REFLECTING SOCIETY: STUDIES IN FEDERAL CIVIL LITIGATION INVOLVING BUSINESSES, 1971-2004

By

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Abstract

Discussions of litigation and the so-called "litigation explosion" have focused on the underlying "litigiousness" of Americans. While Americans' readiness to assert their rights is an important factor driving litigation volumes, as well as the expression of these rights though a wide variety of laws (and underlying constitutional protections) that create the rights, there are many other factors that influence the size of the caseload. These factors include: social mores (and changes therein), the size and the organization of the economy, technological change, and changes in the letter of the law and in how it is interpreted. Judges respond both to social mores and to the political environment. The debate over "litigiousness" is largely an empty one unless all of these background factors are taken into account, and it is difficult to isolate the effects of eacb of these factors from the rest in determining effects on the case load.

In order to understand how these factors operate, one cannot look at litigation as a homogeneous phenomenon; one must break it down. In this study, I look at litigation by case type– that is, by the subarea within the law under which each case falls, e.g. employment law, copyright law, etc. It quickly becomes apparent that the underlying social phenomena driving the volumes of each type of case are distinct. Thus one cannot understand litigation volumes as a whole except as an aggregate of the social phenomena driving each particular case type.

I find that litigation is a very uneven and heterogeneous phenomenon. It is uneven by case type: some case types account for much more litigation than others. It is

uneven in terms of actors: given any particular case type, some actors and types of actors account for much more litigation than others. It is uneven over time: short-term social events can lead to "bursts" of litigation which fade over time, or new causes of action can come into being that create a permanent increase in litigation. Less frequently, causes of action can be legally abolished or decline in usage. One would expect that the total number of possible causes of action to increase over time as increasingly-prosperous Americans demand "total justice" [71]. Litigation is also heterogeneous: each case type has an independent logic. It can useful to look at case types comparatively; for instance, to compare them on win rates and on median awards made, and to investigate the reasons for such differences; I do that herein.

Because of the independent logic underlying case types, there is also substantial variability in plaintiff win rates between different case types. There is no unitary theory that can account for the plaintiff win rates. For instance, some case types have a higher frequency of federal plaintiffs (e.g. Fair Labor Standards Act cases), and federal plaintiffs tend to have a higher win rate than private plaintiffs, because the federal government engages in "creaming," that is, selecting its best cases for prosecution. Case types also vary with respect to the share of their dispositions that are default judgments; if there are more default judgments, the win rate goes up, because plaintiffs win almost all such judgments.

Within each case type, it is interesting for its own sake to examine which actors dominate, and attempt to deter mine why. I examine fourteen different case types and find different actors dominating each type. For instance, in ERISA litigation, there appear to be two dominant subtypes of litigation. One involves individuals suing insurance companies for denial of benefits. In the age of managed care and

HMOs, these cases have become prevalent. Another type of litigation involves union-managed pension funds suing small construction companies for non-payment into the funds. There are many small construction companies in the country, and many of them do not comply with ERISA requirements, especially when they are under financial pressure or are insolvent. A third type of litigation, while not as dominant as the other two, is also common; it involves the Department of Labor suing ERISA trustees for the misuse of funds.

The large supply of attorneys creates incentives for attorneys to creatively invent new types of cases and causes of action, in what I term "legal entrepreneurship." For instance, the RICO statute was originally used for criminal prosecutions against gangsters, but inventive attorneys later started to use it for civil cases against companies and their executives. In employment discrimination litigation, some law firms have learned how to bring class action lawsuits against grocery chains for gender discrimination, and have targeted one chain after another.

Many types of civil lawsuits involve what one might call private policing activity, mainly undertaken by, or on behalf of, corporations. The recent activity of the record companies in bringing actions against people who download music from the Internet is an example. Here, the main motivation is deterring others rather than the damages that will be recovered from these actions. All types of litigation has some policing effect in the "shadow effects" that it creates; that is, actors who never go to court modify their behavior to avoid litigation. So, for instance, employers may create more due process and bureaucratic data gathering and record keeping in their employment practices in order to avoid charges of discriminatory behavior.

Because each case type typically involves some specific types of actors, those actors, if organized, usually lobby Congress and the state legislatures on the laws with which they are concerned. For instance, franchisors and organized franchisees have lobbied state legislatures over laws regulating franchise contracts relationships. Trade unions and corporate associations have lobbied Congress over health and safety legislation and over labor relations legislation. As the volume of lawsuits increases or decreases, organized parties go back to the legislature, trying to change the law in their favor, creating a feedback loop between the legal and political systems.

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This thesis is dedicated to the next generation, several of whom have been born to members of my family and to my friends in recent years; may they grow up in peace and happiness.

Chapter 1

Introduction

Many social critics and popular observers have argued that the United States is the land of the lawsuit. Americans are inherently litigious, and rush to court at the drop of a hat, it is claimed. This is asserted despite the evidence that in the U.S., as in all other countries, the vast majority of disputes are settled before going to court and before either party even consults an attorney. Lawsuits only represent the tip of a "dispute pyramid" consisting mainly of non-litigated disputes [77]. The dispute process involves "naming, blaming, and claiming," and most disputes never make it to the level of "claiming," that is, the making a claim against another for redress [63].[1]

The public discussion of the subject of lawsuits and litigiousness has been one primarily driven by emotion and anecdote rather than calm, sober study. Many popular critics, mainly on the right (e.g. Olson [165, 166] and Howard [109, 110]), have decried a "litigation explosion," often by presenting the most egregious examples of allegedly groundless lawsuits. Examples of this, primarily of the personal injury

[1] For a more detailed discussion of the "dispute pyramid" and "naming, blaming, and claiming," see Chapter 3.

variety, have entered the folklore, often in inaccurate versions. Tort reform advocates cite the case of an elderly woman who won a multi-million dollar settlement from McDonald's because she spilled hot coffee on herself. It turns out that the situation was more complex than indicated by this sound bite.[2] The trial lawyers and the consumer advocates, most notably Ralph Nader, counter that the civil justice system is one of the only mechanisms that protect the individual from the abuses of large corporations.

Corporate lobbies and their conservative allies have promoted tort reform. One of tort reform's main goals is to reduce the size of supposedly inappropriately-large jury verdicts obtained by supposedly inappropriately litigious plaintiffs. The law and economics movement has provided some intellectual ammunition for their arguments. For scholarly reviews of studies of litigation, see Galanter [77], Munger [153], Friedman [72], Dunworth and Rogers [50], and Clermont and Eisenberg [39]. For the economic point of view, see Cooter and Rubinfeld [41] and Kaplow and Shavell [115]. I review the literature on litigation in Chapter 2.

The present study is an attempt to shed some light (rather than heat) on the subject of civil litigation, specifically civil litigation involving business, and specifically Federal business civil litigation. The purpose of the study is to provide an overview of much of federal civil litigation in approximately the last thirty years, and to identify those groups of suits that have been significant contributors to the overall caseload, and the causes of these groups of suits, which are diverse. It focuses on commercial litigation, employment litigation, and intellectual property litigation, and antitrust

[2]What is often left out of this story is that McDonald's superheated the coffee beyond necessary and normal levels in order to extract more liquid coffee from the grind, although there is some debate over the facts in this case, and their meaning.

litigation. Commercial and employment litigation are two of the most important types of litigation in terms of generating cases. I consider intellectual property litigation and antitrust litigation as well, because they are two of the most interesting forms of litigation, and they illustrate some of the ideas that I propose using to understand litigation. The most obvious omissions from the study are product liability litigation and personal injury litigation, but I omit these because they have been extensively studied elsewhere (see, for instance, Hensler [105], Viscusi [235]). I make no claims that the types of litigation that I have selected are representative of litigation as a whole; my view is that litigation is not a unitary phenomenon, but rather that each type has its own logic, and must be examined on its own. The case types that I have chosen are sufficient to show substantial variation in plaintiff win rates. Also, some have been on the increase, and others on the decline, for various reasons that I attempt to identify for each type.

Priest and Klein's [178] well-known, simple model of the litigation process (which I describe in more detail in Chapter 2), predicts that in the absence of differential stakes[3] between the parties, the plaintiff wins exactly half of the cases brought to trial. I find little empirical support for this model in this study. Instead, I find win rates that vary significantly across case types. Some of this variability may be due to differential stakes; however, it is hard to see how one would gather data on such differential stakes other than by observing an increased willingness to litigate a matter, which is the variable that one is trying to explain. It appears that Galanter's simple theory[76] that says that better-resourced actors tend to win more of their cases gives a simpler account of the variability that I observe in my data. For instance, win rates

[3]"Differential stakes" meaning that one side cares more about the outcome than the other, and therefore is willing to invest more to win.

for employment discrimination cases, which tend to have individual plaintiffs, are relatively low (well below fifty percent); win rates for trademark cases, in which the the plaintiff is typically a large company, are relatively high (well above fifty percent). Part of this difference may be due to differential stakes, but it is hard to say how much. How a case is disposed of by a court is also highly related to whether or not the plaintiff wins (although this may not be causally prior to the event of winning or losing). For more on the differences in win rates across case types, including a simple logit model I have built, see Sections 4.4 and 4.5.

