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What We Know and What We Don't Know About Modern Class Actions: A Review of the Eisenberg-Miller Study

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EXECUTIVE SUMMARY

Last March, two law professors, Theodore Eisenberg and Geoffrey P. Miller, published a Study that examined the relationship between fees and class action recoveries. The Study also made the subsidiary finding that the magnitude of the average class action recovery had remained largely constant over the period of the Study, 1993-2002.

In response, *The New York Times* ran a story on the front of its business section entitled, "Study Disputes View of Costly Surge in Class-Action Suits." The president of the Association of Trial Lawyers of America proclaimed, "This empirical study comes out and says the system is working correctly." Senator Russell Feingold referenced the Study as he called the federal Class Action Fairness Act "a solution in search of a problem."

This paper analyzes in more depth the Eisenberg-Miller Study and concludes that, rather than undermining arguments for class action reform, Eisenberg and Miller's data strongly support the need for reform. Relevant findings include:

- Eisenberg and Miller found that the average class action recovery over the ten-year period they studied was $138.6 million.
- The Study shows that the average recovery of the top 20% of cases was $613 million, and the average for the top 10% equaled $1.08 billion.
- Just looking at the cases in the Study's sample, aggregate class action recoveries averaged $5.13 billion per year.
- The Eisenberg-Miller numbers—huge though they are—are significant underestimates of the magnitude of class action litigation overall.
  - Eisenberg and Miller only report data taken from published opinions.
  - Their data set is highly skewed toward securities class action litigation, which constitutes over half their sample.
  - Their data include only 9 civil rights class actions, 23 employment class actions, 22 ERISA class actions, and 7 mass tort class actions. It is simply implausible that, over the ten-year period, in state and federal courts together, these low numbers represent the full volume of class action litigation.
- The Eisenberg-Miller Study does not address a central concern about the class action mechanism, that mere certification of a class will force defendants to settle rather than "betting their company," regardless of the evidence. For example, the Eisenberg-Miller sample includes the silicon breast litigation, which settled for $4.2 billion despite strong scientific evidence showing that implants did not cause the ailments claimed by class plaintiffs.

Reform is more, not less necessary, when a problem has proved persistent over a long period of time. An average $138.6 million recovery for each class action over ten years is suggestive of a real problem. If, as is likely, the magnitude of total recoveries is five, ten, or twenty times the Eisenberg-Miller Study's showing of $5.13 billion per year from a very limited sample, class action litigation is imposing extraordinary costs on American society.

Such a finding buttresses the case for class action reform. The Class Action Fairness Act, if enacted, would constitute a helpful, but largely a modest reform. Moving class actions involving significant different-state parties from state to federal courts will help but is unlikely to solve the problems created by modern class action litigation. Real tort reform requires a fundamental rethinking and redesign of both our substantive and procedural rules of law.

About The Author

George L. Priest is the John M. Olin Professor of Law and Economics and director of the John M. Olin Center for Law, Economics, and Public Policy at Yale Law School. Professor Priest is one of the nation's foremost law and economics scholars and the author of a wide number of articles and monographs on the subjects of antitrust law, products liability, insurance, regulation, and settlement.

Professor Priest's scholarly publications in the area of tort law include *Procedural versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521 (1997); *Private Litigants and the Court Congestion Problem*, 69 B.U. L. Rev. 527 (1989); *Products Liability Law and the Accident Rate*, *in* Liability: Perspectives and Policy (Robert Litan and C. Winston, eds. 1988); *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461 (1985); and George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. Legal Stud. 1 (1984).

Professor Priest has also published widely in the mainstream press, including *The Wall Street Journal*, and he has spoken frequently on the issue of legal reform. In December, Professor Priest appeared with President Bush at the White House Conference on the Economy to discuss the president's tort reform agenda.

