

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
CENTRAL CIVIL WEST

In re: TV WRITERS CASES,
Case No. BC 268 836

Declaration of Theodore Eisenberg

I. Background, Qualifications, and Summary of Opinion

1. My name is Theodore Eisenberg and I am the Henry Allen Mark Professor of Law and Adjunct Professor of Statistical Sciences at Cornell University. I also regularly teach in a Ph.D. program on Institutions, Economics, and Law in Turin, Italy. I have previously taught at UCLA Law School, Harvard Law School, Stanford Law School, NYU School of Law, and at the Centre for Advanced Legal Studies at Tel-Aviv University. Appendix A to this Declaration describes my background and experience that most directly relate to this Declaration, including teaching courses and seminars on empirical methods and their relation to the legal system and on civil rights. Appendix B consists of my C.V. My many empirical studies, including several empirical studies relating to attorney fees, class actions, and employment discrimination,¹ span more than two decades and are listed in Appendix B. I have filed affidavits or declarations in previous actions relating to attorney fees in class action cases. As indicated by my C.V., my empirical studies of the legal system have appeared in leading law reviews and in peer-reviewed journals in several disciplines.

2. As described in Appendix A, my empirical analyses have been relied on by

¹ For convenience, I refer to “my” empirical studies. Such reference of course includes the contributions made by co-authors to the studies.

Justices of the United States Supreme Court as well as by many federal courts of appeal judges, federal district court judges, state court judges, and testifying experts.

3. I have substantial experience in studying discrimination litigation. I wrote a casebook, CIVIL RIGHTS LEGISLATION (LexisNexis 5th ed. 2004), which includes hundreds of pages on employment discrimination, including materials on age discrimination. My empirical studies of employment discrimination claims include: *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111 (2009) (with C. Lanvers); *Summary Judgment Rates Over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (with C. Lanvers), in EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 2008 (K.C. Huang ed., Institutum Jurisprudentiae, Taipei 2009); *Employment Arbitration and Litigation: An Empirical Comparison*, in ADR & THE LAW 8 (20th ed. 2006) (with E. Hill), and others listed in Appendix B.

4. I have been asked by attorneys for plaintiffs in *In re: TV Writers Cases*, Case No. BC 268 836, L.A. Superior Court, Central Civil West to opine about: (1) the reasonableness of the attorney fees request in the *Notice of Motion and Motion for an Award of Attorneys' Fees and Expenses; Memorandum of Points and Authorities in Support Thereof* (filed April 14, 2010) (the "Fee Motion"), and (2) the use of my scholarship in the *Submission of Comments and Objections and Authorities in Support Thereof*, dated April 23, 2010, filed by David Charles Barrow (the "Barrow Objection"). My conclusions, set forth in more detail below, are as follows:

5. My assessment of whether the 33.3% fee request is reasonable is based on four components. Preliminarily, this is not a situation where a class action is brought on behalf

of unknowing consumers by entrepreneurial attorneys who have no express contractual relation with any client, is soon settled, and in which class members receive an insignificant award. Such actions are common and can serve a useful deterrent function but do not necessarily confer substantial monetary benefits on individual class members. In these Writers Cases, express contractual relations with clients have existed from the beginning, have lasted ten years, resulted in multiple hearings and appeals, substantial mediation activities, and a settlement under which class members with evidence of injury likely will receive more than they could have reasonably hoped to receive in individual actions.

6. The first component of my assessment is the tendency of courts to deem reasonable fee amounts agreed to between attorneys and clients. The many retainer agreements signed early in this litigation support a 33.3% fee.

7. Second is an assessment based on the lodestar amount. Based on the lodestar information supplied by counsel to the Court, the achievement of industry-wide relief in a category of case known to be extremely difficult to pursue, the lodestar approach would support a fee in excess of 33.3%, and therefore clearly supports a fee consisting of 33.3% of the settlement amount.

8. Third is an assessment based on the fees approved in class actions analogous to these cases. The closest analogous situation is the 33.3% fee approved in the Order Finally Approving Consent Decree, Settlement Class, and Class Counsel's Fees and Expenses and Amending Administrative Order No. 1, *In re: TV Writers Cases*, Document Relating to Edwards et al. v. International Creative Management, Inc., No. BC 268846, and Mintz et al. v. Broder Kurland Webb Agency, Inc., No. BC 268850 (filed 1/6/2009) ("ICM-Broder").

Other cases analogous to these in terms of time (ten years), case category (employment class action cases), and risk (high) support the reasonableness of a 33.3% fee.

9. Fourth is an assessment based on the pattern in class action cases of the relation between attorney fees and the benefit obtained for the class, as usually measured by the class recovery amount. That assessment indicates that a 33.3% fee is reasonable.

10. The Barrow Objection, which applies my scholarship too simplistically, is unpersuasive that a 33.3% fee is unreasonable.

II. Documents Reviewed

11. In preparing this Declaration, I have reviewed documents I deemed relevant to my analysis, beginning with the complaints filed in 2000 and 2002, the Settlement Agreement, plaintiffs' fee petition and supporting declarations and verifications, the docket sheets in the litigation, and defendants' answers. A list of the documents I have reviewed appears in Appendix A.

III. Brief Summary of Case Background

12. The activity that led to the filing of these cases is set forth in the Declaration of Paul Sprenger Stating Qualifications and Verifying Hourly Rates and Hours Recorded Pursuant to Order Preliminarily Approving Settlement, *In re: TV Writers Cases*, Case No. BC 268 836, L.A. Superior Court, Central Civil West (executed 4/14/2010) ("P. Sprenger Decl."). The original clients agreed to a one-third contingency fee to compensate counsel. *Id.* ¶ 5. After investigation by counsel involving hundreds of interviews and review of

extensive public materials, discrimination charges were filed with the federal Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing in the summer of 2000. Fee Motion at 1-2. After receiving right-to-sue letters, an action was brought in federal court in 2000, alleging, inter alia, state and federal causes of action for violations of civil rights laws. Complaint for Damages, Restitution, Declaratory and Injunctive Relief filed in *Tracey Keenan Wynn et al. v. National Broadcasting Company, Inc. et al.*, No. 2:00-cv-11248-SVW-RZ, U.S. District Court, Central District of California, Western Division (filed 10/23/2000). That matter was dismissed in 2002 with leave to amend, and state-law based actions were filed in California state court.