Like most microeconomic models, the Priest and Klein model takes an overly atomized attitude toward action. In any real situation, litigation is just one of a set of alternative strategies that can be pursued to create redress. Collective action of various types, including such action as organizing groups of like-situated actors for collective negotiation, political action, or both, often occurs, especially when certain types of cases tend to crop up again and again.

Insights from the new behavioral economics (see Section 2.3), which show that people often act in a manner that is not traditionally thought of as "rational," and litigants' desire for procedural justice even if they do not achieve substantive results also can lead to the failure of a simple model such as that offered by Priest and Klein.

Since most civil litigation involves business as at least one of the two disputing parties, business civil litigation accounts for most civil litigation. Since this is a study of *business* civil litigation, I exclude those cases not involving at least one business. These non-business cases have not been the focus of public debate around civil litigation, and tend to be criminal or administrative in nature (for instance, prisoner petitions or social security cases).

When you look at the causes of litigation in detail, I find that these causes are far more diverse than a simple propensity to "litigiousness" on the part of Americans. Rather, I find that these causes vary substantially based on the underlying law, social conditions, and the particular type of case under study, and that some litigants are much more prominent in the case load than others. I also find–consonant with the theories of Kagan [114] and Burke [30]–that law, and therefore litigation, is best understood as a characteristically American response to existing governance problems in society: Americans turn to law, rather than the administrative mechanisms of the state, to solve their governance problems. This partly stems from the federal nature of the American state, and the traditional, and associated, distrust of a strong central state (such a strong distrust is largely not present in Europe). My close examination of the cases leads one to a set of possibilities for reform that goes beyond a simple-minded (and problematic) approach of limiting access to the courts. I describe such possible policy reforms briefly in the conclusion.

In this thesis, I examine patterns of litigation in fourteen different case types within the federal courts. I employ the database of civil court cases maintained by the Administrative Office of the U.S. Courts [68]; for more details on this database, see Chapter 3. The case types included are quite varied: they include, for example, contract cases, real property cases, employment discrimination cases, personal injury cases, product liability cases, and antitrust cases. I focus on employment, intellectual property, and business law, because the federal caseload is so diverse that it is necessary to focus on a subset of it in order to have a tractable project. The goal of focusing on these particular case types was to reveal the mechanisms that are generating the caseload within each case type, and therefore begin to develop a more complex and nuanced understanding of the causes of the caseload, rather than simply attributing all of it to "litigiousness," I found that litigation patterns reflect the social patterns, industrial structure and governance regime underlying each case type. For instance, the social world surrounding copyright law involves many large media corporations, many consumers, many distributors, some of whom are "pirates," and a governance regime that is imperfectly sealed with respect to world trade, so that pirate media from China crop up with regularity on U.S. shores.

I believe it is not possible to answer the question as to whether or not Americans are becoming more litigious. For one thing, the overall American legal regime is a moving target. Since Americans have a tendency to solve their problems with more law (consider the proposed "patient bill of rights"), the amount of law is not remaining constant, but is usually increasing. Since this means that there are more possible causes of action, increased numbers of lawsuits do not mean that people are more litigious; they are simply taking advantage of an expanded sphere of rights. For instance, after the Americans with Disabilities Act (ADA) was put into place, disabled people were able to sue if they were not accommodated. Does this mean that they suddenly became more litigious? I think not; they simply were asserting rights that they didn't have before. This is the hidden agenda behind those who object to litigiousness; often, they are actually objecting to the expansion of rights granted by the state to groups that have managed to politically mobilize to win such rights. And they almost always object to individuals asserting their rights; they rarely object when companies do so, which they do at least as often.

There is also no good measure of litigiousness. A mere count of legal filings is no good, since some cases are open-and-shut in a day or two, while others drag out for years and cost millions of dollars in legal fees and the resources of the parties. The number of cases may decline, but the load on the courts may go up, because the cases that are left are more complex and drawn-out. Also, the peculiar assignment of cases between the state and federal courts and the lack of any unified system of data collection about cases makes the situation difficult from a social science perspective.

It is often said that there has been a transformation from a idealized past of small communities in which (purportedly) everyone knew one another and would rarely consider suing one another to a modern, urbanized, anonymous culture in which people readily bring suit. While it is true that in the (now long ago) past, people mainly lived in much smaller communities, those communities were by no means free of exploitation and conflict. However, it may be the case that the anonymity of modern urbanized life increases the propensity to sue. Insofar as Americans' relationships with other people and with companies are more market-driven and more short-term, this may also increase the propensity to sue, because there is a reluctance to disrupt longer-term relationships with litigation, since such relationships are valuable. Short-term relationships may also be more susceptible to opportunism. It is also sometimes alleged that opportunistic behavior would have been less common in smaller communities, but this is by no means obvious. There are some ways that small communities can *increase* the possibilities for exploitation (think of the company store). Conservative critics want to have it both ways; they look nostalgically at an idealized, small-town past that probably never existed, and yet they support capitalism, which is the primary force leading to more urbanization and the increase in economic competition that exists in larger communities.

In order to support the claim that Americans have become more litigious, figures such as the increase in the number of lawsuits and the numbers of lawyers are cited to document this claim. Yet it is difficult to see how one would test such a claim. In civil law, the underlying action which leads to a lawsuit is often a transaction. The number of transactions increases with the size of the population and the wealth of the economy. So, assuming a fixed rate at which transactions are transformed into lawsuits, the number of lawsuits should grow as the population and economy grow. However, this assumption may be incorrect.

Transactions that go awry turn first into grievances, then into disputes, and then finally into litigation. Grievances can be resolved at any point along the way. Although there is good data on the growth of the economy, and the population, it is not clear how these are related to the underlying number of transactions. Also, transactions vary widely in their value; if I buy a book and a Mercedes, I am much more likely to complain if there is something wrong with the Mercedes, and there is little chance that I will sue if the book is missing a page. There is no good data about what has happened to the distribution of the economic value of transactions, and there is no reason to assume that it has remained the same. The quality of a product also affects the possibility that a grievance will be brought, and the quality of many goods (e.g. cars, televisions, computers) has improved significantly over the last few decades. This is a factor which would actually work to reduce the level of litigation, all things being equal.

While transactions, and the contracts underlying them, are the basis of much disputing, there are also parts of the civil law that are not directly based on transactions gone awry. For instance, intellectual property cases are based on an alleged violation of rights. In such cases, the plaintiff may not have known of the defendant's existence before the plaintiff became aware of the alleged violation. Private antitrust cases are based on relations between competitors or between competitors and consumers; only in the latter case, in which monopolization is alleged to have inflated prices, are direct transactions involved. If two cars are involved in an accident, and one driver is alleged to have been at fault, the two drivers usually had no social relationship of any kind before the accident.

In each of these types of cases, it is difficult to determine the underlying count of events that could lead to litigation. For instance, it has been widely reported that there has been a large increase in the extent of piracy of intellectual property as a result of the opening of trade to China. China is a vast country, and compliance with Western laws and norms, while given lip service by officials, is still low. Yet it would be difficult to get a good measure of the amount of piracy, although one could use proxies such as the amount of counterfeit goods seized by U.S. Customs. If the amount of intellectual property litigation is increasing, it would therefore be difficult to disentangle the effects of increased piracy and improved (or worsened) enforcement.

The use of antitrust law depends on the underlying competitive conditions in industries. In an idealized, perfectly-competitive market, each seller would have a very small share of the market and there would be variability in prices, assuming that a commodity of uniform quality is being sold. It appears that the economy is far from such a situation in many industries today. Rather, an emphasis is placed, in these industries, on innovation, in order to gain a temporary competitive advantage, based on an technological edge. The computer, electronics, pharmaceutical, and biotechnology industries are heavily based on innovation. Intellectual property and antitrust law interact. It is a matter of much contention as to how expansively intellectual property rights should be interpreted; there is no “right” answer, as this is a highly political matter. Similarly, it is much disputed as to the degree to which certain practices by large firms (e.g. product-tying) constitutes violations of the antitrust law.

Since, in these two types of law, it is a subjective matter as to whether in each case a situation exists that could generate a grievance, there is no way to form an objective count, in these cases, of the underlying facts, that can lead to disputes. This differs from the situation in contract law, where at least one can point, in most cases, to discrete transactions. Since there is no way to measure the underlying number of potentially-grievance-generating situations, there is no way to determine whether or not the rate of litigiousness has increased, or simply the number of underlying situations.

Another factor that can possibly explain the increase in the number of lawyers and the amount of litigation is the increasing complexity of society. Durkheim theorized that society got increasingly more complex over time, first involving the division of labor, and then the subdivision of labor [52]. This theory seems to fit what has happened in modern societies and continues to unfold; there is the constant development of new technologies, often each more specialized than the last. New technologies and new social practices require regulation by the state, and this drives demand for more law.

For instance, the recent development of techniques to culture stem cells that have the potential to replace any human organ has created much controversy, because some of these stem cells are harvested from human embryos [35]. Thus the state has stepped in to control the use of these cells, both through regulation and through statute. Another example is the fate of copyright law after the development of the personal computer and the Internet. Copyright law was originally developed mainly with printed materials in mind. Later, it was extended to creative works stored in such forms as vinyl records, films, cassette tapes, and compact discs. The networked computer created new dynamics, such as the situation under which anonymous users can exchange copies of copyrighted material, such as films or songs. Congress responded to this situation with an update of copyright law, the Digital Millennium Copyright Act of 1998 [136].

