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THE INSTITUTIONAL INVESTOR'S GUIDE TO SECURITIES CLASS ACTION LITIGATION

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Fixing The Mutual Fund Industry

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Hardly a day has gone by in the last six months without a news story about the "mutual fund industry scandal." Beginning with the September 4, 2003, revelation in *The Wall Street Journal,* that New York Attorney General Eliot Spitzer had filed a lawsuit against a number of mutual fund companies alleging improper behavior, and continuing with recent announcements by the Securities and Exchange Commission, members of Congress and even presidential candidates, it has become clear to even the most casual observer that the mutual fund industry is being called to account for its greed, which has caused millions of American investors to question the safety of their nest eggs. But what exactly happened and what is being done to correct the improper practices that are at the heart of the scandal?

Mutual Fund Investing

Mutual funds are designed as long-term investments. They are easy to purchase, they create instant portfolio diversification and they provide professional investment management. Mutual funds are a favored savings vehicle for many Americans' retirement and college funds. In fact, more than 95 million Americans, and half of all the nation's households, own shares of mutual funds, making them the

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Study Says Class Actions Not Out of Control

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Talk radio listeners frequently hear commentators attacking America's legal system and pillorying class action litigants. Claims that increases in the cost of class actions – in the form of attorney fees – are strangling American business are repeated so often that many people assume them to be fact. This rhetoric dominated the debate over the adoption of the Private Securities Litigation Reform Act of 1995 ("PSLRA") and is the central rationale for proposed legislation designed to force class action litigants out of state courts and into the federal court system.

Despite the frequent criticism of class-action plaintiffs and the plaintiffs' bar, there have been few detailed scholarly studies of the costs of class action litigation. However, a recently published study of attorney fees in class action litigation goes far to debunk many of the myths surrounding the costs of class action litigation. In an article entitled *Attorney Fees in Class Action Settlements: An Empirical Study* in the Journal of Empirical Legal Studies, Professors Theodore Eisenberg and Geoffrey P. Miller report on their analytical study of fees in class actions. Their research constitutes one of the broadest studies of attorney fees in class action settlements and its conclusions – that class action cases are *not* on the rise and that attorney fees have *not* been increasing – are contrary to many widely held assumptions.

Indeed, the results of the study are diametrically opposed to the many hypotheses adopted by the researchers at the beginning of the study. Specifically, Eisenberg and Miller hypothesized – but did not find – that (1) fee awards in state court actions would constitute a higher percentage of settlements than in actions filed in federal court and (2) fee awards would constitute a higher percentage of awards in "settlement class" cases than in other

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Class Action Study
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class actions. Theodore Eisenberg and Geoffrey P. Miller, *Attorney Fees in Class Action Settlements: An Empirical Study*, 1 Journal of Empirical Legal Studies, 27-78, at 40-42 (2004). Professors Eisenberg and Miller analyzed over 600 common fund class action settlements reported in the March-April 2003 edition of *Class Action Reports*, and a compilation of state and federal class actions with reported fee decisions. This broad range of settlement data allowed Eisenberg and Miller to analyze trends in class action fees over the course of the last decade.

The most illuminating finding of the Eisenberg and Miller study squarely disproves the oft-heard contention that class action recoveries are spiraling out of control. To the contrary, Eisenberg and Miller found that "the mean client recovery has not noticeably increased over the last decade. A few large awards led to unusual peaks at over $200 million in the mean for the reported opinion data in 1994 and 2000. But the time trend in the mean is not noticeably upward over time." Eisenberg and Miller, *Attorney Fees*, at 47. (The $3.18 billion *Cendant* settlement negotiated in 2000 by BR&B as co-lead counsel for the institutional lead plaintiffs and the class was a significant cause of the "unusual peak" that year.) Eisenberg and Miller conclude that "neither the mean nor the median recovery support popular and professional perception that recoveries in large class-actions are ever-increasing." *Id.*