13. Counsel then filed 23 separate state-law based actions in Los Angeles Superior Court in February 2002. P. Sprenger Decl. ¶ 6. Intense litigation ensued, leading to substantial trial court activity, multiple appeals necessary to preserve the cases' viability, *id.* ¶ 21, culminating in years of settlement negotiations and extensive mediation sessions, prior to the instant settlements. *Id.* ¶ 9.

14. The settling defendants include a virtual “who’s who” of the corporate television-related industry as shown by the lead defendant names in the cases listed in the Other Settling Cases definition in Section V.26 of the Settlement Agreement.² These defendants obviously have the financial resources and access to excellent counsel to vigorously contest

² These defendants include CBS Corporation, Time Warner Entertainment Company, L.P., Fox Entertainment Group, Inc., The Walt Disney Company, William Morris Agency, Inc., Columbia Tristar Television, Inc., The Carsey-Werner Company, Lucy Stille & Associates, Inc., Universal Studios, Inc., Shapiro-Lichtman, Inc., The Gersh Agency, Inc., The Endeavor Agency, Inc., United Talent Agency, Inc., National Broadcasting Company, Inc., Agency for the Performing Arts, Inc., and DreamWorks SKG TV, LLC.

allegations against them. Fee Motion at 8. In these cases, defendants' vigorous opposition emerged at the earliest stages in their opposition to the 2000 federal action, and continued as illustrated by the assertion of 46 affirmative defenses in a single Answer by one defendant. Answer of Defendant CBS Broadcasting, Inc. to Plaintiffs' Unverified Third Amended Complaint, *Bob Shayne et al. v. Viacom Inc. CBS Broadcasting, Inc.*, Case No. BC 268882, L.A. Superior Court (filed 9/23/2005). Active opposition to plaintiffs' claims accompanied the pleadings, as evidenced by the need for multiple appellate rulings to preserve the viability of these cases. P. Sprenger Decl. ¶ 7.

15. As Section V.A.1 of the Settlement Agreement states, there are two settlement classes, divided basically into those who performed television writing Work (as defined in the Settlement Agreement) during the Class Period (as defined in the Settlement Agreement) and those who had an interest in securing Television Writing Opportunities (as defined in the Settlement Agreement) during the Class Period. The total amount in the relevant settlement fund is \$70,000,000, Settlement Agreement Section IX.A.6.

16. Section VIII of the Settlement Agreement provides for establishment of the "Fund for the Future," as set forth in Administrative Order No. 3, which will have initial funding of at least \$1.5 million, and will be operated for the benefit of class members. The Fund for the Future may sponsor television writing industry networking events, offer grants and loans to support class members' work, provide emergency social welfare loans to class members in need, and fund a study that explores ways to enhance class members' access to medical insurance and pensions.

17. Section IX.C.2.b of the Settlement Agreement states that counsel's fee

application shall not exceed 33.3% of the relevant \$70,000,000 settlement fund, and counsel's fee application is for that 33.3%.

IV. Assessment of Reasonableness of the Fee Request

A. Overview of Fee Award Standards

18. Attorneys' fees in class action cases in California courts are subject to judicial review for reasonableness and the trial court has a duty to determine the reasonableness of the award. *E.g., In re Cellphone Termination Fee Cases*, 180 Cal.App.4th 1110, 104 Cal.Rptr.3d 275 (Cal. App. 1st Dist. 2009).

19. Courts use different methodologies in assessing fees. The most common method once was to consider multiple factors. The leading precedent outlining this multi-factor approach is *Johnson v. Georgia Highway Express*, 488 F.2d 714, 717–19 (5th Cir. 1974).³ *See, e.g., Theodore Eisenberg & Geoffrey P. Miller, Attorney Fees in Class Action Settlements: An Empirical Study*, 1 J. EMPIRICAL LEGAL STUD. 27, 30-31 (2004).

20. More recently, many courts, without repudiating the multi-factor approach, have adopted two methodologies that appear more objective and quantifiable: the lodestar and percentage methods. 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

³ The multiple factors included the time and labor required, the customary fee, whether the fee is fixed or contingent, the amount involved and the results obtained, the experience, reputation, and ability of the attorneys, awards in similar cases, the nature and length of the relationship with the client, the time limitations imposed by the client or the circumstances, the preclusion of other employment by the attorney due to acceptance of the case, the novelty and difficulty of the questions, the skill needed to perform the legal services, and the "undesirability" of the case.

various factors. Under the percentage method, courts multiply the amount recovered on behalf of the class by a percentage factor. Used alone, each of these methods can be flawed in a particular case.⁴

21. Perhaps in recognition 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. This mixed approach may have value in correcting extreme cases in which the percentage approach alone would generate a windfall for class counsel, but it too is imperfect. Usually, when courts discuss lodestar check, they do so with a view toward adjusting downward if the percentage approach alone results in an excessive fee. Thus, while it may correct for cases in which counsel would receive an exceptionally high hourly rate under the percentage method alone, the lodestar check does not usually adjust for cases in which counsel would receive an unusually low

⁴ Using the lodestar method in isolation, courts cannot easily determine either the reasonable hours or the reasonable hourly rate; few protections exist against counsel exaggerating; the calculation involves the courts in time-consuming counting and risks transforming the fee determination into a collateral lawsuit; standards for determining a multiplier for the lodestar are unclear and potentially arbitrary; and, in some cases, the method can create a perverse incentive to counsel to waste time to increase the billable hours once a recovery appears reasonably certain. Eisenberg & Miller, *supra*, at 31.