Thus we have a situation in which the continuous transformation of society leads to the continuous creation of more law, and therefore more demand for lawyers. Friedman, in his book *Total Justice*, describes the increasing demand for justice in an increasingly more prosperous society [71]. In the United States, there is a tendency to handle this need for more administrative regulation *or* law by choosing law over regulation, because of a distrust of the executive arm of the state and of expanding its powers. Even if the state does not directly pass a law, tort law and/or contract law can often come in to fill the gap. For instance, the invention of in-vitro fertilization technology creates the possibility for malpractice in this area, using existing tort law. Before this technology existed, couples who wanted babies and could not conceive them through sexual intercourse had no other options, so the grievance could not exist.

As is well-known, the use of private civil law, and litigation, which is one aspect of such use, is a part of the English and American culture, dating back centuries. It has also been adopted and adapted by many other countries, although arguably nowhere to the extent as in America. It is one aspect of the system of individual rights on which the legal systems of Great Britain and its former colonies is largely based. The court as an independent forum by which parties can peacefully settle their differences is widely regarded by those who lack such systems (that is, for instance, those living under authoritarian governments) as an enviable aspect of a system of governance. America, it is commonly argued, is particularly rights-oriented and anti-regulatory, especially in recent years, and there is a continual creation of rights in response to public demand (for instance, consider the call for "patient bill of rights" as opposed to direct HMO regulation through an administrative agency [61]).

Kagan [114] argues that the American system of dispute resolution is characterized by "adversarial legalism." This is a a system in which disputes are settled by a system of formal rules (laws) and and which is dominated by lawyers and litigants at the expense of bureaucrats or judges. In the American system, judges serve as referees, enforcing the rules. Kagan contrasts this with more informal methods of dispute resolution, such as mediation, and with bureaucratic legalism, such as is practiced in (continental) Europe. In Europe, a professionalized class of judges, who are civil servants typically spending their entire careers within the state, play a much more significant role in disputes; they gather evidence, question witnesses, and prepare reports and decisions which are subject to internal bureaucratic review. This review makes their decisions much more consistent with one another than is the situation in the U.S., where judges are typically appointed mid-career after working as lawyers, and have much more discretion in making decisions. Thus, the outcome of lawsuits is much more uncertain in the U.S., which itself encourages the filing of lawsuits, since theory tells us that potential litigants are more likely to go to court (as opposed to settling) if they are uncertain about the outcome [178].

Disputes in Europe are also, due to the bureaucratic nature of the system, settled much more cheaply and quickly than in the U.S. However. Europeans are accustomed to living with a much more powerful state than Americans are; the American state is fragmented and federalist, and an American individualistic ethic (which was largely responsible for the creation of such a state) precludes the assignment of dispute resolution to government bureaucracies. So, instead, Americans turn to the courts. And they do so increasingly, argues Friedman [71] in *Total Justice*, because the citizens of an increasingly prosperous society want redress for any adversity.

Burke [30] agrees with Friedman in his finding that one of the main reasons for the perception of increased litigiousness in American society is not so much the raw increase in the number of lawsuits but rather in the expansion of the number of laws and possible causes of action, because of the need for "total justice." The creation of each such law implies a political struggle between the potential plaintiffs and defendants; the defendants oppose the law, which Burke calls "resistance." Often a compromise is reached, and the final law represents a balance of the interests of both potential plaintiffs and defendants. Usually, a bureaucratic approach to dispute resolution is not even considered, because of the anti-statist[4] bias of all concerned and because of the bias of legislatures toward shifting dispute resolution costs away from the state and onto private parties, thereby reducing In addition, once laws are in place, they are subject to modification in three ways. The first of these what Burke calls "discouragement," which is modification of the law to discourage litigation. The second is what Burke refers to as "management," which tries to make litigation less

[4]By this, I mean the executive state; the courts are part of the state, of course, but they are viewed as impartial forums for the assertion of rights, and therefore do not detract from individual rights, in principle (although in practice they often do so.)

adversarial and more efficient through mechanisms such as mediation and arbitration. And the third is what Burke calls "replacement," in which a litigation-based dispute resolution mechanism is replaced by some other mechanism, such as social insurance or mandatory insurance (such as workers compensation). Ironically, replacement is often adopted when the number of potential disputes is so great that an administrative system saves enormous amounts of time and money; this is the case when you consider worker's compensation system as opposed to a tort-based system for compensating workers injured on the job.

Part of the reason that litigation is such a controversial subject is because there is a widespread perception that lawyers are major beneficiaries of the system. And it is no doubt true that in many cases, legal fees consume a good share of any eventual settlement. The U.S. does not place very strong controls on the supply of attorneys; nor are legal fees typically controlled.[5] Since the supply of attorneys is not well-controlled, one might make the case that the market is functioning, and people are paying lawyers their market-clearing price, fearful that if they employ less costly representation, they may not win their case at all. Ironically, in any given lawsuit, both parties would be better off if they could conspire to both hire less expensive representation while keeping the ratio of the quality of representation constant, but such conspiracies are obviously nearly impossible because of the adversarial nature of the relationship between the parties.

A preview of my findings from the empirical work in this thesis follows.

Some types of cases are the result of the ordinary course of doing business, through

[5]Contrast this to Japan, which controls access to the courts by placing strong controls on the number of attorneys (bengoshi). However, there are many law graduates, who, while not entitled to practice in court or offer legal services to the public, can work for companies and offer legal advice to their companies [11].

everyday transactions. Disputes between Ford Motor and its dealers, or disputes between insurance companies over coverage, fall into this category. Some litigation is the result of one-time, unusual events. Asbestos litigation, or foreclosures due to a temporary downturn in the real-estate market, fall into this category. Of course, unusual events themselves can be expected to occur with some frequency [169].

At any point in time, litigation reflects underlying patterns and transactions in the economy, and underlying social practices and thus shifts with time as the economy and social practices shift. For instance, the decline in the trade union movement has led to a movement away from the use of labor law to guarantee employee rights and toward a use of employment law. Employment discrimination law creates an environment within firms pushing them toward due process in the treatment of their employees; they are pushed in that direction anyway by processes of rationalization [84].

Such economic and social change is one of the sources of the dynamism in litigation patterns. However, the relation between law and society is not unidirectional; law and litigation do not simply reflect social patterns, but individual and organizational social action is affected by knowledge of the law and the possibilities for legal action (see Edelman and Suchman [54]).

Volumes of litigation are affected by changes in the social environment. The social environment includes the economic, political, and legal environment, as well as social patterns and norms.

Litigation patterns can be affected by shifts in macroeconomic patterns. For instance, there is some evidence that number of employment discrimination lawsuits filed could be related in some manner to the business cycle and the unemployment rate [206]. Also, litigation is affected by changes in technology. For instance, the application of copyright law to computer technology is relatively new; many cases have been filed, because litigants were uncertain what the law was under the new conditions.

When the Reagan administration came into office, and thereby changed the political environment there were changes in federal policy toward filing discrimination [241] and antitrust lawsuits [97]. This led to a decline in the number of such lawsuits, and also created an opportunity for private attorneys and state attorney generals to fill the void left by the administration.

A change in the law, whether brought about by judges, the legislature, or activist attorneys in the public or private sector can affect litigation patterns. is the most obvious example of such a shift. For instance, a law designed to stem lawsuits in a particular area (what Burke [30] refers to as a "discouragement reform") may actually increase suits as attorneys design new strategies and legal theories to get around the new barrier. Attorneys may modify contracts over time to make them clearer, in part to stem litigation resulting from lack of clarity. Thus litigation informs subsequent contracting, and refines it. The law, like all human technologies, is a product of continuous learning. Attorneys may devise new legal theories under existing law and use these theories to pursue new types of cases. I term this legal innovation and legal entrepreneurship, and it is another source of legal change.

Long-term relations that involve asset-specific investment by the parties tend to lead to more litigation (upon breakdown of such relations) than spot-market transactions do. This is because such long-term relations involve contracts that are more complex than those governing spot-market transactions. Long-term relations tend to be very valuable to their participants; they also tend to be subject to more regulation. Franchising and employment are two such long-term relations, and we see many such cases in our data. With respect to both of these, there has been a movement toward the provision of due process to govern the relationships between the involved parties (for a discussion of this in the context of employment law, see Edelman [53]).

Litigation is a highly uneven, heterogeneous phenomenon. By this, I mean that it is unevenly distributed, both by industry and by case type, and that cases in each industry and case type have diverse causes. In order to understand litigation as a whole, one needs to understand what all these diverse causes are, many of which are unrelated to others. This work explores many of these causes.

In all case types, relatively few litigants and/or law firms account for case activity far beyond their numbers. Because of this, policy makers that are interested in reducing amounts of litigation are advised to inform themselves of those companies and industries responsible for large volumes of litigation. This thesis makes a contribution to doing so. Litigation is not caused by "litigiousness" alone, although the tendency in a liberal society for some individual actors to assert their legal rights does contribute to litigation (whereas in some other societies they might "lump it", or turn to the state for intervention). Instead, much litigation involves relatively few actors. Critics appear to want to reap the benefits of individualism in American society (for instance, a robust economy, and extensive civil liberties) without paying the costs (people asserting their legal rights readily and engaging in costly litigation to pursue these rights).

