisdom, they find that attorney fees did not increase during their sample period of 1993-2002, and they find that the most important determinant of the size of the attorney fee is the magnitude of the recovery for the plaintiff class.

However, upon examining the Eisenberg and Miller data and regressions, it is apparent that their failure to find robust evidence of a significant upward trend in fees is an artifact of econometric errors and idiosyncratic specification choices. In terms of the dataset itself, the major limitation is that, contrary to their claims, it is really only comprehensive for federal cases. Specifically, while the Westlaw and Lexis databases from which they collected their data include federal trial court decisions for each state, they contain state trial court decisions from only 10 states as indicated in the Appendix to this article. In principle, if we had some assurance that those 10 states were a random draw from the population, this limitation would not bias the results of the Eisenberg and Miller study (though it would affect the precision of their estimates). If the inclusion of a state is correlated with its tort environment, selection effects threaten to bias the Eisenberg and Miller results.

Characterizing a state's tort environment is inherently difficult, and suffers from the same data problems that hinder an examination of attorney fees. However, one potential measure is the subjective evaluation of individuals with experience in the various states' courts. The Chamber of Commerce has developed rankings of this sort by surveying nearly 1,000 in-house counsels of major corporations on their perceptions of state liability systems along the following dimensions: 1) tort and contract litigation; 2) treatment of class actions suits; 3) punitive damages; 4) timeliness of summary judgment/dismissal; 5) discovery; 6) scientific and technical evidence; 7) judges' impartiality and competence; and 8) juries' predictability and fairness. The rankings for overall tort environment and class action environment in particular are presented in our Appendix.

Although far from dispositive, a simple correlation between a 0/1 inclusion dummy (i.e., variable takes value of 1 if state trial court decisions are included in Westlaw) and the overall tort ranking or the class action ranking yields a negative relationship. That is, as the ranking gets worse, a state's trial court decisions are less likely to be included in the Eisenberg and Miller dataset. For the class action ranking, this negative correlation generates a p value of 0.15. On the face of it, it looks as if there might be a serious bias in the Eisenberg and Miller dataset, such that their estimates of awards and attorney fees might be biased downward because the particularly egregious courts are not included in the analysis. This bias also presumably affects their conclusion that fee awards as a percent of recovery are greater in federal court cases than in state court cases (Eisenberg and Miller, 2004 p. 67).

There are also some potentially serious econometric errors in the Eisenberg and Miller analysis. First, by parsing the dataset between fee-shifting and non fee-shifting cases, Eisenberg and Miller reduce the size of an already relatively small dataset for each of their regressions. While such parsing might be correct if there are *a priori* reasons to believe that the underlying models for the two kinds of cases differ by more than a constant, nothing in Eisenberg and Miller's discussion suggests that this is true. Thus, parsing the data simply lowers the number of observations over which each regression is estimated, lowering the precision of the parameter estimates.² A more reasonable strategy would be to pool the data and include a control for whether the case involves fee-shifting.

Another difficulty with their estimation technique is that their dataset is unbalanced. That is, the cases in their dataset are not uniformly distributed across the period 1993-2002. For example, while they only have 26 cases in 1996, they include 67 from 2002. This imbalance could potentially generate significant problems. For example, observations in years in which there are many cases will be implicitly weighted more heavily than years with few cases. Thus, any estimate of temporal effects might be an artifact of how many cases settled in a particular calendar year rather than being representative of patterns over time.

Although we are not aware of any technical solution for this problem, we propose clustering standard errors by year of observation as a potential remedy. Effectively, clustering instructs the regression to treat each group of observations as having equal weight when determining coefficients.

² Another way of estimating the regressions would be to pool the data but to interact the fee-shifting variable with each of the other controls. This could be done to test whether the underlying models for fee-shifting and non fee shifting cases actually differ by more than an additive constant.