The percentage fee fares better along these dimensions. 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 nonpecuniary 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 to avoid expending hours that yield a lower hourly return. And, unless adjusted for risk, the percentage method tends to overcompensate counsel in easy cases where the probability of recovery is high. *Id.* at 32.

hourly rate. Eisenberg & Miller, *supra*, at 30-31.

22. Regardless of the methodology employed, the essential inquiry is the same: courts seek to determine a reasonable fee for counsel's efforts. *E.g.*, *Apple Computer, Inc. v. Superior Court*, 126 Cal.App.4th 1253, 1270, 24 Cal.Rptr.3d 818 (Cal. App. 2nd Dist. 2005). California courts do not apply a hard and fast rule with respect to class action attorney fee methodology. *E.g.*, *In re Consumer Privacy Cases*, 175 Cal.App.4th 545, 96 Cal.Rptr.3d 127 (Cal. App. 1st Dist. 2009). "It is not an abuse of discretion to choose one method over another as long as the method chosen is applied consistently using percentage figures that accurately reflect the marketplace." 175 Cal.App.4th at 558.

B. Assessment of the Fee Request in These Cases

23. I now describe in more detail the bases for my opinion, summarized in Part I, that a 33.3% fee is reasonable in these cases.

1. Courts' Treatment of Contractual Fee Agreements

24. Courts tend to honor agreements voluntarily entered into between attorneys and clients, and to view fee requests consistent with those agreements as reasonable. In most class actions, no arm's-length client exists with whom class counsel has negotiated a fee. The court reviewing a settlement for fairness in such cases provides the only realistic check on possible fee-related conflicts of interest between counsel and the class. In this case, however, substantial evidence exists as to the fee arrangement an actual client would agree to. As reported by Lead Class Counsel, over 180 clients signed retainer agreements under

which counsel “agreed to work on a contingent basis and advance all moneys for expenses” and these actual clients agreed that counsel would be entitled “to receive 1/3 of the recovery as attorneys’ fees and to be reimbursed for expenses.” P. Sprenger Decl. ¶ 5.

25. While the Court should of course review the fee for reasonableness, it is appropriate for a court, in cases like these, not to find unreasonable arm’s length contract terms between counsel and client, and to consider those terms in assessing a settlement. *See Allapattah Services, Inc. v. Exxon Corp.*, 454 F.Supp.2d 1185, 1209 (S.D. Fla. 2006), where the court quoted approvingly an expert witness’s statement that, “A total fee of one-third of the total class recovery is in line with the expectations of the class, as apparently reflected in the individual retainer agreements of the class representatives.” *See also Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1049 (9th Cir. 2002) (although not binding on the class, district court did not abuse discretion in crediting “class counsel’s evidence showing that the retainer agreements reflected the standard contingency fee for similar cases”).

26. In addition, unlike many class actions, actual class members in these cases had substantive input into the process that led to the settlement. Settlement positions with respect to relief were informed by “information from Plaintiffs’ Liaison Committee of six clients, all professional television writers.” P. Sprenger Decl. ¶ 9.

27. This Court has already approved a fee consistent with the retainer agreements in related litigation. In ICM-Broder, the Court approved attorneys’ fees of \$1.5 million out of a common fund of \$4.5 million.⁵

⁵ *See* Memorandum in Support of Class Counsel’s Motion for an Award of Attorneys’ Fees and Expenses, *In re: TV Writers Cases*, Document Relating to *Edwards et al. v. International Creative Management, Inc.*, No. BC 268846, and *Mintz et al. v. Broder*

28. The ICM-Broder cases were settled approximately two years prior to the instant cases, which have continued to be the subject of substantial work by counsel. In this sense, the instant cases might support a higher percentage fee than in ICM-Broder. Thus, the approved fee in ICM-Broder and the additional effort necessary to settle the current cases support the reasonableness of a 33.3% fee in this case.

29. It is noteworthy that in these cases the one-third contingency fee contractual arrangement, by which class counsel feel bound, see Fee Motion at 14, can be viewed as protecting the classes. Counsel estimate the lodestar amount to be about \$41,700,000. *Id.* at 13. If that is even a close approximation to what a lodestar approach would support, then the one-third contingency fee agreements have protected the classes against what might reasonably be a much larger fee request.

2. Lodestar Amount

30. Based on Declarations by plaintiffs' counsel, the lodestar attorney fee amount in these cases would be not less than \$41,700,000. *Id.* at 13. Given ten years of active litigation, the number of counsel and support personnel involved, the undisputed documented events and complexity of this case, it would be surprising if a lodestar calculation, however done, yielded a fee of less than the requested \$23,333,333. To the extent the lodestar approach supports a higher fee, the lodestar supports the reasonableness of the fee request.

Kurland Webb Agency, Inc., No. BC 268850 (filed 10/6/2008).

3. Description of the Data and Methodology Used in (1) Assessing Fees and Rulings in Analogous Cases and (2) Fees Based on the Value Obtained for the Class

31. The third and fourth aspects of my assessment of the fee request are based in part on analysis of hundreds of class action decisions. That analysis of common fund cases explores the relation between attorney fees and class recoveries in class action cases.

32. I have published an article empirically assessing common fund class action fee awards in cases from 1993 to 2002. Eisenberg & Miller, *supra*, 1 J. EMPIRICAL LEGAL STUD. 27 (2004). Professor Miller and I have extended that study to the years 2003 to 2008.⁶

33. The results of our empirical study of class action settlements have been published and the more recent results have been publicly presented.⁷ The more recent results will be published in *Attorneys' Fees and Expenses in Class Action Settlements: 1993-2008*, 7 J. EMPIRICAL LEGAL STUD. (2010) (forthcoming) (hereinafter "Eisenberg-Miller JELS II").⁸

⁶ As reported in the 2004 published article, we initially searched in the WESTLAW™ "AllCases" data base using the search "settlement & 'class action' & attorney! w/2 fee! & date(=[1993-2002])" This search's results were checked against a search of the LEXIS™ "Mega" data base using equivalent search terms. We also compiled lists of citations in the cases found by 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. Once cases had been identified by this method, we sometimes gathered additional information about case characteristics from other sources—for example, information on the Internet or docket entries in the U.S. Courts PACER system.