Litigation tends to create groups of litigants that become political actors, most prominently businesses with interests in particular types of litigation. For instance, both franchisees and franchisors have active lobbies that attempt to affect franchise law. Because business tends to be better-organized than their non-business adversaries, the playing field is usually skewed in favor of business. Often business pushes to replace litigation and the courts with arbitration and/or administrative mechanisms in specific areas of the law. But business groups are not the only frequent litigants that are involved politically; black and women's groups are involved in lobbying around employment discrimination law, and plaintiffs' attorneys have been fighting tort reform at the same time that business has been promoting it.

Many federal civil cases involve a large corporate entity and a small entity or individual, with a large perceived power imbalance. The large corporate entity, for familiar reasons (see Galanter [76]) tends to prevail in many of these cases. The corporate litigant often has the law on its side, or at least more expensive lawyers. The smaller litigant may feel that he or she is right and may cite moral reasons rather than legal ones. Thus, at least some of this litigation amounts to resistance to the existing legal system. Many people who violate corporate legal power may view that power as illegitimate. This explains some cases that I observe herein that can not be explained on purely "economic" or "rational" grounds.

Also, the partially-rational decision-making process that brings litigants to file lawsuits and press them forward is imperfect and often shaded by emotion. Litigants and their lawyers often make serious miscalculations in taking these decisions, and such miscalculations end up leading to a good deal of litigation. We live in the real world, not in an ideal world of perfectly rational actors, or even boundedly rational ones.

1.1 The Work of the Business Disputing Group

The Business Disputing Group at the University of Wisconsin, in collaboration with the RAND Corporation and Abt Associates, has provided an overview of federal civil litigation involving corporations that were found on the Fortune 500 lists over the period 1971-1991 [50]. Much of the work in this thesis follows up on directions laid out in their work.

The Business Disputing Group made use of the database of federal civil litigation produced by the Administrative Office (AO) of the Federal Courts, and made available through the Inter-University Consortium for Political and Social Research [68].[6] This database contains such information as the parties involved in each lawsuit, a nature-of-suit code describing the area of law under which the suit was filed, the date of filing and date of termination, the amount demanded, if an), the procedural progress at the time the suit was terminated, the nature of the judgment for adjudicated suits, who won the suit (if a victor was recorded), and the amount awarded, if any.[7]

The Business Disputing Group excluded some cases from consideration because they were unlikely to involve business. First, they excluded from the count of cases Medicare, student loan and veteran's benefit cases because these cases typically only involve individuals and the federal government, and therefore were unlikely to involve business, since business litigation is the subject of their study. Cases where the U.S. was a defendant and concerned a personal injury or Social Security were also dropped,

[6] The database can be downloaded from the Consortium's Web site at www.icpsr.org.

[7] The AO database used a statistical year (SY) that ran from July 1 to June 30 up until and including 1991; for instance, SY 1990 was July 1, 1989 through June 30, 1990. SY 1993 and subsequent statistical years ran from October 1 through September 30. SY 1992 was 15 months long, to handle the transition. All the year-level data reported herein with respect to the AO database is for statistical years as opposed to calendar years. Data for 1992 was adjusted by a factor of $\frac{12}{15}$ (0.8) in order to compensate for the increased length of that year.

for the same reason. Cases in territorial districts (such as Guam) were also dropped, because the Business Disputing Group was only concerned with cases originating in the fifty states. Finally, all cases other than original proceedings or transfers from state court, to avoid the double-counting that would be involved in keeping cases that were transferred from another district or had been remanded. I make use of this restricted database, and throughout this work I refer to these cases as “all business cases” (The Business Disputing Group referred to this same group as the “general population” to distinguish them from the subset of these cases which involved a party that was on the Fortune 500 list at some point.)

In order to perform their study, the authors enhanced the database by identifying the first-named party (plaintiff or defendant) when that party was in the list of the largest corporations as identified by Fortune magazine during the period. The number of corporations on the Fortune lists over this period was approximately 2000,[8] so this list of companies is referred to as the F2000. This study identified the defendant or plaintiff as an F2000 company in about 518,000 cases out of the approximately 2.7 million filed during that period. I make use of both the original database and the enhanced database in my work, and describe both in more detail in Chapter 3.

The major conclusions of that study were: while the aggregate volume of business litigation grew during the 1970s and early 1980s, it had been declining in the subsequent period up to 1991; that business-related litigation is extremely concentrated, with an extremely limited number of business “mega-litigants” accounting for most of the activity; this concentration is especially high in torts, with the result that the

[8]The number of names appearing at one time or another was 2,367 during the period, but these were assigned to 1,905 successor companies due to name changes, mergers, and acquisitions. The full list of names is given in Dunworth and Rogers [50].

trend line in torts, outside the concentration, is actually flat or declining; that a good deal of the growth in litigation outside of the tort area can be attributed to business itself; and that big business wins, overwhelmingly, the cases in which it is involved.

At least four directions for further study were identified by the Business Disputing Group.

First, examination of the data in more detail by case type. Federal civil litigation is highly unevenly distributed. The distributions of cases by case type (that is, the cause of action under which the suit is brought) is highly non-uniform, and within any particular case type the distribution of the types of litigants (in terms of which industry they represent) is also highly non-uniform. For instance, insurance contract cases are dominated (as one might expect) by insurance companies. There is no reason to believe that the composition of litigants by industry would be similar in two dissimilar case types, such as intellectual property cases and employment cases. Federal civil litigation is not a uniform phenomenon; rather, different cases (and case types) have different causes. For instance, a new legal rule or legal theory may cause a sudden spike in a particular case type, as cases are tried on a basis that did not exist before; such a spike typically occurs only in that case type which is directly affected by the new rule or theory, rather than in all case types.

Second, industrial studies. Different industries tend to be involved in different kinds of litigation. For instance, the entertainment and publishing industries tend to be involved in intellectual property cases to a much larger extent than, say, the railroad industry. Industry types vary as well; for instance, it is likely that we would see a different composition of cases in the service industries than we would see in the goods-producing industries.

Third, the activities of particular large firms. The population of cases that a particular large firm is involved in will give a good idea of how its business activity, relative to disputing, has evolved over time. Here, one might want to focus on some of the largest firms in the U.S., because of there is plentiful information in the business literature about their activities, legal and otherwise. For instance, if one considers on AT&T's legal battles, one may find that they are embedded in the law and politics of the regulatory changes in telecommunications over the past fifteen years. They may also consist of ordinary business disputes, such as breach of contract suits.

Fourth, a cross-sectional examination of one year of civil litigation, the most recent for which data is available. Instead of restricting oneself to the largest 2000 firms, one could identify all the business parties in one-year's worth of cases, or a large sample thereof (depending on time and resources). This would allow one to create a map of the substantial share of business disputing that is found in the federal courts. Comparing this map with an input-output table of the U.S. economy, which shows which industries supply others (and therefore are involved in contractual relations), we would be able to see which contractual relationships tend to lead to disputes more frequently, and perhaps theorize reasons for this. Since litigation is the most extreme form of conflict between businesses, such a map would allow us to see where underlying conflict is most common. This work would represent the most accurate cross-sectional picture of business disputing that would be available in the literature.

By looking at the F2000 data in a different way than was done in Dunworth and Rogers's original study, this thesis makes contributions to the first three types of studies listed above. While it looks at litigation primarily on a case type basis, the thesis discovers that individual case types tend to be dominated by several industries.

Thus, by examining litigation of each case type, one finds out a good deal about the litigation activity of particular industries, and of particular large firms within those industries.

In order to do this, the thesis looks at the F2000 database, at the administrative database as a whole (all cases, not just F2000 cases), at published case records (mainly from Lexis/Nexis), and looks at party strings for cases terminated between 1971 and 2001 using the single word and adjacent-word-pair methods described in Section 3.2. This thesis is comparative in that it looks at a variety of cases of different types, and applies the same overall conceptual framework to all of these case types.

1.2 Social Relations, Industrial Structure, and Litigation

All companies in the economy are engaged in networks of relations with other parties. These other parties can be divided into at least five basic classes: 1) parties in which a company is engaged in market relations of a short-term, medium-term, and long-term nature, 2) parties with which a company competes, 3) parties which own the company (its shareholders) or have loaned it money through financial instruments (bondholders) , 4) the state in all its various manifestations (such as municipal, state, and federal authorities), and 5) the public at large (through advertising, public relations, etc).

The parties with which they are engaged in market relations include customers, suppliers, employees, insurance companies, financial institutions, such as banks. Contract cases typically involve relations between customers and suppliers. Employment law typically involves relations between a company and one or more of its employees. Shareholders sometimes sue if they feel that the company has illegally damaged their equity (for instance, by misrepresenting facts). Insurance cases arise when an individual or company disputes the benefits due it under a policy. Bankruptcy cases arise when all the creditors of a bankrupt company dispute the remaining assets of that company.

In contracts, the unit of analysis is the transaction, which is governed by a contract, either explicitly (by written contract) or implicitly (by the Uniform Commercial Code, common law, and state law). Transactions result from interactions between parties, which may be individuals or businesses, in one of their legal forms. There may be an ongoing relationship, which may be governed by a single long-term contract or many short term contracts. Or the relationship may be a one-time event, such as when a consumer passes through a town and buys something in a store that she may never patronize again.