Stephen R. Basser

Eisenberg and Miller's study also rejects the frequently repeated allegation that attorney fees are swallowing up an increasingly large portion of class action settlements. Despite the initial hypothesis that attorney fees have been increasing, the professors conclude that "neither the mean nor the median level of fee awards has increased over time." *Id.*, at 55. While critics of class action litigation often assert that attorneys lay claim to one out of every three dollars in a settlement, the Eisenberg and Miller study indicates that fee awards tend to make up only 20 to 25 percent of a recovery. The most dramatic exceptions to this finding are civil rights class actions in which fee awards tend to make up a larger percentage of the recovery because the recoveries in these actions tend to be smaller.

The study shows that fee awards are primarily influenced by two factors: (1) the value of the settlement; and (2) the risk associated with the case. Eisenberg and Miller found that as the amount of a settlement increases, the percentage awarded to the attorneys decreases. In a finding that is consistent with the logic underlying contingent fee awards, Eisenberg and Miller determined that attorneys who are willing to litigate risky cases generally recover a higher percentage fee than those awarded in low-risk cases. *Id.*, at 27.

> *"The whole effort by what I call the tort reform industry is based on myth and fabrication."*
>
> *David S. Casey, ATLA President*

Eisenberg and Miller also found no significant evidence that "settlement classes" result in higher percentage fee awards. The term "settlement classes" refers to class actions that are permitted to proceed as a "class action" for the purpose of settlement only. Opponents of class actions often cite "settlement classes" as being vehicles for plaintiffs' attorneys to reach inadequate settlements and reap quick profit without facing the scrutiny of class members. Although Eisenberg and Miller had hypothesized that, on average, "settlement classes" would see higher fee awards than other classes, they concluded that their research "cast some doubt on the common perception that settlement classes are suspect because they can be vehicles for collusion between defendant and class counsel." *Id.*, at 67.

In recent months, the United States Senate has been debating legislation that would force many class action litigants out of state court and into the already over-burdened federal court system. Supporters of this legislation claim that fee awards in class actions litigated in state court are higher than those awarded in federal class actions and that this difference can, in part, be attributed to collusion between judges and lawyers. "National class actions can be filed just about anywhere and are disproportionately brought in a handful of state courts whose judges get elected with lawyer's money." "Making Justice Work," Washington Post editorial, November 25, 2002, at A14. To address this oft-heard allegation, Eisenberg and Miller tested the hypothesis that attorney fees would, as a percentage of the recovery, be higher in class actions filed in state court than in those filed in federal court. Eisenberg and Miller, *Attorney Fees*, at 40. However, their conclu-

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BR&B Welcomes…

Regina Calcaterra, John Haeussler, Marisa Livesay and Sam Ward

Barrack, Rodos & Bacine recently welcomed four new lawyers to its practice.

Regina M. Calcaterra

Regina joined the Philadelphia office of BR&B in early 2004 with extensive experience in both law and government. Before joining BR&B, she had served as Deputy General Counsel of the New York City Employees' Retirement System (NYCERS), one of the largest public pension systems in the nation. She has also been an officer in the firm of Figliola and Calcaterra, Inc., which provided political management and government relations consulting, and she served as the Chief Lobbyist and Director of Intergovernmental Relations to then New York City Comptroller Alan G. Hevesi. Regina began her career in public policy at the Eastern Paralyzed Veterans Association as an advocate for individuals with disabilities. In addition, Regina has been an adjunct professor of public administration at the City University of New York's Baruch College. She also has wide-ranging community involvement, serving as Treasurer to WomenPac, a political action committee that supports local candidates, as a member of the 2001 NYC Political Education Leadership Coalition and as Vice Chairperson of the Public Policy Committee of the National Association of Women Business Owners, NYC Chapter.

Regina M. Calcaterra

Regina graduated from the State University of New York at New Paltz (B.A. Political Science 1988) and from Seton Hall University School of Law (J.D. 1996).

