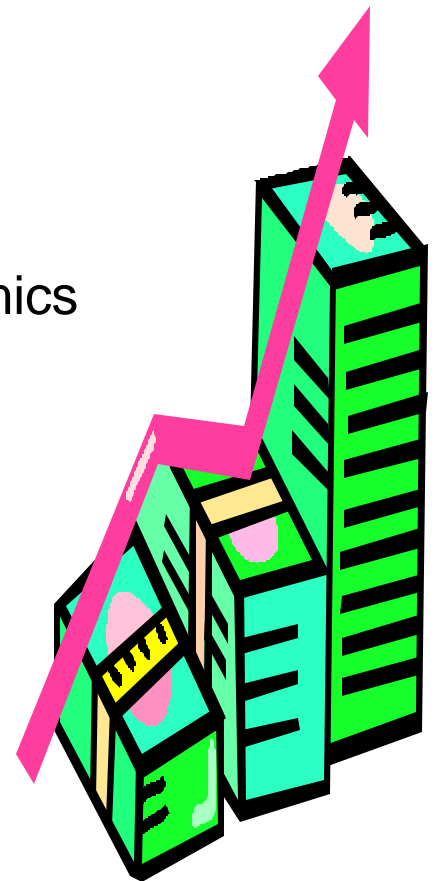


Court Congestion as an Explanation for Rising Attorney Fees



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What Do Judges Maximize?

- Posner (1993): The same thing everyone else does
 - In maximizing welfare, judges are limited in affecting their financial incomes
 - They will choose a relatively high level of leisure conditional on maintaining prestige, popularity, and reputation and they will seek to avoid reversal

How Do Judges Increase Leisure?

- Posner posits that they may simply allow their case queue grow
- However, the pending caseload cannot grow without bound
 - Long case backlogs may induce the legislature to add more judgeships which will diminish prestige of existing judges
 - Internal social pressures will help to internalize the externality

Alternate Strategy

- Seek to resolve cases quickly with little effort
- Expediency in many cases, however, will lower reputation and/or increase reversal rates
- Class action settlements are attractive to a judge since they clear a complex case from the docket and are unlikely to lead to vocal challenges

=>Facilitate settlement in class action cases

Value of Settlement

- Given judges' constraints, the incentive to sign off on proposed settlements increases as caseloads grow
 - i.e., as the queue resource grows increasingly scarce, judges gain greater value from freeing it up (shadow price of resource increases as caseload grows)
- One of the elements a judge is supposed to police in settlements is attorney fees
 - Rejecting fee proposal, however, slows down settlement process
 - Certifying even relatively egregious fee arrangements will generate low costs for the judge
 - Defendant presumably doesn't care
 - Plaintiff class is too diffuse to monitor

=> Attorney fees rise as court congestion rises

=> Shouldn't come as surprise when conventional wisdom observes upward trend in both court congestion and attorney fees in class action cases

But Wait . . .

Didn't Eisenberg & Miller (2004) Find that Attorney Fees Haven't Been Rising?

- “Study Disputes View Of Costly Surge In Class-Action Suits” – NYT, January 14, 2004
- “Attorney Fees in Class Action Settlements: An Empirical Study,” *Journal of Empirical Legal Studies*, 1(1): 27-78 (March 2004)
 - “The hypothesis that attorney fees are increasing over time finds little support in our data.” (p. 55)
 - “in most models, we cannot reject the hypothesis of no linear time trend in either fee levels or fee percents.” (p. 67)
- To be fair, Eisenberg claims that the trend result wasn't the heart of the paper, even though it's what most of the popular press picked up on

Housekeeping with Eisenberg & Miller data/analysis

- In many ways, the no trend result is questionable
 - Include state and federal settlements though the Westlaw/Lexis datasets do not include trial court decisions from judicial “hellholes”
 - Negative correlation between inclusion and tort environment
 - Partition fee-shifting and non fee shifting cases
 - n is already quite small (370); would prefer interaction model
 - Unbalanced dataset
 - Some years have many observations and some have few
 - Effectively partition cases on basis of lodestar/no lodestar amount
 - Again would like to see interaction model
 - Square root transform on percentage fee regressions
 - Square root dampens variation; fine for forecasting purposes; less fine for inference purposes
 - Inclusion of risk variables
 - Circularity problem; could be artifact of conventions in language in decisions

What Happens When Different Specifications Used?