Firms and individuals are not uniformly distributed in the economy. There are different numbers of firms, and different numbers of employees, in different sub-sectors of the economy. Although the number of employees and the number of firms does not directly give the number of transactions in which these parties are involved, these variables are related. For instance, each employee is involved in at least one employment contract at a time. And each firm is involved in many transactions. Although the number of transactions per firm may vary between sectors, all things being equal, sectors with more firms should see more disputes, and more litigation. Similarly with sectors with more employees.

For instance, in 1995 there were 1,567,884 establishments in the retail sector in the

U.S. These establishments employed 21,084,574 people (U.S. Census Bureau [225]). These represented percentages of 23.7 and 21.0 respectively of the total number of establishments and total number of employees in the economy. The retail sector leads all the other sectors in both the number of employees and the number of establishments. On this observation alone, one would expect to find many disputes involving the retail sector. And, in fact, we do find many disputes. In particular, we find many disputes between retail franchises and their large (often multinational) franchisors. And, in employment litigation, we find many lawsuits between large retailers and their employees.

Much of this is simply because the large retailers, such as Sears Roebuck or K-Mart, have many employees. Overall, we would expect the patterns of disputes to reflect the overall patterns of interaction in the economy, especially with respect to contracts. Of course, we may find more or less disputes depending on the nature of the governance relationship between interacting parties. For instance, one reason why we find more litigation in the franchising relationship than we do in other types of retail transactions is that this relationship is complex, like a marriage, with many possible points of dispute. Most other retail stores simply have suppliers and distributors, with whom their contract relationships tend to be simple; that is, they contract simply to deliver goods of a particular kind or quality on a particular day for a specified price; even so, they may sometimes still find themselves in disputes. We may also find more litigation in employment in companies where a history has been established of employees asserting their rights in a particular area.

Companies may or may not be involved in direct relations with their competitors. Sometimes companies are organized with their competitors in trade organizations.

However, sometimes competitors have little direct contact with each other; they simply relate, indirectly, through the customer base. Certain parts of the law often pit competitors against one another. For instance, copyright infringement lawsuits often occur between publishers or authors. Trademark or patent infringement suits are also often brought by one competitor against another. Private antitrust litigation is often brought by one competitor against another, with the allegation made that the defendant acted illegally to keep the plaintiff out of a market, by exercising market power. In addition, antitrust litigation is sometimes brought by the state, in the public interest, with the goal of promoting competition.

Much litigation results when one or more of the social relations between parties break down, due mainly what can be viewed, on one level, as improper system design (on the part of those designing the contractual aspects of the relations between the parties, or on the part of the legal system as a whole). Since it is a rare defendant that wants to be dragged into court, it is usually due to poor planning, accident, ignorance of the law, or uncertainty that cases result. For instance, in the 1980s there was an explosion of asbestos product liability lawsuits, which resulted in the bankruptcy of the major manufacturers of asbestos. There are two possible explanations for this turn of events. The first possible explanation is that the manufacturers knew all along of the risks posed by asbestos and figured that they could get away with selling it anyway. This amounts to poor planning and ignorance of the law (in making the erroneous judgment that they could get away with it.) The second explanation was that the manufacturers did not know of the risks and did not anticipate being sued. This is would be due to uncertainty; under this scenario, the litigation resulted by accident, since the risks arose unanticipated.

The above view of litigation, that it stems from improper, or imperfect system design, is consonant with a Durkheimian view of society as a harmonious system that nevertheless occasionally malfunctions, creating disputes, crime, and civil litigation. Litigation actually helps reestablish norms as judges, through case law, define what the law is. and norms reinforce and are reinforced by laws. However, there is always going to be some uncertainty as to what the law is, and actors who, in advancing their interests, test the law on its uncertain fringes.

An example of this is the fact that intellectual property rights have fuzzy boundaries. As owners of extremely valuable trademarks, McDonald's and Coca-Cola want to make their trademarks as expansive as possible, and possible competitors are constantly testing the boundaries of these property rights, as we will see in the section on intellectual property. The result of this conflict is a clearer sense of what the boundaries of the law are. However, since the economy is constantly changing, the law tends to lag behind such changes, and more uncertainty is generated here. An example of this is the current confusion and struggle over intellectual property rights on the Internet.

1.3 Transactions and the Litigation "Conversion Rate"

Generally speaking, the number of claims brought for a specific case type are related to the number of underlying transactions by some coefficient, which we may call k. Social changes tend to alter the value of k. For instance, a legal rule change that makes it possible for plaintiffs to recover attorney's fees from losing defendants would tend to raise k, since more cases would be brought given a fixed number of underlying transactions. Or if the economy improved, reducing the default rate on mortgages, the number of foreclosure cases brought (per mortgage) would decrease, thus reducing k.

Changes in social knowledge of and attitudes toward tobacco ultimately led to a group lawsuits. Although the health damage caused by cigarette smoking has been known for decades, it was only relatively recently that tobacco companies were found liable for this, and damages were awarded in the billions of dollars, both to the states, and to individual plaintiffs. This was in part due to the discovery of evidence that the tobacco companies deliberately misled the public on the results of its own scientific studies and deliberately tried to addict people to cigarettes. However, another factor was a shift in the social environment; the public shifted, to some extent, from a belief in the individual responsibility of smokers in choosing a dangerous activity, to a belief in the culpability of the companies that were promoting this activity. Judges and juries do not exist in a social vacuum, so litigation in this area began to be successful, and took off from there.

We may be seeing the beginning of the same situation with respect to food companies that sell unhealthful food, as a result of the current obesity epidemic in the U.S. and in other parts of the world. There was a well-known lawsuit against McDonald's for selling high-fat "super-sized" meals that promote obesity; this suit did not succeed. More recently, there was a lawsuit filed against Kraft Foods, maker of Oreo cookies, because they contain trans fats, which have been shown to be dangerous. Public awareness of both the obesity epidemic and of the dangers of trans fats has been growing, due to the efforts of public health promoters and the media, and to the lawyers and plaintiffs that have been pursuing these suits. A bill proposed in the U.S. Senate by Republicans would block suits based on obesity from going forward; it is supported by the restaurant association and the food industry association, both of which have given most of their campaign contributions to Republicans (77 and 81 percent respectively), and it is opposed by the trial lawyers, who have given 91 percent of their contributions to Democrats [10]. If these lawsuits become a more significant factor (as of this writing, there have only been a few such suits), they have a potential to influence political giving by these groups and thus the overall shape of American politics.

As awareness of a possible tort grows, entrepreneurial attorneys also become more aware of the possibilities for litigation. (Sometimes these attorneys are motivated by the public interest rather than financial motives; this appears to be the case for the attorney involved in the aforementioned trans fats case.) Thus there is an interaction between the attention given by the public to a problem, and the responsiveness of attorneys and the legal system to it. Another recent example would be a case that the Ninth Circuit Court of Appeals allowed to proceed against the airlines on behalf of victims of deep vein thrombosis, a condition in which people who sit for long periods in constrained spaces develop blood clots. When former Vice President Dan Quayle developed this condition, the public, and presumably attorneys and physicians, became more aware of it. The plaintiffs claimed that the airlines failed to warn the passengers of the danger. While the Ninth Circuit allowed the case to proceed, a similar court in Britain did not, perhaps indicating something about the differences between the two countries in what the local norms and laws consider a viable tort.

1.4 Litigation and Organized Actors

Another way to look at litigation is in terms of governance and conflict. On this view, which is in the tradition of the "groups in conflict" view of society associated with Karl Marx, Max Weber,[9] and many others (pluralist views in political science also fit into this category), society is composed of contending groups, which conflict (and cooperate) in many ways. Litigation is one of these ways, albeit one of the more extreme. Other modes of interaction between groups include informal negotiation, political action, economic competition, and war.

Two of the most significant types of cases that we found in our database of federal litigation are employment lawsuits, and lawsuits between franchisors and franchisees. These lawsuits, while superficially dissimilar, have several things in common. First of all, they both involve parties that tend to engage in complex, long-term business relationships. Such relationships, because they are complex and involve large numbers of events and transactions, tend to lend themselves to litigation.

Secondly, they tend to involve organized actors. Employers and large companies that franchise tend to be very well organized in associations. Franchisees, although they are more numerous (and therefore perhaps less likely to organize because of free-rider problems; see Olson [164] and Marwell and Oliver [147]), also have been organizing to promote their interests. While employee organization (into trade unions) has become less common in recent years, there are large organized groups that promote the rights of various groups in society, including blacks, women, Hispanics, the elderly, and the disabled. Each of these groups is a protected category with respect to

[9] Marx's work is primarily concerned with groups in conflict, namely capitalists and workers; groups in conflict can be seen as an aspect of Weber's work.

employment (and other aspects of life, such as housing and public accommodation), and advocate for these rights at all levels of government. Civil rights litigation in employment can be seen as one aspect of the overall push for these rights.

Many cases pit a party which is large and relatively well-resourced, and part of a relatively smaller group, against an opponent which is smaller and less well-resourced. Table 1.1 gives some examples of this.

Political action by these various organized groups of people–whether they be members of a protected class or franchisees who have entered into a specific type of contract–may seem dissimilar on the surface, but each group has organized to persuade the rest of society, and the state, to intervene in the relationship that they have with a powerful entity, whether it be their employer or their franchisor. Each group argues that it is necessary for the state to intervene (in a relationship that libertarians would argue should be governed by freedom-of-contract) in the relationship because of alleged unequal bargaining power between the parties, and due to equitable considerations (although considerations of fairness are more compelling in the civil rights context than they are in the franchising context).