John L. Haeussler

John L. Haeussler

John grew up in Saudi Arabia and attended Aberlour House boarding school in Scotland, and the Pennington School in New Jersey, where he was on the wrestling team and was President of Student Council. John graduated from Hamilton College with a B.A. in government (B.A. 1998). John attended Temple University School of Law (J.D., *cum laude*, 2001), where he was a First Year Merit Scholar and the recipient of achievement awards for criminal and contract law studies. Before joining BR&B, John worked as a trial attorney for the Federal Defenders of San Diego, where he was lead counsel in several federal jury trials and argued before the United States Court of Appeals for the Ninth Circuit.

Marisa C. Livesay

Marisa C. Livesay

Marisa C. Livesay was born in Tucson, Arizona, and graduated from the University of Arizona (B.A. 1999) where she studied History and Spanish. During college, Marisa was elected by the student body to the Associated Student Senate where she co-chaired a basketball league for inner-city youth. Marisa attended the University of California at Los Angeles School of Law (J.D. 2002), where she served as a staff member on the Journal of International Law and Foreign Affairs, and was a member of the Moot Court Executive Board.

Samuel M. Ward

Samuel M. Ward

Samuel M. Ward was born in Fort Ord, California, and graduated with an honors degree in history from the University of California, San Diego (B.A. 1995). Sam attended the University of California, Hastings College of the Law (J.D. 2001). Prior to joining BR&B, Sam worked as a political consultant in San Diego, managing and advising several candidates for City Council, State Assembly, and United States Congress.

John, Marisa and Sam have joined BR&B's San Diego, California office. ❖

Claims Filing Deadlines

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Fixing the Mutual Fund Industry

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main investment and savings vehicle for the middle class. Unbeknownst to investors, however, from at least as early as November 1, 1998, until September 3, 2003, many mutual fund managers and hedge funds allegedly engaged in fraudulent schemes that allowed them to reap millions of dollars in profits through secret and illegal "timed trading" and "late trading," at the expense of ordinary investors.

> *"[T]he mutual-fund industry operates on a double standard...in ways that harm ordinary long-term investors."*
>
> *Eliot Spitzer, Attorney General of the State of New York*

"Timed" trading is an investment strategy that allows short-term traders to profit from mutual funds' use of "stale" prices to calculate the value of securities held in the funds' portfolio. Mutual fund share prices are set daily at 4:00 p.m. EST for the next day, based upon the value of the securities held in the fund at the close of the day's trading. As a result of events that occur after the close of business and through the following day, however, this price, to be used the following day, may not always reflect the "fair value" of the fund's portfolio. For example, one strategy, known as "time zone arbitrage," is designed to take advantage of the fact that mutual fund share prices may not always reflect their "fair value" as a result of movement in the prices of international securities held in the portfolio. In "time zone arbitrage," ABC Japan Fund sets its price at 4:00 p.m. EST every day based on the closing prices in the Japan market (set 14 hours earlier when the Japanese market closed). On day 1, the U.S. market is up 5 percent. Because international markets usually follow the U.S. market, an investor would assume that the Japan market would, likewise, increase the next day. The investor purchases 1,000 shares of the Japan fund at 3:00 p.m. on day 1 at the day 1 price of $10 (set the previous day). As predicted, the Japan market surges on day 2 and at 3:00 p.m. that day, the investor places an order to sell the shares. If the selling price is set at $12, the investor reaps a $2,000 profit. This example of market timing is a legal investment strategy. However, if a fund company claims that it prohibits market timing, but secretly allows certain individuals or hedge funds to engage in such activities, the activity becomes inappropriate and, possibly, illegal.

Similarly, "late" trading also takes advantage of after-market information to obtain advantageous pricing of mutual fund shares. "Late" trades are trade orders received after 4:00 p.m. EST (the time when the next day's mutual fund share prices are set) that are filled at that day's price, rather than at the following day's price, as required by SEC regulations.

