That is why we have Rule 23. That’s why lawyers can’t just drop cases, settle cases, take payoffs. They have to go through a process. They have to send out notice, they have to make people aware of what they are doing, and they are subject to objections, to a hearing, to a judge’s scrutiny, to a court awarding fees. It is a fishbowl litigation like no other in society.

Melvyn Weiss, a leading securities class action litigator, testifying before the Civil Rules Advisory Committee, November 22, 1996

In litigation, as in other life events, protagonists often have very different stories to tell about what happened and what was achieved. One person’s trivial damages, pursued out of greed or plain orneriness, is another person’s noble cause, requiring rectification and compensation. One person’s satisfactory compromise is another person’s excessive—or inadequate—remedy, given the facts and the law. One person’s reasonable reward for a job well done is another person’s outrageous extortion. Because most civil lawsuits are negotiated in private and settled between the parties without needing judicial consent, our ability to determine for ourselves the merits of these lawsuits and the justness of their settlements is highly constrained.

Class actions, however, are creatures of the court system. Without the judge’s decision to certify a class, the representative plaintiffs and their attorneys cannot proceed on behalf of the class members. Without the judge’s approval, a class action settlement cannot bind class members. Without the judge’s award of fees, the class counsel cannot be paid. Although most class actions—like most other civil lawsuits—are not tried to verdict, class actions are litigated in a fishbowl.

But the decisionmakers who are called upon to assess the virtues and vices of class actions generally cannot peer into the fishbowl themselves. Instead, they rely on stories about what transpired—what the plaintiffs alleged, what the defendants answered, what was gained, by whom, at what cost—told by the protagonists and, often, by their political allies. Inevitably, these stories are colored by the storytellers’ interests and perspectives. Moreover, most of the stories the
decisionmakers hear concern the relatively small fraction of cases that have attracted media attention, or have been the subject of key appellate court decisions. As transcripts of congressional and Civil Rules Advisory Committee testimony illustrate, it is difficult for policymakers to know what to make of such stories.

To develop a better understanding of the issues that are central to the debate over damage class actions, we decided to peer into the class action fishbowl ourselves. We selected a small number of class action lawsuits for intensive analysis. By interviewing participants on all sides of a case and studying documents pertaining to the lawsuits, we hoped to discern the character of these lawsuits and their outcomes for ourselves, rather than through the prism of interested parties.

Our goals were to find out how these lawsuits arose, what they were about, how they proceeded through the court system, and what their outcomes were. Because critics claim that damage class actions are simply vehicles for entrepreneurial attorneys to obtain fees, we investigated the factors that contributed to the inception and organization of the lawsuits and their underlying substantive allegations. Because critics claim that damage class actions achieve little in the way of benefits for class members and society—while imposing significant costs on defendants, courts, and society—we examined the outcomes of the cases in detail. And because critics and supporters debate whether current class action rules, as implemented by judges, provide adequate protection for class members and the public interest, we studied the role of notices, fairness hearings, judicial approval of settlements, and fee awards.

Social scientists call this research approach the “case study method,” and it is frequently used for collecting and analyzing information about complex institutional and individual behavior. We describe our approach to selecting and conducting the case studies in detail in Appendix D. Here we summarize the most important features of our approach and preview the cases we selected for analysis.

**CASE SELECTION**

With the financial resources available to us, we could select only ten class action lawsuits for case studies. How to select these cases was a matter of great import. It was critical that we not select—or appear to select—cases in which we were sure to find out that class action practices and outcomes were absolutely good or absolutely bad. But without a complete specification of the universe of class actions—which no one could provide—and with only enough resources to conduct ten case studies, we could not select a statistically representative sample.
The data we had collected on the scope of class actions (described in Chapter Three) indicated that current class action activity is diverse. Ten cases would clearly not be sufficient to provide even one example of every type of case. Therefore, we decided to concentrate on the two types of cases that are central to the current controversy over class actions: consumer class actions, involving small individual losses, and mass tort class actions, involving personal injury and property damage. We excluded securities class actions from our study because the passage of the Private Securities Reform Act of 1995 destabilized practice in that domain, and it was not clear what the long-term consequences of the Act would be.

Because practitioners had told us that class action practice is in flux, we wanted to study recently filed class action lawsuits, which would best reflect current practices. Because so much of the controversy over damage class actions focuses on alleged shortcomings in their resolution, we wanted to study cases that were certified and resolved as class actions. This meant that our case study research would not tell us anything about an important segment of the class action universe: lawsuits that are filed and not certified. What happens to those cases remains a question for further research. Our interest in outcomes also meant that we needed to study substantially terminated cases. Had litigation still been under way, we would not have been able to answer questions about benefits and costs.