In both contexts, political action at the legislative level and litigation in the courts represent parallel strategies to achieve similar goals, as does informal negotiation between employer and employee, and between franchisor and franchisee. The main difference between the two is that in most cases (except for class actions) litigation advances the interest of a single party or small group of parties, whereas legislation affects the entire group advocating for it. Nevertheless, much as Clausewitz [37] wrote that "war is the continuation of politics by other means," litigation can be understood as simply another governance strategy, a continuation of negotiation. Franchisees or employees may pursue litigation as one strategy as they pursue legislation as another.

Table 1.1: Strength of Litigants in a Variety of Case Types

Case Type	**Larger Party**	**Weaker Party**
Copyright	“Content” Owners	Small-Time “Pirates”
Employment Discrimination	Employers	Employees
OSH	Employers	Employees
Antitrust	Monopolists	Victims of Unfair Competition
Insurance	Insurers	Policy Holders

1.5 Permanent and Temporary Litigation

There is a permanent, background level of litigation within each case type. This litigation tends to be related to the overall level of transactions and interactions that exist in the economy and in society. It tends to be steady over time, perhaps increasing slowly as the level of transactions and interactions. A typical case might be a “slip-and-fall” liability case in a grocery store. Each year, a certain number of people will slip and fall on, say, a grocery store floor. The number of such incidents is fairly steady from year to year, although it grows slightly with the population, and a fairly steady number of cases are brought. Each year, a certain number of motorists will get into disputes with their automobile insurance company over whether there is coverage under certain circumstances. Automobile insurance companies are in the business of selling contracts for coverage, and no matter how you write such a policy, and how clear you try to define the circumstances under which policyholders are covered and the circumstances under which they are not covered, there are always going to be a certain number of disputed cases on the borderline of coverage and non-coverage.

Again, the volume of cases is likely fairly steady from year to year, if circumstances do not change sharply.

The case volume may be reduced if steps are taken to remove cases from the courts and into some other case management system, such as an administrative system, a alternative dispute resolution system, or an administrative system within the state. The case volume could also go down if there are changes in law, contracts, and regulation that cause more cases to be settled before they are taken to court. Finally, interested parties could take steps to reduce the underlying case parties; for instance, groceries could purchase flooring that is harder to slip on.

There are also temporary volumes of cases that stem from "shocks to the system," that is, disruptions of the ordinary way of doing business. This because it stems from unusual events. Mass tort litigation, such as that around Asbestos or the Dalkon shield, is of this variety. Everyone goes along for years using a product, thinking that it is perfectly safe, or at least not worrying about it, and then it is shown not to be safe. A sudden explosion of lawsuits occurs as a result. Macaulay gives another example.[140] For years, energy contracts between large customers (such as utilities) and large suppliers (such as coal companies) were set over a long term, because of the large capital expenditures involved. Then in the early 1970s, the oil crisis hit. Energy suppliers suddenly found themselves with contracts that were a losing proposition, given much higher prices. The result was a number of lawsuits which attempted to get out of these contracts, using various legal theories.

Another source of a sudden spike in litigation is a change in the law. Obviously, we wouldn't see many civil rights cases in the database if there had not been a civil rights law. But we can also see shifts in litigation volumes based on changes in how the law is interpreted, or because of laws that modify how the federal courts are supposed to deal with a subject. An example given by Posner [175] from criminal law is illustrative: in 1996, Clinton signed both the Anti-Terrorism and Effective Death Penalty Act, and the Prison Litigation Reform Act. These acts, Posner notes, were intended to curtail habeas corpus appeals in the first instance, and prisoner petitions in the second.

Such temporary clusters of cases are similar to what Galanter [79] terms a "case congregation." Galanter defines a case congregation as "a group of cases that ... share common features, that are shaped by a common history, that are subject to shared contingencies, and that lean into a common future." Asbestos litigation is the canonical example of this. Note, however, that a new variety of case can have two fates: it can build up and peter out, or it can become part of the steady volume of litigation, continuing over time. So, for instance, the insurance companies, as we will see in Chapter 17, have begun to use civil RICO charges to prosecute rings of individuals allegedly engaged in insurance fraud. This starts with a small number of companies pursuing a small number of cases. This may or may not occur right after the enabling statute goes into effect; sometimes it takes a creative lawyer to realize the applicability of a statute, and this may be years after the statute is enacted. If they are successful, more join in, and each pursues more cases. This activity in itself may curtail the underlying activity leading to the litigation (the fraud), but the result may be that this stabilizes into a new category of litigation, producing a steady volume of cases each year.

These two categories of litigation, permanent and temporary, sum to create the overall pattern of litigation. However, since the shocks which cause spurts in litigation appear to be randomly distributed in time, because they tend to be unrelated to one another (e.g. Dalkon shield litigation has nothing to do with asbestos litigation) the curve in litigation tends to be smoothed-out to some degree, as a surge in one particular kind of case is offset by a decline in another. This leads to the relatively smooth curve in filings over our period.

1.6 "Mega-Litigants"

Dunworth and Rogers coined the term "mega-litigant" [50]. A mega-litigant is a party–usually a company, but sometimes a government, an association, a union, or a entrepreneurial law firm–that is involved in a large number of cases. Mega-litigants, we find, account for much of the caseload overall, and they also account for much of the caseload within each case type.

For instance, McDonald's has been involved, over the years, in a large number of cases in which it has been defending its trademark. 3M and Union Carbide have been involved in a large number of patent cases, because they are technology-based companies. All the chapters in the thesis that describe the individual case types give numerous additional examples of mega-litigants; in fact, one of the significant contributions of this thesis is simply the identification of these mega-litigants, by case type, and the logic that makes them mega-litigants.

Some companies, or entrepreneurial law firms, act as private attorneys general, and become mega-litigants. Typically, this occurs when the state is either too busy with other matters or has different priorities than does the private actor. For instance, as we will see, Coca-Cola has an entire department devoted to making sure that what is served as Coca-Cola actually is Coca-Cola, and it pursues–with legal action–those who violate this principle. McDonald's aggressively protects its trademark, using its network of franchisees as its eyes and ears.

Nader and Smith [157] point out that Monsanto, maker of a hormone–known as BST or BGH–that stimulates milk production in cows has aggressively been threatening legal action after dairies that want to label their milk as free of the hormone. It has become "mega-litigious" in this area, because BST is a very profitable product. While Monsanto may not be able to prevent dairies from doing so, the simple fact that it becomes known that it goes after ones that do may give others pause. It would be difficult for Monsanto to get the state to take its side in the dispute, given that it is consumers who–prompted by health and environmental activists–were clamoring for milk that was labeled as free of the hormone. Nevertheless, Monsanto can use litigation, or the threat of it, as a stratagem to help fight this tide. This is only one of the weapons in the corporate arsenal: the others include lobbying, advertising, and public relations campaigns designed to influence the press. In such cases, where a company is acting as a private attorney general to enforce a particular law, the stakes for the company typically go beyond that particular case, so the company is likely to expend resources beyond what would be rational if the stakes were only the immediate stakes associated with that case (e.g. the lost sales of the hormone that stem from a single dairy's labeling of its milk as hormone-free.)

We will see in the section on insurance company mega-litigants is that the insurers have been acting as private attorneys general in going after rings of doctors, lawyers, and "victims" who commit fraud in auto accident claims. Here, the state could potentially file criminal fraud charges against these rings, but the insurance companies are not waiting for the state to do so, and are instead pursuing civil cases, with the lower associated standard of proof. State attorneys general are typically burdened with a heavy docket of more serious criminal matters, so the companies are coming in to fill the void, as they see it. They also are suing groups of physicians and other providers for filing allegedly inflated medical bills resulting from actual accidents.

We will see in the section on employment law, plaintiffs attorneys have been pursuing class action employment discrimination suits. This was prompted first by a movement of the government away from class-actions. This movement away started under Reagan, and has continued to date. The plaintiff bar has also been motivated by an expansion and strengthening of the anti-discrimination laws, particularly changes that have allowed plaintiffs to recover punitive damages as well as compensatory ones, and to obtain jury trials.

For instance, as we will see in subsequent sections, a good deal of contract litigation stems from franchising arrangements. so large franchisors (e.g. big hotel chains or fast-food chains) tend to be mega-litigants. And the ordinary volume of insurance contracts generated by the management of risk in the economy generates a certain amount of insurance litigation, so large insurers are mega-litigants. Both of these one would expect to rise as the underlying activity that generates them increases.

1.7 Causes of Litigation and its Increase

> George L. Priest, a Yale University law professor, said some of the new restrictions, like the limits on gun suits, showed disillusionment with what he said was the idea that had prevailed for decades that 'all disputes can

> be–and ought to be–resolved through litigation.' [85]

Priest's statement is hyperbole: it would be hard to find someone–even a trial lawyer–who believes that all disputes should be resolved by litigation, and all the research available indicates that the vast majority of disputes are resolved without litigation, which is obvious to anyone who thinks about it, since many people get into a dispute at work, at home, or in their private business dealings quite frequently, and disputes are usually only litigated when the stakes are high and the outcome uncertain.