In the Eisenberg and Miller specifications in which they include a log transformation of the lodestar amount used in the given case, the sample size used in estimating the regressions drops substantially. It turns out this is an artifact of Eisenberg and Miller's choice not to correct the "zeroes" problem that often arises with logarithmic transformations. That is, because the log of 0 is not defined, their specifications using the log of the lodestar amount effectively drop all observations in which the lodestar method was not used or where the amount was not ascertainable from the Westlaw record of the settlement. Dropping these observations could bias the estimated results if the presence of a lodestar amount is not randomly distributed in the universe of cases. Further, dropping so many observations in a relatively small dataset will necessarily affect the precision of any estimates adversely. To remedy this problem, econometricians generally replace the 0 value with an arbitrarily small value before performing the log transformation.³

Another mathematical peculiarity plagues Eisenberg and Miller's specifications in which they examine attorney fees as a percent of the class recovery amount. Without explanation, Eisenberg and Miller transform the percentage using the square root function. When dealing with dependent variables that are percentages, econometricians are often concerned with the fact that a linear regression model of percentages will not be bounded between 0 and 1. To solve this problem, the preferred solution is the logistic

transformation $\ln\left[\frac{p}{(1-p)}\right]$ (Greene 2000, pp. 215-216) or through the reasonably

accurate approximation $\ln(p)$ (Finkelstein and Levin 2001, p. 411). For many applications, the boundedness of the model's predictions is of small concern, and

³ See, for example, Greene (2000) or Maddala (1983).

economists will simply use the percentage variable without transforming it.⁴ The square root transform, to our knowledge, is not generally used in econometric analyses. The square root function does not solve the boundedness problem and merely serves to dampen variation in the dependent variable. **MIGHT BE ABLE TO SHOW THIS MATHEMATICALLY VIA JENSEN'S INEQUALITY AND THE $\text{VAR}(X) = E(X^2) - E(X)^2$ RELATIONSHIP, THOUGH IT MIGHT NOT BE WORTH IT SINCE IT'S INTUITIVE AND IT'S EASY TO SEE IN AN EXCEL SIMULATION.**

One of the innovations of the Eisenberg and Miller study is to take account of varying risk levels faced by attorneys in bringing class action suits. In some cases, the prospects for recovery are very low *ex ante*, while others might be viewed as a sure thing. Presumably, attorneys should be compensated for the level of risk they face, just as they would be if pure market mechanisms determined their fees. We need to rely on the courts to make some allowance for the riskiness of a given case.

Unfortunately, from a researcher's standpoint, it is not always clear what constitutes a risky case. Eisenberg and Miller face this problem by noting whether the court opinion mentions risk or not, classifying a case as high risk if the author of the opinion suggests the case is risky and low if the opinion suggests there is little or no risk. If risk is not mentioned, the case was assigned to the medium risk category. While we ideally would like to control for this risk effect, there is an inherent problem with the

⁴ Using the variable directly has the benefit of avoiding the problem of taking logarithms when the percentage is 0 or 1 which requires that the analyst drop the observation or implement some ad hoc correction such as assuming all zero values are actually small but non-zero.

chosen method.⁵ First, there is little confidence that various judges use the same implicit standards for viewing a case as risky (and therefore referring to it as so in an opinion). Further, cynical critics of the class action system might view this classification as circular such that, if a judge wishes to provide a high (or low) fee, he can simply assert that the case is risky (or riskless). Such an endogeneity problem would lead to biased estimates of the various coefficients.

If the use of risk as a justification for large fees has been increasing over time, without an objective increase in the riskiness of the cases in the universe, the high risk indicator used by Eisenberg and Miller will mask any underlying trend in attorney fees.

If we remedy these problems (i.e., drop state court observations, pool fee-shifting and non fee-shifting cases and including a fee-shifting control, clustering standard errors by year, remedying the zeroes problem in specifications using log transforms of the lodestar amount, using the untransformed percentage fee dependent variable, and dropping the risk controls), the evidence for a significant upward trend becomes more apparent.