The Allegations

The complaint filed in New York Supreme Court by Attorney General Spitzer alleges that certain mutual fund companies secretly allowed, and in some instances facilitated, a New Jersey-based hedge fund to engage in prohibited and/or fraudulent trading in mutual fund shares. The profits earned from such trading came dollar for dollar at the expense of mutual fund investors and were often arranged for favored clients and affiliated entities so as to be exempt from rules of the funds that were designed to deter such practices. In return for receiving this favored treatment – which harmed long-term mutual fund investors who were not allowed to engage in the same type of trading – the hedge funds often "parked" (or deposited) funds in financial instruments controlled by the fund companies or their affiliates and thereby increasing fees paid to fund managers. The hedge funds also entered into other arrangements that benefited the fund companies and/or their affiliates. *The Wall Street Journal* reported that:

> Edward Stern… finds himself at the center of a sweeping investigation into the mutual-fund industry after paying $40 million to settle charges of illegal trading made by the New York State Attorney General's Office. According to the settlement, Mr. Stern's hedge fund, called Canary Capital Partners LLC, allegedly obtained special trading opportunities with leading mutual-fund families… by promising to make substantial investments in various funds managed by these institutions.
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> * * * *
>
> In a statement, Mr. Spitzer said "the full extent of this complicated fraud is not yet known," but he asserted that "the mutual-fund industry operates on a double standard" in which certain traders "have been given the opportunity to manipulate the system. They make illegal after-hours trades and improperly exploit market swings in ways that harm ordinary long-term investors."

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Fixing the Mutual Fund Industry

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The Spitzer complaint received substantial press coverage and sparked additional investigations by state agencies, the SEC and the U.S. Attorney for the Southern District of New York, and led to calls for more regulation and tougher enforcement of the mutual and hedge fund industries. On September 5, 2003, *The Wall Street Journal* reported that the New York Attorney General's Office had subpoenaed a large number of hedge funds and mutual funds as a part of its growing investigation, including Alliance Capital, AXA Financial, Inc., Bank of America, Bank One, Bear Stearns, Canary Capital Partners, Charles Schwab, Citigroup, Excelsior Family of Mutual Funds, Federated Investors, Fred Alger & Company, Invesco, Janus Capital, Massachusetts Financial Services Company, Merrill Lynch, Morgan Stanley, Nations Funds, Pilgrim Baxter & Associates, Putnam Investments, Strong Capital Management, Millennium Partners, Prudential Securities, and Wilshire Asset Management. The investigation by the Attorney General's office has culminated in four settlements since September 2003, totaling $1.65 billion, including the recently announced settlement with Bank of America and FleetBoston for $675 million and important improvements in those funds' accountability practices.


David E. Robinson

Since the announcement of the actions by Attorney General Spitzer, private investors and other governmental entities have instituted lawsuits alleging that mutual fund managers permitted certain hedge funds to engage in timed trading and late trading in their respective funds, to the detriment of other investors. The alleged fraudulent trading permitted by fund managers in these cases is in sharp contrast with the representations made in the prospectuses pursuant to which shares in the various funds were issued. The prospectuses falsely stated that the funds actively safeguard shareholders from the harmful effects of such activities.

The Remedies

The Securities and Exchange Commission has announced several proposed rules to combat the abuses in the mutual fund industry. The proposed rules fall into three categories of reforms to address problems with the management and sale of mutual funds. The proposed reforms address (1) investment company governance, (2) codes of ethics for investment advisors, and (3) confirmation and point-of-sale disclosure. To improve investment company governance, the SEC has proposed a requirement that independent directors constitute at least 75 percent of each fund's board, and that the chairman of the board be appointed from the pool of independent directors. In addition, the independent directors would be required to hold their own annual meetings, and hire their own staff. Boards would also be required to undergo annual self-assessment, including consideration of the board's committee structure and the number of funds on whose boards the directors serve. These proposed rules would enhance fund boards' independence and effectiveness, and improve their ability to protect the interests of the funds and fund shareholders.