WHAT WE KNOW AND WHAT WE DON'T KNOW ABOUT MODERN CLASS ACTIONS:

A REVIEW OF THE EISENBERG-MILLER STUDY

As Congress resumes its consideration of class action reform,[1] it is helpful to review our current knowledge of the operation of class actions in modern litigation. Last March, two law professors, Theodore Eisenberg and Geoffrey P. Miller, published the results of an empirical study that they had conducted of attorneys' fees in class action litigation.[2] Professors Eisenberg and Miller had reviewed all published opinions over the preceding ten years in state and federal courts in which, in the context of a class action, the court discussed the magnitude of the attorneys' fee award. It is evident from their data selection and from their analysis of the data that their principal subject was attorneys' fees and the relationship between fees and class action recoveries. Nevertheless, one of their subsidiary empirical findings unrelated to fees attracted great attention and has been trumpeted as constituting important evidence that there is no current need for class action reform.[3]

Professors Eisenberg and Miller found that the magnitude of class action recoveries in the cases they studied had remained relatively constant over the preceding ten years. According to their article, in inflation-adjusted dollars, the average class action recovery in their sample equaled $100 million, a figure that had not changed dramatically over the period 1993 to 2002.[4] Although they did not emphasize the point in their published paper, in the subsequent commentary that the paper generated, this finding was elevated into the Study's most heralded result because of its presumed relevance to the issue of class action reform. The President of the Association of Trial Lawyers of America proclaimed, "This empirical study comes out and says the system is working correctly."[5] Professor Eisenberg, somewhat more modestly, told *The New York Times*, "We started out writing an article about fees, but the shocking thing was that recoveries weren't up."[6] In debates in the preceding Congress, Senator Feingold, citing the results of the Eisenberg-Miller Study, called the Class Action Fairness Act "a solution in search of a problem."[7]

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1. Congress is currently considering the Class Action Fairness Act, S.5, which, most importantly, would transfer class actions involving a significant number of parties from different states from the state courts into the federal courts. The bill narrowly failed to defeat a Senate filibuster in the last Congress, *see Senate Abandons Class-Action Lawsuit Bill*, A.P., Jul. 8, 2004, but is expected to pass this year in amended form, *see Senate Panel Backs Class Action Suit Bill*, REUTERS, Feb. 3, 2005.

2. Theodore Eisenberg & Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004) [hereinafter "Eisenberg-Miller Study"].

3. *See, e.g.*, Jonathan D. Glater, *Study Disputes View of Costly Surge in Class-Action Suits*, N.Y. TIMES, Jan. 14, 2004, at C1.

4. More precisely, the average class action recovery varied substantially over the ten-year period, equaling nearly $300 million in 1994 and 2000, but there was no long term trend upward in the average, nor any substantial increase in the two years preceding the Study. *See* Eisenberg-Miller Study, *supra* note 2, at 47-48 and Figure 1; *see also* discussion *infra* Part II (showing the authors' limited definition of what constitutes a class action "recovery").

5. Remarks of David S. Casey, Jr., *quoted in* Glater, *supra* note 3. Note that the Eisenberg-Miller Study does not adopt the conclusion that the system is working "correctly," though its normative evaluation of class action practice suggests substantial satisfaction with current outcomes.

6. *Id.*

7. Remarks of Sen. Russell Feingold on S. 1751, the Class Action Fairness Act, 149 CONG. REC. 213,006 (Oct. 22, 2003).

This paper reviews the Eisenberg-Miller Study to examine exactly what its findings tell us about the operation of modern class actions. As I will explain, the subsidiary empirical result regarding the magnitude of the average class action recovery over time, first, is an understatement of the Study's findings and, second, is subject to a vastly different interpretation that, rather than undermining arguments for class action reform, strongly supports the need for reform. Indeed, that the average recovery in a class action—again, the average—has equaled, according to the authors, an extraordinary $100 million (or, as I shall show, substantially more) over a long ten-year period suggests that our society has needed class action reform for many years.[8]

More broadly, however, this paper explains the methodological failings of the Eisenberg-Miller Study, some of which they acknowledge, others of which they ignore.[9] Although their Study is a worthy effort with respect to attorneys' fee awards (which, of course, was their principal subject), the Study tells us very little about the role of class actions in modern litigation. The little that it does tell is alarming and strongly supports the need for class action reform, indeed, reform far more extensive that what is currently proposed in the Class Action Fairness Act. As we shall see, from the results of their study alone, our current experience with class action litigation demonstrates that that litigation imposes far higher costs on our society than have previously been imagined.