Table 1 contains descriptive statistics for the corrected Eisenberg and Miller dataset, and Table 2 contains our refined regression results. For both measures of attorney fees, we find a positive trend in all specifications. While the trend coefficient is not statistically significant for the specifications examining the log of the attorney fee (in constant 2002 dollars), it is statistically significant for the regressions examining fees as a percentage of recovery. We find a coefficient of 0.54 percent, implying a conditional increase in fees of almost 5 percent over the sample period in absolute terms. This result

⁵ Although, we note that the following results are invariant in terms of coefficient signs and statistical significance if we include the risk measures in the regressions.

is statistically significant at the 5 percent level and it implies a relative growth rate of about 20 percent over the sample period.

IV. Does Increasing Court Congestion Explain the Upward Trend in Fees?

Of course, while the foregoing analysis does demonstrate an upward trend in attorney fees during the 1993-2002 window, it does little to shed light on what has been driving that trend. One possibility suggested by Posner's model of judicial behavior is that judges, facing increasingly binding queue constraints due to increased court congestion, have become less eager to challenge class action attorney fee requests.

To investigate this possibility, we use data on court congestion, specifically the number of cases terminated in a given year in a given federal district or appellate circuit divided by the number of judgeships in that court. These data are collected by the Administrative Office of the U.S. Courts under the supervision of the Federal Judicial Center. The results that follow are robust to using other congestion measures such as filings per judgeship or cases pending per judgeship.

Re-running the previous regressions with the additional variable terminations per judgeship, we find that both the log of attorney fees (in constant 2002 dollars) and attorney fees as a percentage of class recovery are strongly correlated with the congestion measure. Our results are presented in Table 3. For log attorney fees, we find an elasticity of 0.13, implying that if the congestion measure increases by 1 percent, attorney fees increase by 0.13 percent, all else equal. The coefficient is statistically significant at the 1 percent level.

Looking at the percentage fee regressions, we also find a positive and statistically significant relationship between congestion and fees. The estimated coefficient implies that a one standard deviation increase in the congestion measure is associated with a 0.78 increase in the percentage fee, a relative effect greater than 3 percent. The result is statistically significant at the 5 percent level.

Also of interest in the percentage fee regressions, we find that the trend effect is diminished (dropping from an increase of 0.54 per year to 0.51 per year, though the difference is not statistically significant) but a statistically significant time trend is still apparent in the data.

It turns out that our congestion results are particularly sensitive to the inclusion of a case from the Northern District of Alabama in 1999. While there is nothing especially remarkable regarding either the recovery or fee reached in *Garst v. Franklin Life Insurance Company*, 1999 U.S. Dist. LEXIS 22666, the congestion level in the Northern District of Alabama in 1999 was unusually high because of the termination of more than 19,000 breast implant cases there in that year. While the average termination per judgeship figure for the sample as a whole is 442 cases per judge, the figure for Alabama's Northern District in 1999 is 3,441. That year was even quite high for the relatively busy Northern District of Alabama, which witnessed 843 terminations per judgeship in 1998 and 709 in 2000. While such an anomaly would not be problematic in a large dataset, given that the Eisenberg and Miller dataset contains fewer than 300

usable federal court observations, such an outlier could potentially have undue effect on our estimates of the congestion effect.⁶

We present the regression results where the *Garst* case is omitted in Table 4. Again, we find uniformly that higher congestion is related to significantly higher attorney fees regardless of whether we examine the log fee or fee as a percent of recovery. Excluding the observation increases the congestion coefficient by a factor of three and the revised elasticity estimate is 0.15, suggesting that a 1 percent increase in congestion leads to a 0.15 percent increase in attorney fees.

The increase is similarly large in the percent fee regressions where a one standard deviation increase in the congestion measure is associated with a rise in the percentage fee of 1.6. This effect in relative terms is about 3 percent. In these regressions as well, the time trend remains positive and is statistically significant at the 10 percent level.

These results suggest that attorney fees in class action cases are positively related to the congestion level of the court presiding over the case. While rising congestion explains some of the upward trend in fees during the 1993-2002 period, a substantial trend remains even after controlling for the congestion effect.