> *"We are committed to rooting out the bad actors and fraudulent practices that have shaken the mutual fund markets..."*
>
> *Philip Angelides, Treasurer*
> *State of California*

The SEC has also proposed a new code of ethics for investment advisors to prevent fraud by reinforcing the fiduciary principles that govern the conduct of advisory firms and their personnel. Investment advisors would be required to safeguard non-public information about securities recommendations and clients' holdings and transactions. Certain transactions involving personal interests in IPO's and limited offerings would require pre-approval, and investment advisors would be required to report their own personal holdings and any code violations. These proposals would reinforce the seemingly lost concept of the investment advisors' fiduciary duties to their clients.

The third category of reforms addresses confirmation and point-of-sale requirements. These proposals are designed to improve the quality of information provided by broker-dealers to their clients about certain types of securities transactions. The proposals require specific information at the point of sale, and at the completion of a transaction in the written confirmation. These proposals would apply to the distribution of mutual fund shares, unit investment trust interests (including variable annuity contracts and variable life insurance policies), and municipal fund securities used for education saving (so-called "529") plans.

Aside from the SEC proposals, institutional investors have also announced plans to combat the excesses of the scandal. On January 15, 2004, New York State Comptrol-

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Schering-Plough Class Certified

Robert A. Hoffman, Esquire
Partner, Barrack, Rodos & Bacine

On October 9, 2003, in a significant decision for institutional lead plaintiffs, United States District Judge Katherine S. Hayden certified the securities fraud litigation against Schering-Plough Corp. and certain individuals to proceed as a class action and appointed the Florida State Board of Administration ("FSBA") as a representative of the class. Judge Hayden certified the action to proceed on behalf of a class of all persons, other than the defendants and certain other excluded persons, who purchased Schering-Plough securities between May 9, 2000 and February 15, 2001 (the "Class Period"). The complaint asserts that during the Class Period, Schering-Plough issued several SEC filings and press releases that were materially false and misleading because they failed to disclose severe manufacturing and quality control deficiencies in violation of FDA regulations that affected many of the Company's leading products. The complaint also alleges that defendants made statements that failed to disclose serious impediments to FDA approval of a seasonal allergy drug known as "Clarinex." The complaint, which was previously upheld against defendants' motion to dismiss in May 2002, alleges violations of the Securities Exchange Act of 1934.

Class certification is an important milestone in the prosecution of a securities fraud case. Defendants routinely oppose the certification of a case as a class action because it exposes them to potential liability for the damages of an entire class that can be comprised of hundreds of thousands of investors. On the other hand, in an individual action, defendants' potential liability is limited to the damages of the individual plaintiff. Under the rules governing class certification, a proposed class representative must show, among other things, that its claims are "typical" of the claims of the members of the class and that there is no "antagonism" between its claims and those of the class. In most cases, these requirements are satisfied because the alleged fraud inflates the market price of a company's stock, thereby affecting all purchasers of a company's stock in precisely the same manner. Indeed, under the securities laws, plaintiffs are entitled to a presumption of reliance on the integrity of the market (often referred to as the "fraud-on-the-market theory").

Securities fraud defendants, however, often attempt to demonstrate that the elements for class certification are lacking. For example, they may contend the proposed class representative did not purchase its stock in reliance on the market price of stock, rendering its claim "atypical" of other class members. They may also seek to devise purported "conflicts" between the proposed class representative and the other class members in an attempt to show that their interests are antagonistic.

The *Schering-Plough* litigation was no different, with defendants vigorously opposing the class certification motion brought by FSBA. The October 9th class certification ruling is notable, however, for its rejection of a number of arguments that defendants in securities class actions have attempted to level against institutional plaintiffs. For example, defendants asserted that the claims of FSBA were somehow "atypical" of the claims of the class because some of its purchases of Schering-Plough stock during the Class Period were made through passively-managed accounts tied to a benchmark, such as the S&P 500. The Court squarely rejected this argument, observing that, "All class members rely on the same theory - that defendants' conduct effected a fraud on the market . . . [T]he fact that a portion of FSBA's shares were bought by simply replicating index funds such as the S&P 500 does not perforce preclude FSBA from *invoking* the fraud-on-the-market theory because 'these [index] funds relied on both the efficiency of the market . . . as well as [Schering-Plough's] historical and current stock price trends." *In re Schering-Plough Corporation Securities Litigation*, Civil Action No. 01-0829, slip op. at p. 8 (D.N.J., October 9, 2003).