I. What Eisenberg and Miller Studied and What They Found

As mentioned, Professors Eisenberg and Miller were principally interested in attorneys' fees in class action litigation.[10] Their central interest was the relationship between the fees awarded by courts to class counsel and the magnitude of the recovery that the counsel had secured for members of the class.[11] In order to study this relationship, they read all published opinions by state and federal courts over the ten-year period, 1993-2002, in which a court supervising a class action had, in its published opinion, indicated the magnitude of fees awarded to the attorneys for the class.[12] Secondarily, they reported the results of a similar study conducted by the trade publication *Class Action Reports* of attorneys' fee awards in common fund class action litigation,[13] though their Study makes little of the *Class Action Reports*' data.

Their principal findings concerned fee awards versus class recoveries. The authors found that there was a fairly consistent relationship between attorneys' fees and the award achieved on behalf of the class, at least on a log-linear basis.[14] Thus, they found, "the most important determinant of the

8. For further discussion of this result and its implications, *see infra* text accompanying notes 16-25.

9. I should state that Professor Eisenberg and I were formerly colleagues and remain friends. Professor Miller is also a friend. Our differences here are solely professional.

10. Professor Miller has written extensively about the role of attorneys in class action litigation as well as about attorney payment issues. *See, e.g.*, Geoffrey P. Miller, *Payment of Expenses in Securities Class Actions: Ethical Dilemmas, Class Counsel, and Congressional Intent*, 22 REV. OF LITIG. 557 (2003); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991).

11. *See* Eisenberg-Miller Study, *supra* note 2, at 28.

12. *See id.* at 44.

13. *See id.* at 46 (citing 24 CLASS ACTION REP. 167-68, 194-97). Common fund class actions are those in which the attorneys' fees are taken from the fund itself, not paid separately by the defendant in the case, either by the terms of settlement or because of a fee-shifting statute. Fees in common fund class action litigation may be evaluated differently by courts because, in requesting fees from the common fund, the attorneys' interests conflict with those of the class which the attorneys were otherwise representing.

14. *See* Eisenberg-Miller Study, *supra* note 2, at 28. Logarithms are absolute numbers expressed in this Study as exponents of base ten. Converting absolute numbers to logs suppresses the effect of larger awards on the relationship studied. Typically, authors will present some theory as to why the description of the data in logs is superior to

attorney fee amount" was the level of client recovery.[15] They found no substantial difference in this respect as between class actions brought under statutes that required defendants to pay fees (fee-shifting statutes) and those brought under laws that did not compel the defendants to pay fees.[16] In addition, though they had very weak means of determining the "riskiness" of the claims in a case, they concluded that higher risk was associated with higher fees.[17]

In retrospect, these conclusions are hardly controversial. I know no one who would contest—empirical study or not—that attorneys' fees approved by state or federal courts must be generally related to the magnitude of the class recovery in both fee-shifting and non-fee-shifting contexts or that the greater the risk in the success of the claim, the greater the reward to the attorneys. Indeed, to have found otherwise would have suggested some serious dysfunction in the legal system. If, in contrast, attorneys' fee awards were inversely proportional to class recoveries, it might suggest either deep confusion or corruption in the system. Similarly, if attorneys' fees were not related in some form to the effort and imaginativeness that the attorneys brought to the case, it would violate our society's most serious ambitions to reward merit. Thus, it is not surprising that the central findings of the Eisenberg-Miller Study confirmed expectations about the status quo.

What was surprising in the Study—or made to seem surprising—was its finding that the magnitude of awards in class action litigation had not increased substantially over the ten-year period of the sample. It was this result—stability over ten years—that led the president of the Trial Lawyers' Association to claim that the "system is working correctly" and that led Professor Eisenberg to be quoted prominently in many national journals emphasizing the normalcy of class action litigation. This finding is that which Senator Feingold and others put forth as evidence that there is no need for class action reform, and this finding is that which requires further examination.