This analysis, while providing strong support for the judicial expediency hypothesis, potentially suffers from two weaknesses. First, there might be simultaneity between congestion and fees to the extent that certain courts are congested because they agree to high fees in class action cases. While we do not have enough observations to rule out this possibility, a larger dataset might be able to focus on exogenous changes in judicial vacancies and the number of judgeships in a court to rule out this endogeneity

⁶ It is interesting to note that excluding the case from the regressions where we do not consider congestion and focus merely on the time trend and the Eisenberg and Miller variables has no appreciable effect on the time trend coefficient.

possibility. Given that class action cases make up such a small percentage of any court's docket, it would seem unlikely that endogeneity is driving this result.

The more glaring problem involves the difficulties inherent in analyses of small datasets. Given that the Eisenberg and Miller dataset is among the best available on this topic, it might not be possible to improve on the analysis until more comprehensive, both along the cross section and the time dimension, datasets are collected. Until then, it might be profitable to attempt to replicate these basic results with the limited datasets that do exist.

ADD SOME REPLICATIONS WITH ERIC'S DATA

V. Conclusion

Civil Litigation has a large impact on economic welfare in the United States. According to the 2004 *Economic Report of the President*, "tort liability leads to lower spending on research and development, higher health care costs, and job losses" (p. 203). However, much of this cost is justified by the deterrence and insurance functions performed by the tort system.

Some critics contend that we are in the midst of a "torts crisis" with the costs of the system starting to outpace the benefits derived from it. Further, some commentators argue that attorneys themselves are at the root of this crisis (Olson, 2003). One charge levied in this line of argument is that lawyers who bring class action suits against firms, effectively subvert the democratic process by engaging in regulation through litigation without generating much gain for the individuals who are ostensibly their clients. That is, although class action suits generate substantial judgments and settlements, it is claimed

that an increasingly large portion of those proceeds are directed toward attorneys' fees, leaving a relatively meager amount to compensate those who have been harmed.

Important research by Eisenberg and Miller (2004) purports to expose the claim of rising attorney fees as unsupported in the face of the data. Unfortunately, the Eisenberg and Miller analysis is handicapped by a number of methodological problems and idiosyncratic design decisions. A more reasonable examination of the data does reveal that fees have been growing over time, though it is not clear what has been driving the trend.

One possibility is suggested by Posner's work on judicial behavior. Specifically, judges might have the incentive to expedite the settlement of class action cases by agreeing to attorney fee requests as standard operating procedure. In so doing, they decrease the amount of time and effort spent on the case, clearing it from their docket in a way that is unlikely to hurt their reputation.

While we find substantial support for this expediency theory of a judge's decisions regarding fees, rising congestion levels in the federal courts explain only a small fraction of the overall upward trend in attorney fees in class action cases.

References

- American Tort Reform Association (2003). *Bringing Justice to Judicial Hellholes* available at <http://www.atra.org/reports/hellholes/report.pdf> .
- Economic Report of the President* (Washington, D.C.: United State Government Printing Office, 2004).
- Eisenberg, Theodore and Geoffrey Miller (2004). "Attorney Fees in Class Action Settlements: An Empirical Study." *Journal of Empirical Legal Studies*, 1(1): 27-78.
- Finkelstein, Michael and Bruce Levin (2001). *Statistics for Lawyers*, 2nd ed. (New York: Springer-Verlag).
- Greene, William (2000). *Econometric Analysis*, 4th ed. (Upper Saddle River, NJ: Prentice Hall).
- Lynk, William (1994). "The Courts and the Plaintiffs' Bar: Awarding the Attorney's Fee in Class Action Litigation." *Journal of Legal Studies*, 23(1): 185-209.
- Maddala, G. (1983). *Limited-Dependent and Qualitative Variables in Econometrics* (New York: Cambridge University Press).
- Olson, Walter (2003). *The Rule of Lawyers: How the New Litigation Elite Threatens America's Rule of Law* (New York: St. Martin's).
- Posner, Richard (1993). "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)," *Supreme Court Economic Review*, 3: 1-41.
- United States Chamber of Commerce (2004). *2004 U.S. Chamber of Commerce State Liability Systems Ranking Study* available at <http://www.legalreformnow.com/pdfs/2004%20full%20report.pdf> .
- Willging, Thomas, Laurel Hooper, and Robert Niemic (1996). *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 4*.