⁷ The results have been presented at conferences at Tel Aviv University in the spring of 2009, at the 42nd federal Transferee Judges' Conference, held in West Palm Beach, Florida, on October 26-28, 2009, and at an international legal conference held at the University of Turin, Italy, in December 2009.

⁸ The more recent results are publicly available at <http://ssrn.com/abstract=1497224>. Our empirical results are consistent with other data sets relating to class action attorney fees. Eisenberg & Miller, *supra*, 1 J. EMPIRICAL LEGAL STUD.; Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 2009 Conference on Empirical Legal Studies, Univ. of Southern California Law School (Nov. 20, 2009); 2009 Meeting of

34. Our recent results, forthcoming in Eisenberg-Miller JELS II, seem especially relevant in the context of these cases because the Barrow Objection relied on excerpts from our findings.

4. Fees and Rulings in Analogous Cases

35. In identifying reasonably analogous precedents, perhaps the most distinctive feature of these cases is their having been vigorously contested since 2000. The cases have been on the docket for approximately ten years. That lengthy time is an objective fact, unlike more subjective or manipulable measures of performance and effort. And time on the docket is unlikely to be artificially enhanced since plaintiffs' counsel serving on a contingency fee basis have no incentive to drag out litigation. So no reasonable likelihood exists that these cases were somehow stretched out in time by counsel to make it appear that they were more difficult than they actually were. It is of course possible that a long-lasting case could sit dormant for much the time period it was pending, which would undercut the inference of difficulty and effort suggested by a decade of litigation. But that is not likely for these cases. The state and federal docket sheets I have reviewed reveal no substantial period of case inactivity. The federal case filed in 2000 was continuously litigated until resolved by dismissal with leave to refile. The state court docket sheet in Superior Court Case No. BC 268 836 reveals filings and hearings continuously occurring at the trial level or on appeal for basically the entire period of the cases' pendency. The number of hours

the Midwestern Law and Economics Association, Univ. of Notre Dame (Oct. 10, 2009); Univ. of Minnesota School of Law (March 12, 2009).

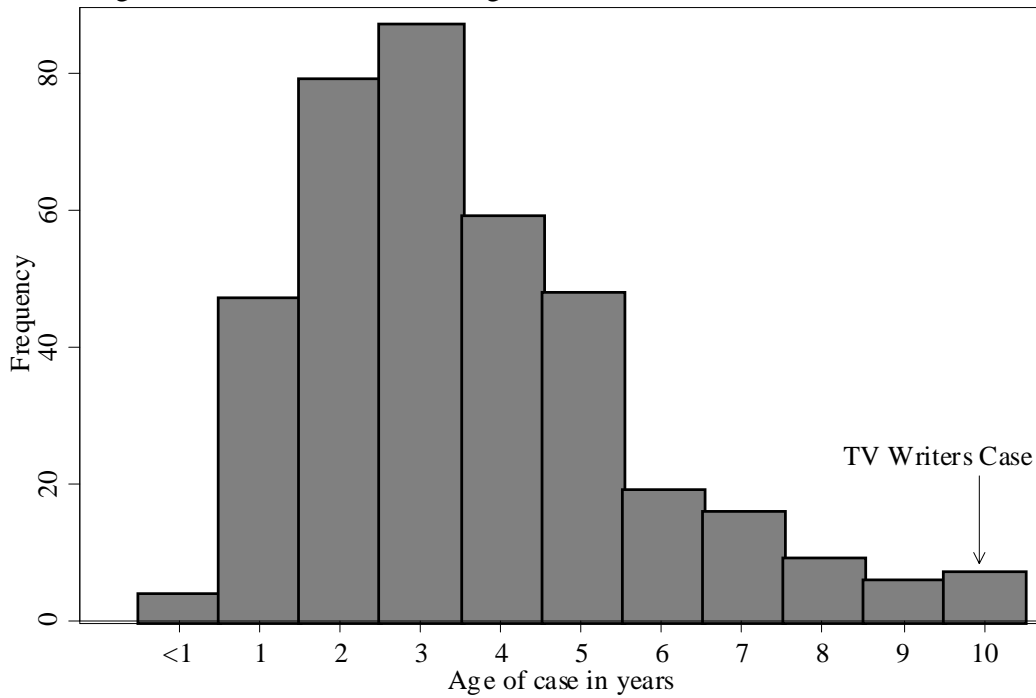
expended by counsel and other personnel, estimated at over 100,000, also suggest substantial ongoing activity.

36. I therefore first assessed the instant cases using age-of-case data on the mass of class action cases analyzed by Professor Miller and me. Of the 381 cases in Eisenberg-Miller JELS II for which age-of-case information was available, cases lasting ten years or longer were in the top 1% or 2% of the distribution.⁹ The extraordinary length of the instant cases is suggested by Figure 1, which is a histogram of the age distribution of the 381 class actions. The text label in the lower right-hand portion of the figure, which indicates where the instant cases fit in the distribution of cases, suggests the dearth of decade-long cases.

37. Common sense suggests that cases that take ten years to resolve are different than other cases and fee awards in such cases in our data support this. The median fee in a ten-year old case in the Eisenberg-Miller JELS II data, was 32%. That is, one-half of such cases had fees of at least 32%. The median fee in cases less than ten years old was 25%. The difference in medians is statistically significant ($p=0.010$), suggesting that such a difference is unlikely to have occurred by chance. So cases that are analogous to these with respect to time, which in these cases is a reasonable proxy for effort and complexity, are fully consistent with a fee award of 33.3%.

⁹ Because the filing date of a case is not always stated in the opinion, we often used the year of filing, ascertainable from the docket number, and the year of the opinion, to compute the measure of the case age in years. I inspected all of the cases coded as nine years old and verified that none of them were on the docket for more than nine years. In the Writers Cases, the exact date of termination is of course not yet known. Based on an initial filing in October 2000, a final approval by this Court in May 2010 or later will mean that these cases will have been pending not less than ten years using the customary rounding convention.