II. Reexamining the Normalcy of a $100 Million (or More) Average Class Action Recovery

What are the implications of the finding that the average class action recovery from the Eisenberg-Miller data has remained roughly stable[18] at $100 million (in inflation-adjusted dollars) over the preceding ten years? First, from a reexamination of their data, the number is not quite accurate.[19] The authors present mean recovery figures by decile in Table 7 of the Study. From those numbers, it is

presentation in absolute numbers. In a study of class action recoveries, there is no reason for such suppression because a central complaint about class actions is that some awards are extraordinarily high and skew expectations of the effect of the aggregation mechanism. Professor Eisenberg has been criticized for this numerical manipulation in his earlier papers, in particular with respect to his studies of punitive damages where, again, the suppression of the impact of high values on a regression misses the point of the analysis—whether punitive damages verdicts are high and unpredictable. The suppression, in contrast, serves to support Professor Eisenberg's position that punitive damages awards are totally "normal." *See* Proceedings, John M. Olin Program in Law and Economics Conference on "Tort Reform", *papers published at* 26 J. LEGAL STUD. 475 (1997)(discussing Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623 (1997)). To my knowledge, Professor Eisenberg has not attempted to answer this criticism. This methodological point is not important for evaluating the finding of the $100 million (or more) average class action recovery, but it is suggestive of Professor Eisenberg's strong desire to employ his data to defend the status quo. I am grateful to John Lott for a discussion of this point.

15. Eisenberg-Miller Study, *supra* note 2, at 28.

16. *See id.*

17. *See id.* Eisenberg and Miller used length of time between suit and settlement as a measure of riskiness but augmented their measure if the judge in the opinion commented on the risk undertaken.

18. For a more careful discussion of the time trend, *see supra* note 4.

19. Professors Eisenberg and Miller generously provided their raw data. It is difficult to use, however, because it is not entirely clear which cases they included in their published totals. As a consequence, although I will refer to that data anecdotally, the analysis in the text derives from the Study's published tables.

evident that the average class action recovery for the sample equals $118.1 million, not $100 million. But this number only indicates the recovery to members of the class. To assess the total impact of class action litigation, it is necessary to include in the consideration the amounts paid to the class attorneys as fees[20] and costs and expenses reimbursed.[21] The authors present fee information by recovery decile and indicate that costs and fees averaged 3.97 percent of all class recoveries. When these amounts are added, the Study shows that the average aggregate recovery for the cases in the sample equaled $138.6 million. The $100 million figure quoted by the authors, thus, is a substantial understatement.

$138.6 million is a huge figure in itself for any single case (as is $100 million), not to mention as an average of all cases in a large sample. As merely an average, there are of course many cases involving far higher class action recoveries. According to these same calculations, the Study shows that the average recovery of the top 20 percent of class actions over the ten-year period equaled $613.02 million; and the average for the top 10 percent exceeded a billion: $1.077 billion. Again, these are huge recoveries and are suggestive of the effects of the class action aggregation mechanism on the character of litigation.

As is well known, a principal concern regarding the operation of class actions is that the certification of a class itself, often based upon satisfaction of relatively undemanding procedural requirements, will bludgeon a defendant into a massive settlement. Judge Richard A. Posner, for example, in an opinion decertifying a mass tort class action, alluded to the irreparable harm to a defendant from the prospect that "[o]ne jury, consisting of six persons, . . . will hold the fate of an industry in the palm of its hand."[22] This proposition is not hyperbole, and there are two strong empirical confirmations of the point: Commentators unanimously concede that virtually every mass tort class action that has been successfully certified has settled out of court rather than been litigated to judgment. For any subset of cases, uniform settlement and zero litigation is an extraordinary empirical fact,[23] neither predicted by nor consistent with *any* current economic model of litigation and settlement.[24] This fact reflects the huge uncertainty and, therefore, the risk that attends judgment of claims brought by means of class actions resolved by lay juries.

The second empirical proof is less easily generalized, but is no less graphic. We have recently observed settlements of class actions at enormous sums of money where there appears to be no substantive basis for defendant liability. The silicone breast implant litigation is an example, and is one of the cases in the Eisenberg-Miller case sample.[25] As indicated from the data, that class action settled for the sum of $4,225,070,000—*i.e.*, $4.2 billion—despite predominant scientific evidence indicating no relationship between the implants and the diseases claimed by the plaintiffs.[26]

That 20 percent of the class actions in the Eisenberg-Miller Study had aggregate average recoveries of $613.02 million, that 10 percent had average recoveries of $1.077 billion, and that the average recovery for the entire sample equaled $138.6 million are findings strongly supportive of these con-

20. The authors separated the class recovery from the class attorneys' recovery of fees for sensible reasons: their principal subject of study was the relationship between the two.