Many scholars, however, have argued that American society has more litigation than is optimal. Even if they admit that most disputes are solved without turning to the courts, they would prefer that even fewer were. Shavell [202] points out that since the courts are paid for by the taxpayer, this amounts to a subsidy to litigants, who may use this subsidy to "purchase" more litigation than is optimal. He also notes that the incentive effects of litigation may be weak; the prospect of a tort award may not do much to reduce automobile accidents, even though half of the total amount paid out for torts in a given year is to compensate people involved in accidents.

Federal litigation is a diverse subject. Many different types of business relationships and competitive situations find themselves ultimately resolved through litigation. Thus we should not expect that federal litigation has a single, uniform cause, i.e. "litigiousness." We could define "litigiousness" as the differing "propensity to sue" of two different actors presented with the same circumstances leading to the same potential complaint. Viewed this way, litigiousness could potentially have some causal efficacy, but unfortunately the only way that one can measure the propensity to sue is by measuring whether or not they bring suit, which is the dependent variable one is trying to explain.

Litigation in various industries and in various types of cases has various causes, and it must be examined in a fine-grained fashion. For instance, patent holders often sue to protect their patents from perceived infringement, and mortgage holders often sue in order to foreclose on people who haven't made their payments. Both of these types of cases involve property rights, but there is no reason to believe that the rates of patent infringement, and of mortgage default, the underlying causes of the two types of litigation, are related to one another. Of course, given an adverse event, an underlying "propensity to sue" or "litigiousness" may determine how that event is resolved, whether it is through negotiation (to license the patent or refinance the loan, in these cases) or litigation. But such a "propensity to sue" may vary between industries and even between types of litigation, as industries have varying cultures, as do different parts of the bar.

Nevertheless, one of the underlying causes of litigation is the increase in the populations of individuals and firms, and the interactions between them. One such form of interaction is the transaction which, in legal form, is the contract. Such transactions are the source of many disputes. They can be the source of disputing over the terms of the contract and whether they were met. And people brought together by contract (such as employer and employee) can injure one another, for instance, if an employer violates an employee's civil rights, or if an employee damages an employer's property.

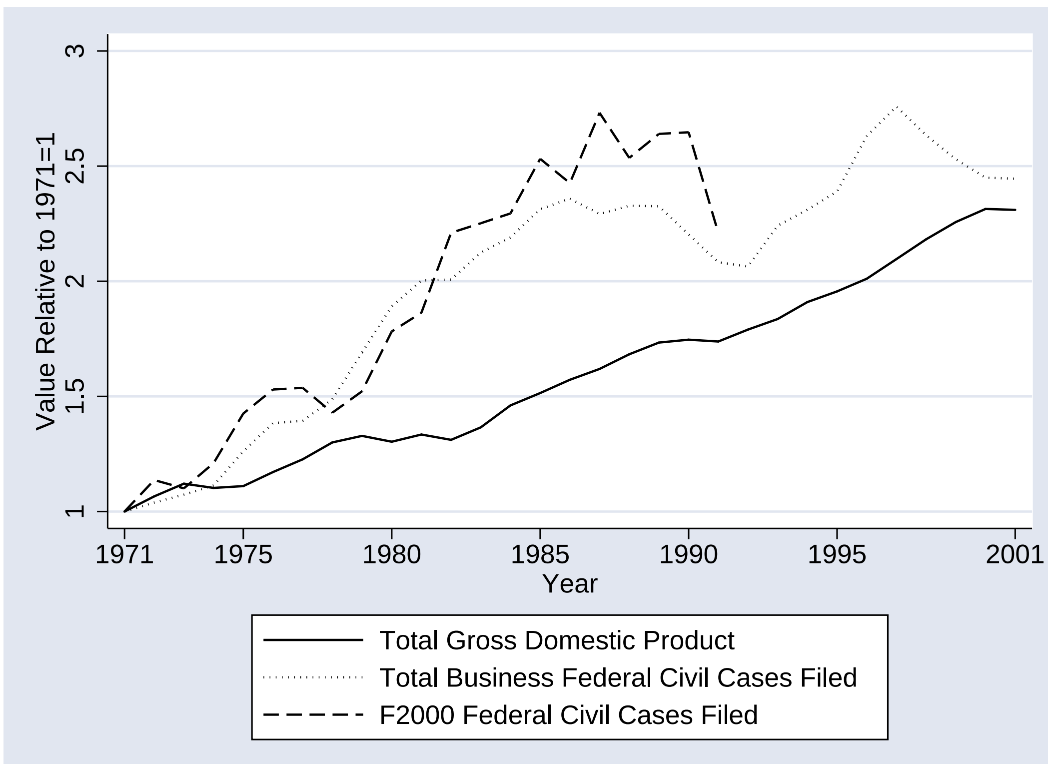
Posner notes that has been a large increase in the federal caseload since 1960, a much larger increase than there was in the thirty years prior to that, despite the fact that the population and the economy grew more rapidly in the earlier period [175]. Posner advances some reasons for this caseload growth. We will consider only the reasons that he gives that affect civil litigation, although he gives some reasons to the rise in the criminal caseload as well. First of all, the minimum amount under dispute in order to bring a case in diversity jurisdiction[10] has risen only occasionally, in 1958 (to $10,000), and again in 1989 (to $50,000) and 1997 (to $75,000, the value as of this writing). Thus this value has been eroded by inflation over the period in which it was not raised, and therefore disputes of lesser and lesser value are brought into court. Posner found a tight relationship between the rate of inflation and the number of diversity filings. After 1989, the number of diversity cases declined, due to the rise in the required minimum amount.

This study presents data which indicates that the explosion of lawsuits cited by Posner and many popular commentators may not be as significant as is commonly thought. For instance, Figure 1.1 shows that although there has been a significant increase in federal business litigation over the period 1971-2001, real gross domestic product increased by almost as much. Of course, for much of this period, growth in litigation was outstripping GDP growth, which has only (almost) caught up in recent years.

Thus most of the increase in litigation may be due to growth in the economy, which increases the volume of transactions, the which make up a significant fraction of the underlying relations that can lead to disputes. Two factors may account for the difference between the growth in GDP and the growth in cases: first, that society and technology, and contracts and transactions, are constantly getting more complex, leading to more uncertainty, more rapid change, and more disputes, and second, that there is more interaction between states than there was in the early 1970s, due to

[10]Diversity jurisdiction exists in federal court when the parties are citizens of different states. A dispute may be brought in federal court under state law if there is diversity jurisdiction and the minimum dollar amount is met.

Figure 1.1: Real Gross Domestic Product and the Increase in Business Cases, 1971-2001 (1971=1)



drops in the real costs of communication and transportation, leading to an increase in the number of cases brought under diversity jurisdiction.

Figure 1.2: Legal Services' Share of U.S. GDP, 1947-2001

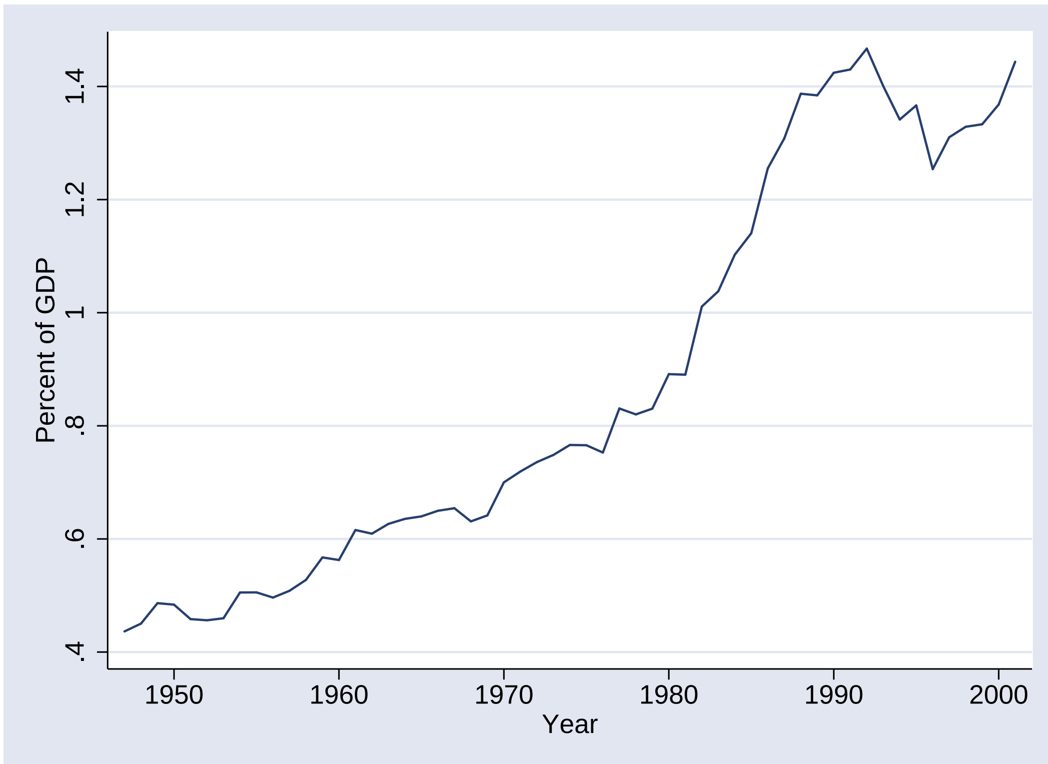


Figure 1.2 shows the growth in the legal services sector's share of the U.S.'s Gross Domestic Product in the the period from 1947 to 2001. It has grown from about 0.4% in 1947 to 1.4% in 2001. Looking at the graph, we see that while there was more or less steady growth up until about 1980, when it was 0.9%, there was steep growth in the 1980s, reaching a peak of 1.5% in 1992, and then a dip, and a rise. This does not fit in with a theory that it was the regulatory state that has caused most of the increase in the demand for legal services, since substantial growth occurred

Figure 1.3: Growth in Legal Services GDP and Overall GDP, 1971-2001 (1971=1)

in a deregulatory period (after 1980). However, whatever the cause, this is a major increase, although legal services remain a small part of the economy overall. Because of the vast growth in the economy over this period (over sixfold in real terms), legal services grew even faster, because it both grew with the economy and increased its share.