Robert A. Hoffman

The Schering-Plough defendants also sought to manufacture purported "conflicts" between FSBA and other class members. For example, defendants noted that FSBA continued to retain significant holdings of Schering-Plough stock, while many class members may have sold all of their shares. The Court held, however, that any such "conflict would seem to have little relevance at this point, where, as here, both sell and hold plaintiffs currently share a strong common interest in establishing all the elements of defendants' liability." *Id.*, slip op. at P.13. Moreover, the Court noted that the Private Securities Litigation Reform Act of 1995 seeks to encourage institutional investors to lead the prosecution of securities class actions and that since "such investors were highly unlikely to divest all of their holdings in [a] defendant company . . . , [d]enial of class certification . . . would undermine that Congressional aim." *Id.* Similarly, the

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Fixing the Mutual Fund Industry

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ler Alan Hevesi, California Treasurer Phil Angelides, and North Carolina Treasurer Richard Moore announced a major initiative to protect investors and pensioners, through a wide range of mutual fund reforms they believe should become the market standard for the entire mutual fund industry. The three state chief investment officers unveiled their proposed Mutual Fund Protection Principles with the idea that their states' and pension funds' size and influence in the mutual fund marketplace would encourage funds to comply with the principles in order to do business with their respective states. They describe their proposal as follows:

> The Mutual Fund Protection Principles proposed today, for example, would require mutual funds to disclose to shareholders at least annually the actual charges debited from their accounts for management fees and other expenses. But under the proposals being discussed by Congress and the SEC, funds would only be required to disclose charges based on hypothetical accounts. In addition, the Mutual Fund Protection Principles would require mutual funds to offer meaningful "breakpoints," or volume discounts, on fees they charge to shareholders. Those breakpoints would result in a sliding scale that reduces all management fees as the overall size of the particular fund grows. Today, these breakpoints typically are set too high for most shareholders to benefit. The Principles also would require a mutual fund to make public the rationale supporting its fee structure. The Congress and SEC proposals, as currently drafted, do not require meaningful breakpoints or the public disclosure of the rationale supporting fee schedules.

The financial clout of these three chief investment officers is substantial. Mr. Hevesi is the sole trustee of the New York State Common Retirement Fund, the nation's second largest public pension fund with assets of $106 billion. Mr. Angelides is a board member of both the California Public Employees' Retirement System (CalPERS) and the California State Teachers' Retirement System (CalSTRS), the first and third largest pension funds in the United States, respectively, with combined assets of $250 billion. Mr. Moore is the sole trustee of the North Carolina Public Employees Retirement System with assets of more than $60 billion, and is responsible for the largest 401(k) plan in the country worth $2.3 billion. They are urging other public and private pension funds throughout the country to adopt the Mutual Fund Protection Principles. Mr. Angelides had the following message for mutual funds:

> If you are a mutual fund that wishes to do business with California, we expect you to adhere to the highest standards of disclosure and business practices.... We are committed to rooting out the bad actors and fraudulent practices that have shaken the mutual fund markets and have harmed millions of families who have placed their savings in mutual funds.

The Mutual Fund Protection Principles have found support in another important venue. The National Association of State Treasurers ("NAST") recently approved a policy resolution that calls upon institutional investors to adopt these principles. *NAST Adopts Mutual Fund Protection Principles,* NAST Review, Spring 2004, at p. 5. As noted by Chris Allen, Director of the NAST, "[t]he principles are intended to leverage the states' and pension funds' size and influence as large customers in the mutual fund marketplace – to spur mutual funds to comply with the principles." *Id.* NAST President and Indiana State Treasurer Tim Berry emphasized these points in testimony before the U.S. Senate Committee on Banking, Housing, and Urban Affairs:

> [G]overnment fund investors are frequently the most important shareholders in a mutual fund. Consequently, they are in a unique position to influence corporate policies and financial markets... It is in this unique position that state treasurers have taken specific actions designed to restore investor confidence.