Because not all information we were interested in is a matter of public record (the fishbowl having some cloudy areas), we could study only cases in which at least some of the key participants were willing to talk to us. And because we wanted to talk about real cases—and to tell readers what these cases were—we could not promise informants that we would disguise the identity or key factual aspects of the litigation.

Finally, we wanted to study cases that had not been the subject of widespread controversy, cases that might reflect the mundane aspects of class actions rather than the notorious. It is through large numbers of mundane cases, rather than through a few notorious lawsuits, we reasoned, that class actions bring about broad social and economic effects.

Using these criteria, we ultimately selected six consumer class actions and four mass tort class actions for study.

**Consumer Class Actions**

Our six selected consumer class actions all arose as a result of business-consumer transactions that a consumer, private attorney, or regulator thought questionable (see Table 4.1). Three cases involved the calculation of fees for financial products and one involved the calculation of fees for cable TV service.
Table 4.1
Profile of Consumer Class Action Case Studies

<table>
<thead>
<tr>
<th>Short Case Title</th>
<th>Subject</th>
<th>(Court)</th>
<th>Scope</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>Roberts v. Bausch and Lomb</em></td>
<td>Contact lens pricing</td>
<td>(Federal) Northern District of Alabama, 1994</td>
<td>Nationwide</td>
</tr>
<tr>
<td><em>Pinney v. Great Western Bank</em></td>
<td>Brokerage product sales</td>
<td>(Federal) Central District of California, 1995</td>
<td>Statewide</td>
</tr>
<tr>
<td><em>Selnick v. Sacramento Cable</em></td>
<td>Cable TV late charges</td>
<td>(State) Sacramento County, California, 1994</td>
<td>Metropolitan area subscribers</td>
</tr>
<tr>
<td><em>Inman v. Heilig-Meyers</em></td>
<td>Credit life insurance premium charges</td>
<td>(State) Fayette County, Alabama, 1994</td>
<td>Statewide</td>
</tr>
<tr>
<td><em>Martinez v. Allstate Insurance; Sendejo v. Farmers Insurance</em></td>
<td>Automobile insurance premium charges</td>
<td>(State) Zavala County, Texas, 1995</td>
<td>Statewide</td>
</tr>
</tbody>
</table>

One case involved allegedly deceptive labeling and one involved the sale of mutual funds. Two of the fee cases were instances of “families” of cases—lawsuits brought against the same or similar defendants, alleging the same or similar improper business practice. Three cases were ultimately resolved in federal court, and three in state courts, although some spent time in both. Two cases were ultimately resolved on behalf of nationwide classes—that is, all consumers in the United States who had been party to a particular transaction during a particular moment in time. Three cases were settled on behalf of consumers in a single state, and one involved local (metropolitan area) customers of the defendant corporation. Some attorneys played a role in more than one of these cases, and some were identified with only a single case. All of the cases were filed between 1994 and 1996. One of the litigations involved the consolidation of two cases (*Martinez v. Allstate Insurance Company* and *Sendejo v. Farmers Insurance Company*); this was the only litigation that had attracted significant attention outside of the jurisdiction in which it arose.

Mass Tort Class Actions

As a group, the four mass torts we studied were more diverse than the consumer class actions with regard to the substance and size of claims, which we think reflects the greater diversity of these class action lawsuits in the population (see Table 4.2). Two cases involved allegations of personal injury, and two arose out of allegations of property damage only. Class actions for property
Table 4.2
Profile of Mass Tort Class Action Case Studies

<table>
<thead>
<tr>
<th>Short Case Title</th>
<th>Subject</th>
<th>(Court) Jurisdiction, Filing Date</th>
<th>Scope</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>In re Factor VIII or IX Blood Products</em></td>
<td>Personal injury, product defect, blood products</td>
<td>(Federal) Northern District of Illinois, 1996</td>
<td>Nationwide</td>
</tr>
<tr>
<td><em>Atkins v. Harcros</em></td>
<td>Personal injury and property damage, toxic exposure, chemical factory</td>
<td>(State) Orleans Parish, Louisiana, 1989</td>
<td>Current and former neighborhood residents</td>
</tr>
<tr>
<td><em>In re Louisiana-Pacific Siding Litigation</em></td>
<td>Property damage, product defect, manufactured wood siding</td>
<td>(Federal) District of Oregon, 1995</td>
<td>Nationwide</td>
</tr>
<tr>
<td><em>Cox et al. v. Shell et al.</em></td>
<td>Property damage, product defect, polybutylene pipes</td>
<td>(State) Obion County, Tennessee, 1995</td>
<td>Nationwide</td>
</tr>
</tbody>
</table>