Figure 1. Distribution of Case Ages, Settled Class Action Cases 2003 to 2008



38. The subject matter of these cases, employment discrimination, also provides a basis of comparison with other class action settlements. Table 1, based on Table 8 from Eisenberg-Miller JELS II, reports mean fee percents by category of cases. It shows the mean fee percent in high-risk employment cases to be 35.1%. So cases that are analogous to these in the dimension of subject area also tend to support the reasonableness of a 33.3% fee.

Table 1. Fee Percent, by Risk Level

	High risk		Low/medium risk	
	N	Fee %	N	Fee %
Antitrust	9	20.1	62	22.2
Civil Rights	4	29.3	13	23.2
Consumer	14	31.3	110	24.7
Corporate	4	23.4	26	20.8
Employment	4	35.1	51	26.2
ERISA	5	24.6	38	23.2
Securities	45	26.4	217	22.7
Tax Refund/Tax	-	-	8	10.8
Tort	8	25.1	21	19.0
Other	13	22.1	29	23.9
Total	106	26.1	575	23.1

39. The facts of these cases strongly suggest that the “High Risk” column in Table 1 most directly relates to them. The cases’ ten-year length is itself strong evidence of risk. Additional key events in these cases further establish risk. The cases were on the verge of failure more than once and were only preserved by successful appeals. P. Sprenger Decl. ¶ 21. Such developments are expressly recognized as evidence of extreme risk. *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048 (9th Cir. 2002) (“the [trial] court found the case to have been extremely risky for class counsel Twice plaintiffs lost in the district court—once on the merits, once on the class definition—and twice counsel succeeded in reviving their case on appeal.”)

40. In addition, employment discrimination cases as a class of litigation are unusually risky because of their well documented low success rates. “A substantial literature suggests that employment discrimination cases fare poorly compared to other classes of cases.” Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL LEGAL STUD. 111, 139 (2009). “Employment cases have fewer early terminations than other cases, a much lower plaintiff win rate on pretrial motions than other cases, a much lower plaintiff win rate at trial than other cases, a much lower win rate in judge trials than in jury trials of employment cases, a higher trial rate than other cases, a strong anti-plaintiff effect on appeal, and a diving number of filings.” *Id.* at 145, *citing*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 1 (2009). The dim prospects of a typical employment discrimination case also suggest that class members, had they litigated as individuals, would not have been expected to fare well in the aggregate.

41. Even among employment discrimination cases, these cases posed unique challenges. As described in P. Sprenger Decl. ¶ 13, the unusual structure of contracting in the television industry, with hiring accomplished in other than the traditional employment-application process, raised unique issues and additional risk.

42. The ICM-Broder settlement provides a third relevant analogy. It involved similar issues, the same counsel, and was part of the instant cases for many years. The ICM-Broder percentage, applied in cases on the docket substantially less time than the instant cases, thus provides a conservatively low estimate of a reasonable fee percent in these cases.

5. Fees Based on the Value Obtained for the Class

43. The results achieved in these cases suggest additional reasons for regarding the requested fee as reasonable. The instant litigation achieved historically high relief for an age discrimination case. B. Goldstein Supplementary Decl. ¶ 14. What may be the most comprehensive study of employment class actions also suggests the great success achieved. Estreicher and Yost studied employment class action settlements from 1993 through 2007. Samuel Estreicher & Christina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment*, 6 J. EMPIRICAL LEGAL STUD. 768 (2009). They report a mean gross settlement recovery of \$26.5 million in employment discrimination cases. *Id.* at 776 (tbl. 2). The \$70 million recovery in this case far exceeds that amount.

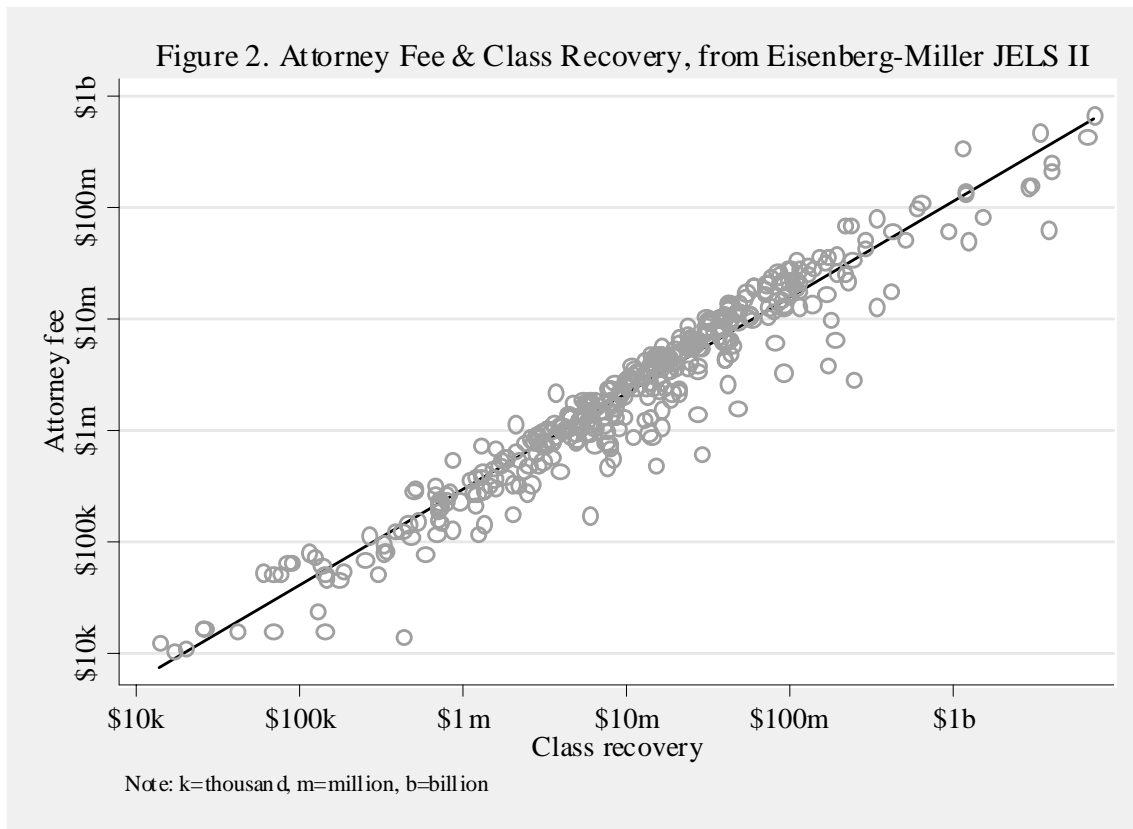
44. These cases' industry-wide scope also suggests that the results obtained are exceptional. Litigating against many defendants, which raised diverse legal issues, obviously benefits television writers more than litigation against one or few defendants.