21. The authors imply that most of the cases they studied represented settlements, though sometimes settlements after class certification. If so, then the defendants generally would be paying attorneys' fees and costs and expenses in one form or another, even where the action was not brought under a fee-shifting statute or where a common fund was created.

22. In the Matter of Rhone-Poulenc Rorer Inc., et al., 51 F.3d 1293, 1300 (7th Cir. 1995). For a similar sentiment, see Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1232 (9th Cir. 1996) (determining that multistate plaintiff products liability class actions were not absolutely barred but holding that plaintiffs had not met typicality requirement).

23. Again, the authors imply that virtually all of the class actions reported in their sample involved settlements, rather than judgments. *See* Eisenberg-Miller Study, *supra* note 2, at 44.

24. *See, e.g.*, George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

25. Silicone Gel Breast Implant Products Liability Litigation, No. CV 92-P-10000-S, 1994 WL 578353 (N.D. Ala. Sept. 1, 1994).

cerns. And the aggregate effect on the society of awards of this dimension is enormous. The Study's $138.6 million average class action recovery was based upon a sample of 370 cases resolved over a ten-year period. That means, just looking at the cases in their sample, that aggregate class action recoveries average $5.13 billion per year, again a huge number.

There is second serious criticism, however, of the claim that the findings of the Eisenberg-Miller Study show a well-functioning system of class action litigation. It is undeniable that the Eisenberg-Miller numbers—huge though they are—are significant underestimates of the magnitude of class action litigation. Professors Eisenberg and Miller fail to document the full range of class action recoveries in several different dimensions. One was intentional: the Eisenberg-Miller Study only recorded recoveries in opinions that included some reference to attorneys' fees.[27] This sample selection is perfectly appropriate for a study of fees; it is inadequate if one is attempting to gain a fuller view of class action litigation. This point is not a criticism of the Eisenberg-Miller Study on its own terms: the Study's principal objective was to examine the relationship between class action recoveries and attorneys' fees. For this purpose, looking only at cases that discuss fees is a reasonable approach. It is inappropriate, however, to render conclusions purportedly general with respect to class action litigation—as Professor Eisenberg has done[28]—from a sample of class action cases chosen because they discuss fees. Any generalization of such a nature will inescapably understate the magnitude of class action litigation.

The second principal category of understatement is more systematic. Eisenberg and Miller only report data taken from published opinions. Data derived from only published opinions are likely to systematically understate the magnitude of the underlying phenomenon in several ways. Initially, of course, the data set omits federal and state opinions that are unpublished.[29] It is difficult to estimate the magnitude of unpublished rulings by federal and state courts in class action litigation. Where, as is typical, a claim has been settled by the parties subsequent to class certification but prior to trial, it is highly plausible that a court would approve the terms of the settlement by a bench ruling, rather than draft an opinion which would require a discussion of the merits of the claim prior to the introduction of any evidence to the court. To my knowledge, this issue has not been carefully studied, but it is likely that reference only to published opinions regarding the huge majority of class actions that settle prior to trial will significantly understate class action activity.

There is a further form of understatement that must also be considered. Again, though this matter has not been thoroughly studied, many class action claims settle prior to class certification, never seeking certification and, thus, never compelling a federal or state judge to evaluate settlement terms. Again, the magnitude of out-of-court settlements in the context of class litigation is not well known. In individual plaintiff litigation, it has been shown that, of all claims filed, the percentage that ever

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26. *See* Marcia Angell, *Science on Trial* (1996); *see also* David E. Bernstein, *Breast Implants: A Study in Phantom Risks*, Manhattan Institute Research Memorandum No. 5 (1995), *available a*t http://manhattan-institute.org/html/research_memorandum_5.htm.