damages have not figured in much of the scholarly controversy over mass tort class actions, but they raise many of the same legal issues as do the mass personal injury suits and enable us to examine these issues apart from the high emotions that often accompany cases of personal injury and death. One of the personal injury cases involved claims of certain, wrongful death; the other involved vague allegations of physical and emotional harm. One of the property damage cases involved an avowedly flawed product; in the other the performance of the product was disputed. Two of the four cases were ultimately resolved in federal court and two in state court, although two spent time in both systems. One case was filed in the late 1980s and the other three between 1993 and 1995. Three of the cases were settled on behalf of all product users in the United States who shared a particular experience, and one involved residents in a single neighborhood. One of the cases is part of a “family” of cases filed against similar defendants for similar alleged product defects; two of the cases involved competing class actions brought by different plaintiff firms or groups of firms. Plaintiff class action firms with nationwide practices played a leading role in three of the four cases; individual tort practitioners played significant roles in only one. One was the subject of a leading appellate court opinion; two others attracted comment in limited practitioner circles; and the fourth was largely unknown except to its parties.

DATA COLLECTION

In many respects, lawsuits are social dramas whose unfolding and resolution reflect both the “scripts” that are shaped by the rules of civil procedure and the
skills and character of the actor-participants. Complex lawsuits such as class actions are often richly textured. Deciding what features of these dramas to spotlight was a key research task. Previous research on class actions (e.g., in the 1970s) had focused on the burden class action lawsuits impose on the courts. But our analysis of recent controversy over damage class actions suggested that this issue was less significant than questions pertaining to the incentives of the key actors (particularly plaintiff class action attorneys), the merits of the cases, and the benefits and costs of the litigation. Specifically, we asked: How did this litigation arise—what were the roles of plaintiff class action attorneys, individual litigants, and defendants? How was the litigation organized, and in what jurisdiction(s) was it filed and ultimately resolved? What were the underlying claims regarding defendant behavior and class members’ losses? How strong a case could be made for the utility of bringing a class action—for regulatory enforcement or for compensation—in these particular circumstances? What did the class action achieve for class members and society? What was the ratio of costs to benefits? How much did plaintiff class action attorneys earn for their efforts, and how did their earnings compare to the benefits produced? What procedures and practices, if any, appeared to contribute to a more positive benefit-cost ratio?

To answer these questions we examined key documents in the case as well as descriptions of the lawsuits by the mass media and other sources. We also interviewed, in person or by telephone, about 80 individuals, including outside defense and corporate counsel, plaintiff class counsel, judges, special masters, and in some cases objectors, regulators, and reporters. In some instances we conducted multiple interviews with a single individual. The actual number and variety of participants we interviewed in each case varied, depending on the complexity of the case and who agreed to participate. When there were divisions among plaintiff counsel we tried to interview representatives of key groups; when there were multiple defendants we tried to interview corporate or outside counsel for each. In some instances we were not able to gain cooperation from both plaintiff attorneys and defendants. When we were able to gather what we judged to be sufficient information about the noncooperating side’s behavior and interests, we retained the case for analysis; had we not done so, we would have found it difficult, if not impossible, to complete ten case studies.

Each case study had a team of two persons assigned to it. This strategy helped to mitigate the effects of biases that individual researchers might bring to their investigations.

Throughout our investigation we came upon areas of litigation about which key participants were uncomfortable or unwilling to share information. We also found that some data that we expected to be part of the public record were not.
Hence, one finding of our study is that there are areas of the class action “fishbowl” that are not always subject to public scrutiny.

RESULTS

In Chapters Five through Fourteen we tell the story of each of the ten lawsuits, as we learned it from the participants and the documents. While our reports inevitably reflect our sifting and sorting of the data, we do not attempt to draw conclusions about the cases. Rather, we hope that readers will make their own judgments as to the motivations of the participants, the virtues and vices of their practices, and the merits and demerits of the case outcomes.

In Section III, we present our interpretive analyses of the case study data and discuss what they contribute to our understanding of class action dilemmas.

NOTE