NAST Testifies on Mutual Fund Issues, NAST Review, Spring 2004, at p. 5.

Barrack Rodos & Bacine is actively participating in the reform of the mutual fund industry by advocating on behalf of our clients against the entities implicated in the scandal. Whether reforms are ultimately enforced by the government, individual investment funds, or both, Barrack Rodos & Bacine will continue to pursue all available legal remedies and provide up-to-date information for our clients' monitoring purposes. ❖

DOES YOUR PENSION PLAN MISS OUT ON CLASS ACTION SETTLEMENTS?

Defendants paid a record $5 billion in class action securities settlements in 2003, but, according to James Cox, a professor at the Duke University School of Law and co-author of two studies on claims filing, as much as $1.8 billion has not been claimed by institutional investors that were entitled to participate in those settlements, but did not.

If your fund believes it may be losing out on recovering its share of those settlement proceeds, BR&B can advise you on a remedy. Please contact BR&B's Director of Public Affairs, Scott Freda (sfreda@barrack.com or 215/963-0600) to see how BR&B can help your fund. ❖

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by Barrack, Rodos & Bacine

Schering-Plough

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Court rejected defendants' assertions that differences between FSBA and class members in the timing of their purchases and sales of Schering-Plough stock during the Class Period gave rise to conflicts that warranted a denial of class certification.

The arguments made against FSBA by the Schering-Plough defendants in opposing class certification are arguments that could be made against virtually any institutional investor in any securities class action. Most institutional investors have at least a portion of their assets invested in passively-managed funds tied to a benchmark index. Most will continue to retain an equity interest in a large company that is the subject of a lawsuit. All institutions will invariably buy and sell stock at times that do not necessarily coincide with the purchases and sales of each and every member of the class. By rejecting such attributes as a basis for the denial of class certification, the *Schering-Plough* class certification decision provides further support for institutions seeking to lead the prosecution of securities fraud class actions. ❖

Class Action Study

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sions were, once again, counter to the rhetoric espoused by critics of class action litigation. Eisenberg and Miller concluded that "being in *federal* court is associated with significantly higher fee levels and percents than is being in state court." *Id.*, at 67 (emphasis added).

Because they dispel so many of the popular misconceptions regarding class action litigation, Eisenberg and Miller's conclusions will likely continue to be the subject of continued debate. David S. Casey, Jr., President of the Association of Trial Lawyers of America argues that the Eisenberg and Miller findings are a stiff reproval of tort reform advocates: "The whole effort by what I call the tort reform industry is based on myth and fabrication." *See* Jonathan B. Glater, "Study Disputes View of Costly Surge in Class-Action Suits," New York Times, January 14, 2004, at C1. By quantifying settlement and fee trends, Professors Eisenberg and Miller have added a measure of objectivity to a debate rife with hyperbole and unfounded allegations. In broad terms, the findings of the Eisenberg and Miller study are indicative of a legal system which, contrary to the diatribes of self-anointed "judicial reformers," continues to function in a fair and just manner. ❖

About the Publisher...

BR&B

Barrack, Rodos & Bacine

Barrack, Rodos & Bacine is a boutique law firm that has been extensively involved in class and derivative actions alleging violations of securities laws since 1976. The firm, with attorneys in offices located in Philadelphia, San Diego, New York, and New Jersey, has been appointed by federal judges throughout the country as lead counsel in over 40 cases since the passage of the PSLRA and represents a number of institutional investors in securities class actions. The Barrack Bulletin is edited by BR&B partner Leslie Bornstein Molder.

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