a. Formal Analysis

45. Whether the class recovery supports the proposed fee can be analyzed more formally by statistical analysis of the relation between fee and the result obtained for the class, as measured by the recovery. Courts' treatment of fees can be largely explained by the relation between the class recovery and the fee, which can be explored using a graph. FEDERAL JUDICIAL CENTER, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 134 (2d ed. 2000) (hereinafter "REFERENCE MANUAL").

46. Figure 2 summarizes the attorney fee-class recovery relation in the Eisenberg-Miller JELS II data.¹⁰ Each circle represents a case with the class recovery indicated on the x-axis and the attorney fee on the y-axis. The line in the figure is explained below.

¹⁰ Figure 2 is Figure 1b in Eisenberg-Miller JELS II. Dollar amounts are adjusted for inflation to 2008 using the Bureau of Labor Statistics consumer price inflation index.



47. Visual inspection of the figure shows a strong linear relation between the class recovery and the attorney fee. Figure 2 suggests that the amount of the attorney fee is strongly associated with the amount of the class recovery. Figure 2 uses logarithmic scales because they were more suitable for the data than linear scales.¹¹ Statistical analysis

¹¹ Preliminary inspection of the data using a scatter diagram in non-logarithmic scales suggested the need to use such scales. “In regression problems with one predictor and one response, the scatterplot of the response versus the predictor is the starting point for regression analysis.” Sanford Weisberg, *APPLIED LINEAR REGRESSION 1* (3d ed. 2005). A preliminary scatter diagram of the punitive and compensatory award for the same data as presented in Figure 2 was not helpful in exploring the relation between fee and class recovery amounts. The hundreds of data points visible in Figure 2 are largely invisible in

confirms the relation between the attorney fee and the class recovery shown visually in Figure 2. Such statistical analysis, described below, was used to generate the line in Figure 2 and applied widely accepted regression techniques.¹²

a figure that fails to properly transform the data to a logarithmic scale. Such a pattern “indicates [to the statistical analyst] immediately that some sort of transformation is required.” Sanford Weisberg, *APPLIED LINEAR REGRESSION* 130 (1980). Because of the variation in the fee and recovery amounts, “log transformations are obvious candidates.” *Id.*

Such transformations have been consistently used by me and others in prior analyses of attorney fees and other quantitative aspects of the legal system, such as punitive damages, that have been published in both peer-reviewed and student-edited journals. *E.g.*, David A. Hyman, Bernard Black, Kathryn Zeiler, Charles Silver, and William M. Sage, *Do Defendants Pay What Juries Award? Post-Verdict Haircuts in Texas Medical Malpractice Cases, 1988-2003*, 4 *J. EMPIRICAL LEGAL STUD.* 3, 25 (2007) (tbl. 6 model 2); Jonathan M. Karpoff & John R. Lott, Jr., *On the Determinants and Importance of Punitive Damage Awards*, 42 *J. L. & ECON.* 527, 543 (1999); Erik K. Moller, Nicholas M. Pace & Stephen J. Carroll, *Punitive Damages in Financial Injury Jury Verdicts*, 28 *J. LEGAL STUD.* 283, 300 n.52 (1999); Margo Schlanger, *Inmate Litigation*, 116 *HARV. L. REV.* 1555, 1605 & n.136 (2003); Catherine M. Sharkey, *Dissecting Damages: An Empirical Exploration of Sexual Harassment Awards*, 3 *J. EMPIRICAL LEGAL STUD.* 1 (2006); Theodore Eisenberg & Martin T. Wells, *The Predictability of Punitive Damages Awards in Published Opinions, the Impact of BMW v. Gore on Punitive Damages Awards, and Forecasting Which Punitive Awards Will Be Reduced*, 7 *SUPREME CT. ECON. REV.* 59, 70 (1999).

For purposes of analysis, I transformed dollar amounts to base 10 logarithms. The transformation associates each amount of fee and class recovery with the logarithm in base 10 of the amount. For example, an award of \$10 can be written as 10^1 (which is read as “10 to the first power”). The logarithm of 10^1 is 1. An award of \$100 can be written as 10^2 , with an associated logarithm of 2. An award of \$1,000,000 can be written as 10^6 , with an associated logarithm of 6 and an award of \$10,000,000 is associated with a logarithm of 7. For convenience, the labels indicating amounts on the axes in Figure 2 are reported in untransformed dollars rather than as powers of 10.

