

What's so bad about paying plaintiffs?

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Introduction

- Milberg indictment
- Fastow's deal
- General policy framework.
 - Payments to plaintiffs and witnesses should take account of incentives to produce information.
 - Legal rules should not distinguish similar conduct to encourage or deter particular types of litigation.
 - Perverse effects of prohibitions

Paying plaintiffs

- Functions
 - Reimburses litigation costs
 - Rewards superior service
 - Ensures proportionality with other plaintiffs
 - Potential self interested behavior by class counsel.
- Eisenberg & Miller evidence supporting reimbursement and proportionality vs. self-interest and reward-for-service.
- PSLRA
 - 15 U.S.C. § 78u-4(a)(2)(A)(vi) (class representative must certify non-acceptance of non-pro-rata payment).
 - § 78u-4(a)(4) pro rata award except "reasonable costs and expenses . . . directly relating to the representation of the class to any representative party serving on behalf of a class."
 - Perverse incentive effects (Eisenberg & Miller)
 - Encourages arbitrage through illegal behavior as in Milberg

Paying witnesses

- Incentives:
 - Effort
 - Social stigma
 - Fear of punishment and retribution
 - Free-rider problem
 - Payment vs. compelling appearance
- 18 U.S.C. 201 distinguishes lay and expert witnesses:
 - (c)(2): penalizes “[w]hoever ... directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness”
 - (d)(2): permits reasonable travel costs and expert fees.
- Problems with prohibiting lay witness payments:
 - Encourages perverse avoidance conduct
 - Encourages hiding both plaintiff and witness payments
 - Secrecy impedes judicial oversight

Singleton: the AUSA exception

- Statutory interpretation:
 - Why doesn't "whoever" in 18 U.S.C. 201(c)(2) mean AUSAs?
 - Can they bribe with cash? Does 201(b)(3) apply to AUSAs?
 - Sentencing Guidelines: authorizing bribes, or creating currency?
- Policy
 - Regulating the government or its agents?
 - Can AUSAs be trusted? Some recent history
- Toward principled reconciliation
 - Explicit rule authorizing ex post sentence reduction subject to strict supervision of ex ante promises and constraints on prosecutors.
 - Permit judicially supervised payments to civil class action plaintiffs
 - Repeal PSLRA limitations on paying plaintiffs

Procedural rules as substantive reform

- Perverse incentives to engage in arbitrage
- Promoting cover-up
- Decreasing transparency for judicial oversight
- Interfering with norm-creation function of criminal laws.
 - Problem of letting prosecutors use the same conduct that is forbidden for non-government actors, possibly in same case

Milberg and Enron

- Apparent distinctions
 - Fastow's 4-year reduction was arguably court-supervised
 - Milberg dealings were secret, not court-approved
- Questions concerning court supervision in Enron
 - Fastow said no ex post payment for testimony
 - Not raised in sentencing hearing
 - Structural problem: both sides had incentive to hide ex ante deal
- Secrecy in Milberg promoted by PSLRA ban
- Suggests similar incentives in Milberg and Enron

Conclusion

- *Both* Milberg and the government have been alleged to have violated same statute based on conduct they engaged in.
- Need for consistency requires rethinking incentives in connection with paying litigants and witnesses.
- Agency costs and incentives are similar in government and private suits
- Litigation rules should be based on litigation incentives, not views of underlying claims