**Appendix:
Relationship Between Inclusion in Dataset and Class Action Environment**

State	Federal Cases	State Cases	Tort	Class Action	State	Federal Cases	State Cases	Tort	Class Action
AK	Yes	No	33	26	MT	Yes	No	43	37
AL	Yes	No	48	47	NC	Yes	No	19	18
AR	Yes	No	42	42	ND	Yes	No	16	6
AZ	Yes	No	14	15	NE	Yes	No	2	5
CA	Yes	No	46	45	NH	Yes	No	7	7
CO	Yes	No	13	13	NJ	Yes	Yes	26	23
CT	Yes	Yes	18	14	NM	Yes	No	37	38
DE	Yes	Yes	1	1	NV	Yes	No	34	24
FL	Yes	No	38	39	NY	Yes	Yes	22	8
GA	Yes	No	29	31	OH	Yes	Yes	32	21
HI	Yes	No	39	43	OK	Yes	No	31	35
IA	Yes	No	4	2	OR	Yes	No	27	33
ID	Yes	No	5	4	PA	Yes	Yes	30	28
IL	Yes	No	44	44	RI	Yes	Yes	36	32
IN	Yes	No	11	11	SC	Yes	No	40	40
KS	Yes	No	9	22	SD	Yes	No	17	3
KY	Yes	No	35	34	TN	Yes	No	25	20
LA	Yes	No	47	46	TX	Yes	No	45	41
MA	Yes	Yes	28	29	UT	Yes	No	6	9
MD	Yes	No	21	27	VA	Yes	Yes	3	–
ME	Yes	Yes	12	10	VT	Yes	No	20	17
MI	Yes	No	23	25	WA	Yes	No	24	30
MN	Yes	No	8	16	WI	Yes	No	10	19
MO	Yes	No	41	36	WV	Yes	No	49	48
MS	Yes	No	50	–	WY	Yes	No	15	12

Note: The columns labeled “Federal Cases” and “State Cases” indicate whether or not cases from the respective trial courts appear in the Westlaw and Lexis Databases from which Eisenberg and Miller draw their data. The “Tort” and “Class Action” Columns provide the rank of each state in the Chamber of Commerce’s 2004 Liability Systems Ranking Study. Mississippi and Virginia are not included in the “Class Action” column because those states do not have a class action mechanism.

**Table 1:
Descriptive Statistics**

Variable	Description	Mean	Standard Deviation
Terminations / Judgeship	Cases terminated in court for a given year per existing judgeship	442.986	194.822
Deflated Fee Amount	Dollar amount of attorney fee deflated to 2002 dollars	10,100,000	33,000,000
Fee as a Percentage of Recovery	Attorney fee divided by total class recovery	25.193	14.988
Gross Recovery	Total class recovery	88,400,000	331,000,000
Lodestar Dummy	=1 if court used Lodestar method to determine or check fee	0.431	0.496
Lodestar Amount	Fee suggested by Lodestar method	4,296,326	8,728,192
Defendant Pays	=1 if defendant paid attorney fee	0.254	0.436
Age	Number of years between filing date and opinion date	3.501	2.774
Appellate Opinion	=1 if opinion issued by appellate court	0.090	0.287
Objector Dummy	=1 if court noted an objector to the fee request	0.335	0.473
Nonincluded Soft Relief	=1 if soft relief was not included as part of common recovery fund	0.090	0.287
Included Soft Relief	=1 if soft relief was included as part of common recovery fund	0.107	0.310
Settlement Class	=1 if settlement class existed	0.327	0.470
Fee Shift Dummy	=1 if fee shifting statute applied	0.192	0.394

Note: All data are from Eisenberg and Miller (2004) except Terminations/Judgeship which was provided by the Administrative Office of the U.S. Courts.