Find positive trend coefficients in all specifications

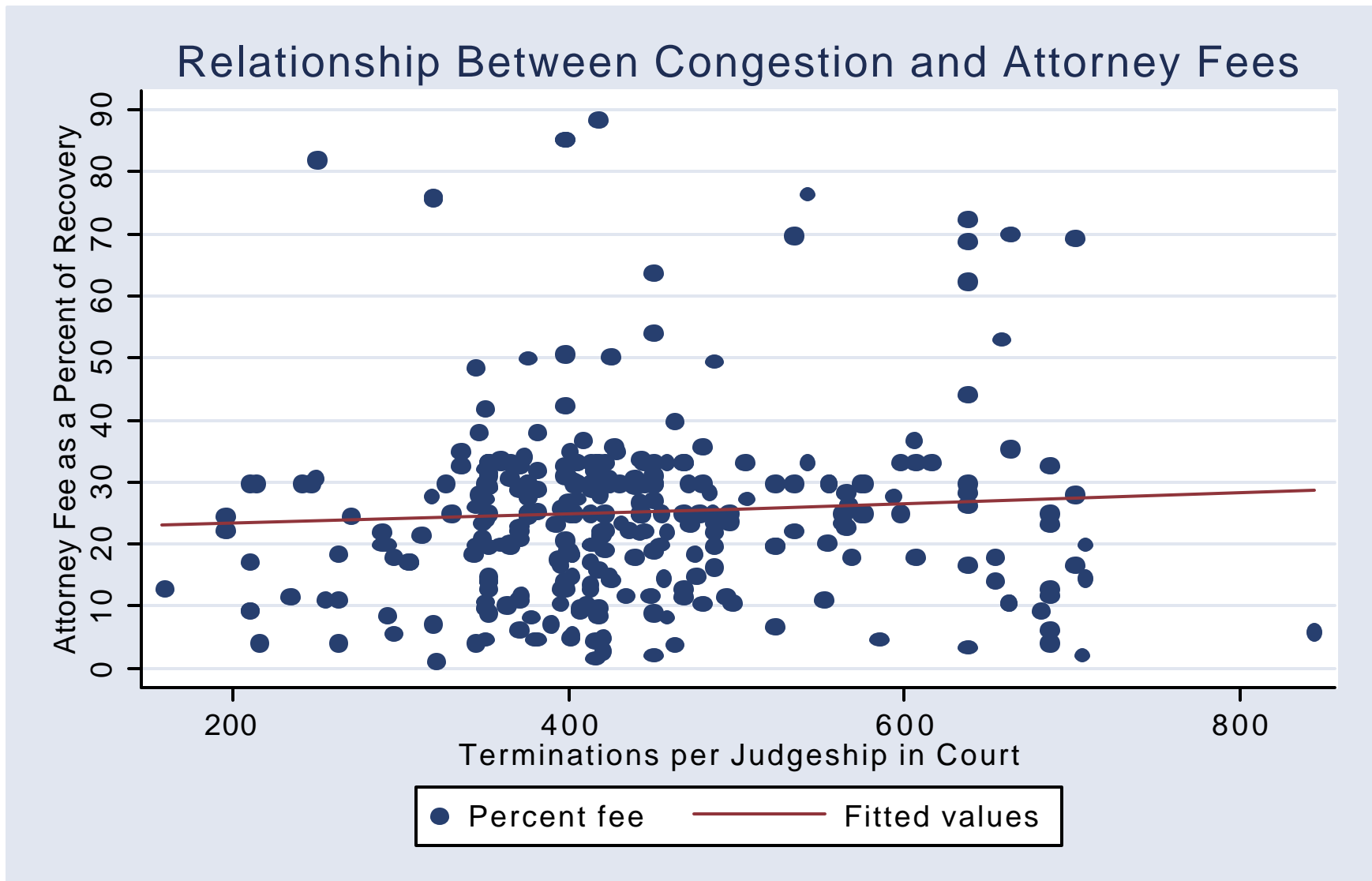
- Coefficients in fee percent regressions are positive and statistically (and practically) significant
- If interaction models estimated, still find statistically significant trend if fee shifting cases differ by slope (recovery amount) only; significance disappears if slope and level (i.e., different constant) differ
- Which is correct?
 - If n were large, we could estimate full interaction model
 - n is quite small, so we need to make some trade-offs

⇒ Did Eisenberg & Miller demonstrate that there's no trend?

Judgment call, though one could argue that a trend does exist in the data

Effect of Congestion on Fees

- Merge Eisenberg & Miller data with caseload data from FJC



Regression Results

- For $\ln(\text{fee})$, we find $e = 0.13$
 - For an increase in congestion of 1%, attorney fee goes up by 0.13%
 - Coefficient statistically significant at 1% level
- For percent fee regressions, we find coefficient of 0.4
 - For a one standard deviation increase in congestion leads to fee percent rising by 0.78 (relative effect > 3 percent)
 - Coefficient statistically significant at 5% level
- Trend coefficient drops slightly, but remains statistically significant in percent fee regressions

Sensitivity

- Small samples, outliers matter
- *Garst v. Franklin Life Insurance* (ND AL 1999)
 - *Garst* not all that interesting *per se*
 - ND AL terminated 19,000 breast implant cases in 1999
 - Terminations per judge = 3,441 (843 in 1998 & 709 in 2000)
- Omitting *Garst*, coefficient triples
 - $e = 0.15$ (1% increase in congestion => 0.15% increase in fees)
 - Statistically significant at 1% level
 - In percent fee regressions, effect of increase in congestion of one standard deviation now 1.6 % increase in the percentage fee (6 % relative effect)
 - Statistically significant at 5% level
- Time trend still positive in these specifications, though significance drops

Conclusion

- Robust evidence of judicial expediency theory (a corollary of Posner's judicial leisure theory), though we're dealing with incomplete data here as we are in most empirical work on litigation matters
- A small fraction of the apparent upward trend in fees might be due to increasing court congestion, but the two effects are largely independent phenomena
- Absent better datasets, need to look for robustness in the available incomplete datasets