27. The Study is not totally clear on this subject. It appears from their search program that they identified all published opinions which included the words "settlement," "class action," and "attorney fee." Their sample thus includes opinions in which the words "attorney fee" appear but which included no discussion of the magnitude of the fee. *See* Eisenberg-Miller Study, *supra* note 2, at 44. For example, the *Silicone Gel Breast Implant* case did not discuss the actual magnitude of the fees awarded the attorneys. Eisenberg-Miller data at list # 52.

28. *See supra* text accompanying note 6.

29. Eisenberg and Miller acknowledge this form of understatement, but defend it on the grounds that, although "published opinions are not necessarily representative of the universe of all cases, they can lead to important insights." *Id.* at 45. Having conducted many empirical studies myself, the more forthright explanation is that unpublished opinions are very difficult to acquire systematically, an important practical fact to a researcher, but not one that makes the data that can be acquired any more representative.

proceed to verdict ranges from 2.36 percent to 4.90 percent.[30] If this percentage were replicated for class litigation, it would imply that the aggregate effects of class litigation on society are twenty to forty times the $5.13 billion aggregate annual recovery described above.

It is unlikely, however, that the relationship between settled and litigated cases is identical in individual and class litigation. Instead, it is plausible that more class claims proceed at least to the stage of class certification than individual claims proceed to verdicts. First, the substantial power that plaintiffs gain from class litigation derives from certification of the class. That, in itself, does not compel certification, because defendants can be expected to be equally aware of the effect, adjusting their pre-certification settlement offers to take the effect into account.[31] The difference is that there is often advantage to a defendant from class certification, even if the case settles shortly after (or even before) the certification ruling. Settlement accompanied by certification gives a defendant a release of claims against all absent class members. This advantage often leads litigants to settle claims prior to certification, but then seek certification as a settlement, rather than a litigation, class.[32]

There are many occasions, however, in which parties will settle claims prior to class certification, and the case will never thereafter be ruled on by a judge. Cases of this nature are totally outside the range of inquiry of the Eisenberg-Miller Study and further indicate the Study's serious underestimation of class action litigation.[33] There is strong evidence of this problem in the Eisenberg-Miller Study itself. I do not question that Professors Eisenberg and Miller were comprehensive in their review of published opinions. But the categories of cases that constitute the data set is very peculiar and can only be explained if large numbers of cases were settled prior to class certification or approved for settlement without opinion by the court.

The large majority of cases in the Eisenberg-Miller Study consists of securities class actions. Of the 303 cases they report,[34] over half—157—are securities cases.[35] I do not doubt that there is substantial securities class litigation, often because the class claims follow prosecutions by the Securities and Exchange Commission. In addition, securities class actions may be less likely to settle out-of-court because the lead plaintiff is often a pension fund or other institutional investor for which agreement to a settlement requires broader justification.[36]

Various other categories of cases, however, appear in the data in such small numbers that one can only conclude that the sample is highly partial, seriously underestimating the magnitude of class action litigation. As examples, the Eisenberg-Miller data include only 9 civil rights class actions; 23 employment class actions; 22 ERISA class actions; and only 7 mass tort class actions.[37] It is simply implausible that, over the ten-year period, 1993-2002, in state and federal courts together, these low numbers represent the full volume of class action litigation.[38] As a consequence, it is inescapable that the Eisenberg-Miller Study seriously underestimates the magnitude and effects of class action litigation in modern society.

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30. *See* George L. Priest, *Private Litigants and the Court Congestion Problem*, 69 B.U. L. REV. 527, 540 & Table 1 (1989).

31. *See generally* Priest and Klein, *supra* note 24, addressing this dynamic.

32. The Eisenberg-Miller Study includes data on settlement classes, *see* Eisenberg-Miller Study, *supra* note 2, at 45, but again only as long as the court's ruling on the class settlement discussed fees and was memorialized in a published opinion.

33. It is not uncommon for parties to settle claims with inventories of plaintiffs, dismissing class claims. These settlements, too, are influenced by the prospect of class certification and should be included in any evaluation of the effects of the class action mechanism.

34. Apparently, there were 303 of the 370 cases in which there was some discussion of fee and recovery magnitudes.

35. *See* Eisenberg-Miller Study, *supra* note 2, at 51, Table 1. I sum those listed as "Corporate" with "Securities." From the raw data, the Corporate category appears to include securities claims.