Table 2:
Replicate Eisenberg and Miller with Corrections
(Year Clustered Standard Errors in Parentheses)

	Natural Log of Deflated Fee Amount			Fee as a Percentage of Recovery		
Year	0.008 (0.005)	0.007 (0.005)	0.007 (0.005)	0.539 (0.214)	0.545 (0.222)	0.540 (0.215)
Log of Gross Recovery	0.813 (0.016)	0.812 (0.018)	0.814 (0.016)	-8.827 (1.294)	-8.949 (1.373)	-8.827 (1.306)
Lodestar Dummy	-0.019 (0.020)	–	–	0.007 (0.947)	–	–
Lodestar Amount	–	0.003 (0.005)	–	–	0.188 (0.191)	–
Defendant Pays	-0.187 (0.026)	-0.187 (0.028)	-0.189 (0.027)	-3.903 (2.098)	-3.822 (2.130)	-3.902 (2.133)
Age (log years)	0.011 (0.019)	0.009 (0.019)	0.010 (0.019)	-1.254 (0.960)	-1.309 (1.001)	-1.254 (0.935)
Appellate Opinion	-0.046 (0.088)	-0.047 (0.090)	-0.047 (0.089)	0.873 (4.492)	0.848 (4.538)	0.873 (4.485)
Objector Dummy	-0.007 (0.041)	-0.005 (0.042)	-0.007 (0.040)	-0.291 (1.693)	-0.135 (1.783)	-0.291 (1.703)
Nonincluded Soft Relief	-0.006 (0.027)	-0.002 (0.028)	-0.004 (0.027)	-1.803 (1.217)	-1.691 (1.286)	-1.804 (1.219)
Included Soft Relief	0.065 (0.062)	0.064 (0.061)	0.064 (0.061)	3.162 (2.377)	3.148 (2.347)	3.163 (2.350)
Settlement Class	-0.040 (0.036)	-0.035 (0.034)	-0.036 (0.034)	-2.585 (1.181)	-2.503 (1.068)	-2.586 (1.069)
Fee Shift Dummy	0.099 (0.051)	0.091 (0.051)	0.095 (0.052)	11.537 (1.728)	11.286 (1.743)	11.538 (1.791)
<i>n</i>	298	298	298	298	298	298
R ²	0.935	0.935	0.935	0.516	0.518	0.516

Note: As in Eisenberg and Miller's original regressions, each specification contains dummy variables for each of 12 case types.

Table 3:
Effect of Court Congestion on Attorney Fees
(Year Clustered Standard Errors in Parentheses)

	Natural Log of Deflated Fee Amount			Fee as a Percentage of Recovery		
Terminations / Judgeship	0.012 (0.002)	0.012 (0.002)	0.012 (0.002)	0.399 (0.150)	0.392 (0.159)	0.398 (0.001)
Year	0.007 (0.005)	0.007 (0.005)	0.007 (0.005)	0.510 (0.210)	0.514 (0.217)	0.509 (0.211)
Log of Gross Recovery	0.811 (0.017)	0.810 (0.018)	0.812 (0.017)	-8.907 (1.304)	-9.022 (1.375)	-8.906 (1.315)
Lodestar Dummy	-0.022 (0.019)	–	–	-0.049 (0.900)	–	–
Lodestar Amount	–	0.003 (0.005)	–	–	0.180 (0.190)	–
Defendant Pays	-0.198 (0.027)	-0.198 (0.029)	-0.199 (0.028)	-4.204 (2.025)	-4.121 (2.060)	-4.208 (2.049)
Age (log years)	0.009 (0.021)	0.007 (0.020)	0.008 (0.020)	-1.370 (1.011)	-1.428 (1.056)	-1.372 (0.987)
Appellate Opinion	-0.061 (0.082)	-0.061 (0.084)	-0.061 (0.083)	0.432 (4.265)	0.419 (4.310)	0.432 (4.261)
Objector Dummy	-0.008 (0.039)	-0.006 (0.040)	-0.008 (0.039)	-0.343 (1.625)	-0.195 (1.705)	-0.344 (1.633)
Nonincluded Soft Relief	-0.003 (0.031)	0.000 (0.032)	-0.001 (0.032)	-1.704 (1.294)	-1.592 (1.364)	-1.699 (1.298)
Included Soft Relief	0.068 (0.062)	0.067 (0.061)	0.067 (0.061)	3.305 (2.376)	3.291 (2.351)	3.303 (2.350)
Settlement Class	-0.048 (0.035)	-0.042 (0.033)	-0.043 (0.032)	-2.800 (1.149)	-2.703 (1.051)	-2.789 (1.046)
Fee Shift Dummy	0.094 (0.058)	0.086 (0.058)	0.090 (0.058)	11.554 (1.694)	11.322 (1.714)	11.544 (1.772)
<i>n</i>	297	297	297	297	297	297
R ²	0.936	0.936	0.936	0.517	0.519	0.517