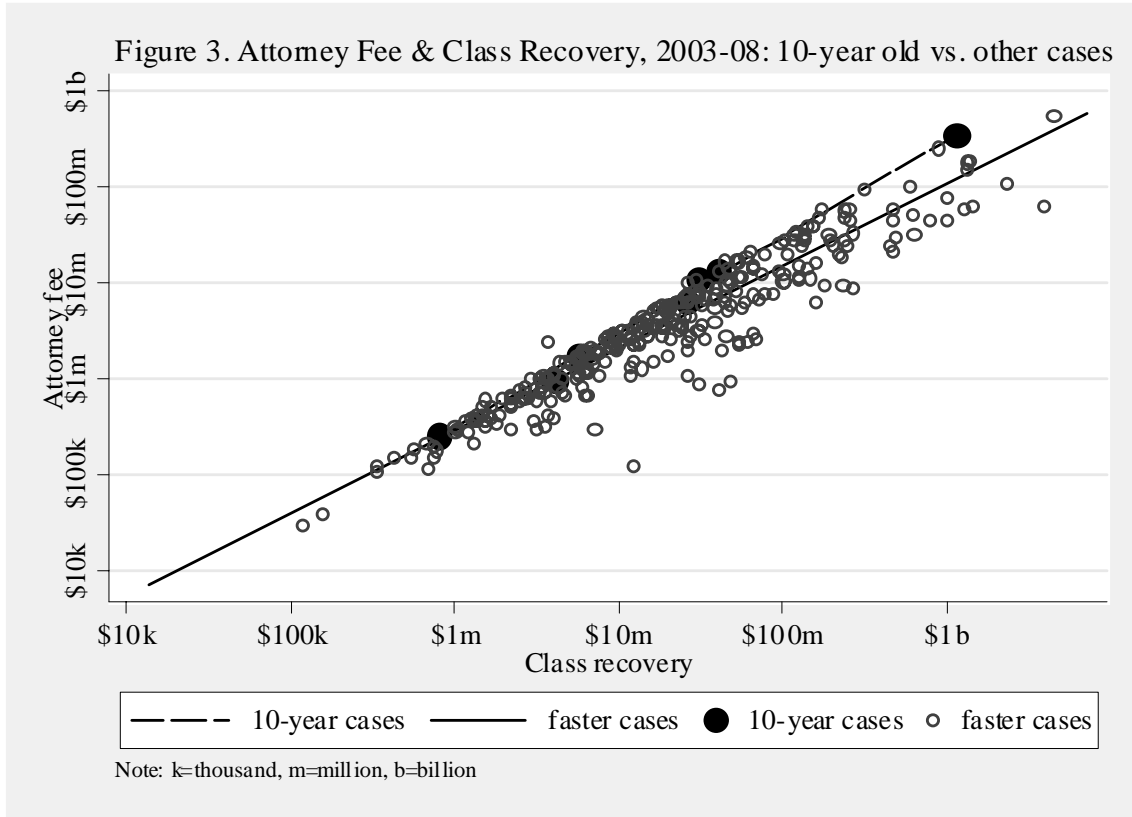
¹² Regression analysis is widely used in statistical analysis, is often relied on by courts, and is substantially discussed in the REFERENCE MANUAL. As summarized in the REFERENCE MANUAL:

A regression model attempts to combine the values of certain variables (the independent variables [the compensatory award variables in the context of this case]) in order to get expected values for another variable (the dependent variable [the punitive award variable in the context of this case]). The model can be expressed in the form of a regression equation. A simple regression equation has only one independent variable; a multiple regression equation

48. But Figure 2 and the statistical analysis can be incomplete if they fail to account for known factors that influence the fee. Analysis in ¶ 37 above indicates that the fee-recovery relation may significantly vary based on the age of a case. The percent fees in decade-old cases and other cases are shown there to significantly differ. Ten-year old cases may have a different fee-recovery relation than less complex cases. So the goal is to explore the fee as a function of both the class recovery and the age of the case.

49. Figure 3 accounts graphically for both characteristics. It divides the sample of class action cases into cases that lasted less than ten years and cases that lasted ten years or longer. (In addition to the scatter diagram of individual cases, Figure 3 also includes two lines which are discussed below.) As in the case of Figure 2, each point in the figure corresponds to a class recovery amount (on the x-axis) in a case and the corresponding fee award (on the y-axis) in that case. The larger darkened circles indicate cases that lasted ten years. The smaller hollow circles indicate other cases. The many fewer darker circles are consistent with Figure 1's demonstration that ten year old cases are rare.

has several independent variables. Coefficients in the equation will often be interpreted as showing the effects of changing the corresponding variables. REFERENCE MANUAL at 144.



50. The lines in Figure 3 represent the best-fitting lines for the two subsets of class actions. The dashed line represents the relation between attorney fee and class recovery in cases lasting at least ten years. The solid line represents the relation between attorney fee and class recovery in cases lasting less long.

51. The crucial point for present purposes is that the lines in Figure 3 noticeably differ. The fee-recovery relation in ten-year cases differs from the fee-recovery relation in shorter cases, as also suggested by the different fee percents described in ¶ 37 above. The line representing longer cases slopes upward more steeply than the line in faster cases,

indicating that higher fees are associated with cases that take longer while holding constant the class recovery amount.

52. This noticeable graphical difference was explored by me using regression analysis, which confirmed the key result in Figure 3—that ten-year cases tend to receive higher fees than faster cases.¹³ That analysis, used to construct the lines in the figure, also confirmed that the difference between the groups of cases are statistically significant—they are unlikely to have occurred by chance.

b. Implications of the Analysis for this Case

¹³ Table 2 reports the results of regression models underlying the straight lines in Figure 3, using two models. Model (1) is for cases one to nine years old. Model (2) is a model for cases lasting ten years or more.

Table 2. Regression Models of Fee Amount as a Function of Class Recovery Amount

	dependent variable = Fee amount (log10)	
	(1)	(2)
	Age <10 years	Age ≥10 years
Class recovery (log(10))	0.858 (70.17)***	1.003 (36.72)***
Constant	0.321 (3.70)***	-0.537 (2.69)*
Number of observations	374	7
R-squared	0.930	0.996
<u>Absolute value of t statistics in parentheses; *** significant at p<0.001; * significant at p<0.05</u>		

In the case of a \$70,000,000 recovery, model (2) results in a fee amount of \$21.5 million, without any express accounting for risk. Risk cannot reasonably be accounted for in model (2) because there are so few ten-year cases.

To confirm the significant difference between ten-year cases and other cases, I ran a regression model that included an interaction term consisting of the product of a dummy variable for ten year old cases and the class recovery. The result was highly statistically significant, suggesting the propriety of accounting separately for ten-year cases and other cases.