36. I am grateful to Jon Macey for these points.

37. *See* Eisenberg-Miller Study, *supra* note 2, at 51, Table 1.

38. *See, e.g.*, John H. Beisner and Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, Manhattan Institute Civil Justice Report No. 3 (2001), *available at* http://manhattan-institute.org/html/cjr_3.htm (showing 200 class action filings in 3-year span, 1998-2000, in 3 magnet court counties alone).

III. Conclusion

The empirical findings of the Eisenberg-Miller Study with respect to modern class action litigation are serious enough in themselves. That the average recovery in a class action has been $138.6 million demonstrates the serious power created by the class action aggregation mechanism. That this average has remained fairly constant over a long period demonstrates that class action reform has been needed for a lengthy period and could be claimed to be long overdue.[39]

Moreover, the data presented in the Eisenberg-Miller Study inescapably understate the magnitude of class action litigation. The Study ignores the approval of class action settlements in non-published opinions that are surely likely to dramatically outnumber settlements in published opinions. The Study ignores all claims settled prior to class certification where certification was never sought. Again, it is simply impossible to believe that over the ten-year period, 1993-2002, there were only 7 mass tort class actions brought in all of the state and federal courts, the only number reported by the Eisenberg-Miller Study.

The force of the Study and the great attention that has been given it in the press stem from its finding of stability over the period of study: the average class action recovery remained stable at $138.6 million per class action. There is a substantial difference, however, between a phenomenon that is stable and a problem that is engrained. It is often helpful rhetorically when calling for reform to assert the existence of some new or increasing problem. That is the presumption that Professor Eisenberg built upon when he claimed that "the shocking thing was that recoveries weren't up."[40] But reform is more, not less necessary, when a problem has proved persistent over a long period of time. An average $138.6 million recovery for each class action is suggestive of a real problem. If the magnitude of total recoveries is ten, twenty, or forty times the Study's showing of $5.13 billion per year from their very limited sample, class action litigation is imposing extraordinary costs on American society.

In my judgment, the Class Action Fairness Act, if enacted, would constitute a helpful, but largely a modest reform. Moving class actions involving significant different-state parties from state to federal courts will help; it is not likely to solve the problems created by modern class action litigation. Class action litigation has proven a problem in this country because of the conflation of three separate but conjoining changes in our civil justice system: the adoption of very loose procedural requirements for class certification based upon a conception of the class action quaint by modern standards; the adoption of vastly looser substantive standards under the Federal Rules for allowing claims to reach juries; and the expansion of liability standards since the mid-1970s based upon largely simple views about how liability judgments can improve societal welfare.[41] Shifting some number of class actions from state to federal courts may tighten up in modest ways the requirements imposed for class certification. It would also prevent plaintiffs' attorneys from shopping their cases to local judges in backwater jurisdictions,[42] and it would permit clear and immediate avenues of appeal after classes of plaintiffs are certified. Real tort reform, however, requires a fundamental rethinking and redesign of both our substantive and procedural rules of law.

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39. Of course, a more careful study of this issue would evaluate the character of class action recoveries, including an evaluation of the recovery on the merits. Note that, since virtually all of the cases in the Eisenberg-Miller Study appear to consist of settlements, *see supra* note 21, we have no assurance as to the ultimate merits of this litigation versus its coercive power.

40. *See supra* text accompanying note 6.

41. For a discussion of these issues, see George L. Priest, *Procedural versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); George L. Priest, *Internalizing Costs* (forthcoming).

42. *See generally* American Tort Reform Association, JUDICIAL HELLHOLES 2004; John H. Beisner et al., *One Small Step for a County Court . . . One Giant Calamity for the National Legal System*, Manhattan Institute Civil Justice Report No. 7 (2003); Lester Brickman, *Anatomy of a Madison County (Illinois) Class Actions: A Study of Pathology*, Manhattan Institute Civil Justice Report No. 6 (2002); John H. Beisner & Jessica Davidson Miller, *Class Action Magnet Courts: The Allure Intensifies*, Manhattan Institute Civil Justice Report No. 5 (2002); Beisner & Miller, *supra* note 38.

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