Note: As in Eisenberg and Miller's original regressions, each specification contains dummy variables for each of 12 case types. The coefficients and standard errors for the terminations/judgeship variable have been multiplied by 100 for presentation.

Table 4:
Effect of Court Congestion on Attorney Fees
Garst v. Franklin Life Insurance Company Settlement Omitted
(Year Clustered Standard Errors in Parentheses)

	Natural Log of Deflated Fee Amount			Fee as a Percentage of Recovery		
Terminations / Judgeship	0.035 (0.014)	0.036 (0.013)	0.035 (0.013)	1.426 (0.595)	1.455 (0.583)	1.420 (0.579)
Year	0.004 (0.005)	0.004 (0.005)	0.004 (0.005)	0.392 (0.201)	0.398 (0.203)	0.397 (0.195)
Log of Gross Recovery	0.810 (0.017)	0.808 (0.019)	0.811 (0.017)	-8.947 (1.296)	-9.093 (1.378)	-8.951 (1.309)
Lodestar Dummy	-0.016 (0.022)	–	–	0.197 (1.023)	–	–
Lodestar Amount	–	0.004 (0.005)	–	–	0.217 (0.206)	–
Defendant Pays	-0.197 (0.027)	-0.196 (0.029)	-0.198 (0.028)	-4.166 (2.004)	-4.047 (2.052)	-4.153 (2.046)
Age (log years)	0.006 (0.022)	0.004 (0.022)	0.005 (0.022)	-1.524 (1.121)	-1.589 (1.163)	-1.515 (1.078)
Appellate Opinion	-0.090 (0.090)	-0.093 (0.092)	-0.091 (0.090)	-0.940 (4.452)	-1.002 (4.512)	-0.928 (4.432)
Objector Dummy	-0.007 (0.038)	-0.004 (0.039)	-0.007 (0.038)	-0.295 (1.550)	-0.109 (1.637)	-0.291 (1.562)
Nonincluded Soft Relief	-0.013 (0.026)	-0.010 (0.027)	-0.012 (0.027)	-2.133 (1.179)	-2.038 (1.242)	-2.148 (1.178)
Included Soft Relief	0.069 (0.060)	0.068 (0.060)	0.068 (0.059)	3.352 (2.335)	3.350 (2.312)	3.362 (2.315)
Settlement Class	-0.049 (0.034)	-0.044 (0.032)	-0.045 (0.032)	-2.848 (1.104)	-2.788 (1.001)	-2.888 (1.010)
Fee Shift Dummy	0.084 (0.055)	0.075 (0.055)	0.080 (0.055)	11.079 (1.647)	10.835 (1.667)	11.122 (1.709)
<i>n</i>	296	296	296	296	296	296
R ²	0.937	0.937	0.937	0.522	0.524	0.522

Note: As in Eisenberg and Miller's original regressions, each specification contains dummy variables for each of 12 case types. The coefficients and standard errors for the terminations/judgeship variable have been multiplied by 100 for presentation.