53. Taken together, Figure 3 and the related regression models provide a basis for assessing the fee associated with cases yielding recoveries of about \$70 million that took about as long as this case to settle. Based on the above considerations, it is my opinion that a 33.3% fee award in this case is reasonable.

V. Assessment of the Barrow Objection

54. The Barrow Objection appears to be based on tables in Eisenberg-Miller JELS

II. Page 17 of the Barrow submission and reads as follows:

Some empirical statistics from the Eisenberg and Miller common fund studies of relevance to the TV Writers Class Action proposed Settlement Common Fund of \$70m:

(1) **9th Circuit** (113 cases) Fee and Class Recoveries 1993-2008:

(a) **fee%** of common fund: 25% mean; 25% median

(b) legal fees: \$4.64m mean; \$1.92m median

(c) settlement fund: \$32.17m mean; \$9.33m median

(2) **Employment-genre** (55 cases) Fee and Class Recoveries 1993-2008 across all state and federal courts:

(a) **fee%** of common fund: **27% mean; 25% median**

(b) legal fees: \$2.43m mean; \$0.75m median

(c) settlement fund: \$12.28m mean; \$3.0m median

(3) **Class Recovery \$Amount** and **%Fee** of common fund 1993-2008 across all state and federal courts:

(a) Recovery less than \$1.1m (69 cases) 37.9% mean; 32.3% median

(b) Recovery between \$38.3 and \$69.6m (70 cases) 20.5% mean; 21.9% median

(c) **Recovery between \$69.6 and \$175.5m (69 cases) 19.4% mean; 19.9% median**

Since the recitation of numbers is not accompanied by further verbal explanation, the substance of the Barrow Objection's use of my analyses is not entirely clear. Before addressing the specific points, it is first appropriate to comment on the methodology seemingly employed. The Objection recites mean and median fee percents to imply that the

requested 33.3% fee percent is too high. The mean and median, while useful summaries of the central tendencies of a statistical distribution, cannot substitute for analyzing relevant individual case factors. Under the Objection's approach, all fee percents above the median could be arguably too high. Yet, by definition, half of the awards in any distribution will be above the median.

55. The Barrow Objection's first numbered point appears to rely on Table 4 of Eisenberg-Miller JELS II, which reports that the mean and median percent in the U.S. Court of Appeals for the 9th Circuit is 25%. This point does not account for the 9th Circuit rule that 25% is the normal benchmark fee, *e.g.*, *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002), thereby assuring a central tendency in the data of 25%, and does not account for varying case risk. Indeed, *Vizcaino* itself recognizes, "The 25% benchmark rate, although a starting point for analysis, may be inappropriate in some cases. Selection of the benchmark . . . must be supported by findings that take into account all of the circumstances of the case." The Objection's use of our data takes into account no such circumstances.

56. Once risk is taken into account, 9th Circuit rulings regularly support fees of or near 33.3%. In our data spanning 1993 to 2008, we coded 12 9th Circuit cases as being high risk. Five of those 12 cases approved fees in excess of 31%, four of them approved fees of 33%, and the median fee percent was 30%. Each of the cases was litigated for substantially fewer years than this case. In *In re Mego Financial Corp. Securities Litigation*, 213 F.3d 454 (9th Cir. 2000), the court approved a 33.3% fee in a securities class action that was litigated for less than three years. In *Linney v. Cellular Alaska Partnership*, 1997 WL 450064 (N.D. Cal. 1997), the court approved a 33.3% fee on the monetary portion of a

recovery in a cellular phone license dispute that was litigated for an unreported period of time. In *In re NVIDIA Corp. Derivative Litigation*, 2008 WL 5382544 (N.D. Cal. 2008), the court approved a 31.4% fee in a case litigated for about two years. In *In re Heritage Bond Litigation*, 2005 WL 1594389 (C.D. Cal. 2005), the court approved a 33.3% fee in a case litigated for about three years. In *Morris v. Lifescan, Inc.*, 54 Fed. Appx. 663 (9th Cir. 2003), the court approved a 33% fee in a case litigated for about five years.

57. I therefore conclude that the Barrow Objection's reliance on the 9th Circuit mean and median is unpersuasive evidence that a 33.3% fee in this case is unreasonable.

58. The Barrow Objection's second numbered point is apparently based on Table 5 in Eisenberg-Miller JELS II, which reports, for employment cases, a mean fee percent of 27% and a median fee percent of 25%. But the Comment ignores Table 8 in Eisenberg-Miller JELS II, reproduced as Table 1 above, which shows that in high risk employment cases the mean fee percent was 35.1%. And it is of course nearly certain that the Table 1 cases were litigated in less than ten years on average. So accounting for risk and time in employment cases would provide a fee percent in excess of the requested 33.3%.

59. I therefore conclude that the Barrow Objection's reliance on the employment cases' mean and median is unpersuasive evidence that a 33.3% fee is unreasonable.

60. The Objections's third numbered point is apparently based on Table 7 in Eisenberg-Miller JELS II, which reports mean and median fee percents of about 20% for cases with recovery ranges of about \$38 million to about \$175 million. But simply invoking these summary measures of central tendency can be inappropriate in specific cases, as noted above. It ignores this case's ten-year duration putting it in the top 1% of sustained efforts

by class counsel in the history of modern litigation, ignores the risks of taking on employment discrimination cases, ignores the substantially higher fee supported by the lodestar method, and ignores the contractual commitments made by both many writers and counsel early in the litigation for a one-third fee.

61. I therefore conclude that reliance on the information in Table 7 of Eisenberg-Miller JELS II results in a conclusion that is not supported in these cases and thus is unpersuasive evidence that a 33.3% fee is unreasonable. Rather, as I opine above, it is my opinion that a fee award of 33.3% in these cases is reasonable.

62. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Ithaca, NY
May 5, 2010

A handwritten signature in black ink, appearing to read 'Theodore Eisenberg', written in a cursive style.

Theodore Eisenberg