Figure 1.3 shows the growth in GDP attributable to legal services to overall GDP. This scales both so that the value of each of these is set to 1.0 in 1947, so we can compare growth since then. Growth in the economy has been more more or less steady, as this figure shows, with a few small recessionary dips. This shows that while growth in legal services began to significantly outstrip growth in the economy overall in about 1960, the biggest growth has been since 1981. This shows in a different way that something beyond increased laws and regulation was behind this. The boom in law firms on Wall Street and other financial and business centers during the two boom markets of the 1980s and 1990s, must have played some role, as corporate lawyers played many roles there.

Posner considers whether various legal changes, such as the Supreme Court allowing lawyers to advertise and compete on price, may have made legal services more competitive and therefore have lowered prices. This may have lowered the effective price of a lawsuit, since most of the cost of bringing a suit is legal fees, and therefore increased the number of suits, in response to supply and demand.

Posner also points to the expansion of the number of federal rights in the 1960s, in the ability of parties to bring suits on race, sex, and age discrimination. Since these statutes didn't exist prior to the 1960s, they no doubt increased the burden on the federal courts, but many observers feel this is a small price to pay for an expansion of individual rights in society in general.

In addition, Posner lays much of the responsibility for the expansion of suits on the expansion of constitutional rights brought about by liberal jurists through the 1970s. (I would add that this expansion of rights was not simply due to the actions of the these jurists, but of the general social climate of the 1960s that led to this "rights revolution;" the judges were responsive to this climate.) This ended only when Reagan and Bush changed the ideological makeup of the Supreme Court. Of course, this expansion of constitutional civil rights affects business litigation primarily in the area of employment, with other major areas of litigation, such as product liability suits and business contract suits, unaffected by any expansion of rights. One might argue that a normative shift toward rights and their assertion, however, creates an environment in which other people, for instance franchisees, are willing to assert their rights, as opposed to remaining silent and "lumping it."

Posner points out that the massive movement of women into the workforce, and the advancement of blacks and other minorities into better-paying jobs, both can actually contribute to the number of lawsuits, as there are more opportunities for grievances to be perceived, and lawsuits filed as a result. He points out that it is easier to prove discrimination when someone is fired than in a hiring situation.

Posner is skeptical that there is a simple monotonic relationship between the number of cases in an area and the underlying activities that give rise to them. For instance, he points out that admiralty cases have declined despite a vast increase in foreign trade, and that Federal Employers Liability Act (FELA) lawsuits (which apply to railroad workers) have doubled despite a 75 percent decrease in railroad employment. Cases under the Jones Act, an act similar to the FELA, but covering maritime workers rather than railroad workers, have declined despite the fact that maritime employment has actually declined less than railroad employment. Clearly there are other factors at work here other than simply the underlying activity. For instance, it may be that safety has deteriorated more rapidly in an aging railroad industry than in a constantly modernizing shipping industry. Or it may be that unions have encouraged workers to file FELA cases.

Posner is unclear as to the reasons for the increase in tort claims against the federal government. He is also perplexed as to why cases brought under section 301 of the Taft-Hartley Act (enforcement of collective bargaining agreements) increased between 1960 and 1983, despite the decrease in the number of union workers in the same period. I discuss in Chapter 7 a possible reason for this: the strain of downsizing and deunionization in the latter part of this period led to a number of disputes.

1.8 Corporate Responses to Increases in Litigation

Large companies have adopted a multi-pronged attack against increases in volumes of litigation. First of all, they have advocated tort reform. Tort reform consists of three main policies: the limitation of the right to sue, the removal of disputes to alternate forums, such as arbitration or mediation, and the imposition of caps on the amount of money that plaintiffs can recover in a suit. There are two ways to impose such caps; privately, by putting them into agreements with parties with which companies do business, such as employees, customers, and suppliers, and publicly, by pursuing legislation.

Tort reformers have managed to impose legislative caps on the amount of awards in a number of states, due to the power of business lobbies at the state level. Recently, these laws are being overturned in many courts as a result of challenges to them on the grounds that they violate the right to a jury trial that is established in most state constitutions.[86]

Companies have also attempted to limit the fees that they pay to their lawyers. One way to do this is to bring more legal services in-house, although this has disadvantages as well. Large companies that consume large amounts of legal services–notably banks and insurance companies–have substantial bargaining power with respect to relatively smaller law firms. They are bargaining down hourly rates and in some cases moving away from such rates altogether, to flat fees per case and contingency fee arrangements similar to those used by plaintiff lawyers.

As the General Counsel to Burger King put it, "The company and its lawyers should be aligned on risk and reward ... (open-ended hourly fees) run counter to everything business is about. They're inefficient in every way [236]." Such fee arrangements are made possible, in part, by increased competition among lawyers. However, these strategies are used by large corporations mainly in ordinary cases with ordinary stakes (e.g. a dispute over car insurance coverage in an accident). In high-stakes, high-visibility cases, large companies tend to retain expensive, hourly-fee lawyers from the most prestigious law firms, because they tend to believe that this increases their chance of victory. It is unclear if this is the case.

Thirdly, the strategy that firms adopt with respect to pursuing litigation in itself affects the prospects for new cases. If they develop a reputation for vigorously defending themselves against cases that espouse new legal theories (which therefore can become a basis for new classes of cases), they can prevent the success of such theories. They can also settle cases quietly and confidentially, in the hope that an initial case will not be publicized and inspire new ones. They can also fight cases by stonewalling and filing many motions to delay the case and wear out the plaintiffs.

Insofar as any of these corporate responses to litigation are effective, they will become factors that reduce the volume of business litigation.

1.9 Why Do the Haves Come Out Ahead?[11]

Galanter has theorized that the reason why better-resourced players tend to be more successful in court than less-resourced ones is because the former tend to be "repeat-players;" that is, they tend to have a lot of experience in similar disputes [76]. For instance, if Ford gets in a dispute with one of its dealers, it can draw on the many other disputes it has had with dealers in handling this dispute. On the other hand, the less-resourced party is more likely to be a "one-shotter;" that is, they have never been in a similar dispute before.

The Business Disputing Group has found that F2000 companies–who are the ultimate highly-resourced players–experience win rates much higher than would be expected by some relatively simple economic models (see Priest and Klein [178]). Heinz and Laumann [103], in their study of the Chicago bar, have pointed out (as have many others) that the law is a highly stratified profession, and the highest-status firms tend to represent large corporate entities with deep pockets, whereas individuals of modest means tend to be represented by solo practitioners with, on average, less prestige in the legal profession. Not only may it be the case that the lawyers in the

[11] Apologies to Galanter.[76]

highest-status firms are more talented (or at least more driven!), but lawyers in these firms tend to work in teams so as to ensure that to minimize the chances that a legal stratagem or theory is overlooked. They tend to over-match the solo practitioner representing the individual client, even if this practitioner is himself talented. Thus this mismatch may account for some differential in the win rates.

It is possible that differential stakes of the outcome might, in some cases, lead to a difference in win rates, since this would cause, on the standard theory, for the parties to invest differential amounts in the outcome. For instance, it is critical for McDonald's to win every one of its trademark cases, or at least as many as possible, so that it doesn't lose its trademark, which is highly valuable.

However, it is not worth nearly as much to Sam McDonald of Memphis, Tennessee, that he be able to use the name. However, these differential stakes are not obvious in every case. For instance, if Ford Credit wants to collect on some money due it, say from a consumer, the stakes are roughly equal to both parties. The stakes may be slightly higher to Ford since it wants to maintain its reputation as someone who goes after debtors aggressively, but this behavior may be expected of a credit company in any case.

Nader and Smith [157] argue that corporate lawyers use tactics that are unfair and give large corporations an advantage over smaller parties, such as individuals and small companies. To some extent, in a competitive market for legal services, this is to be expected. Purchasers of legal services, if optimizing their self-interest (and not overly fettered by moral or normative constraints), will select those lawyers who are willing to do anything that is arguably legal for their client, or anything that they can get away with. Clearly, the behavior of the lawyers in the Enron and the Worldcom scandals backs up Nader and Smith's argument.

For instance, corporate lawyers will routinely abuse the discovery process, according to Nader and Smith. They argue that corporate lawyers often stonewall on relevant discovery requests. They argue that these attorneys have a double incentive to stonewall on such requests, because stonewalling takes significant time (which translates into billable hours) and serves the interest of the corporate client (although not the interest of justice). In order to stonewall, lawyers file motions to deny discovery on particular matters. This can create substantial delays, which often work to the benefit of corporate defendants, as the matters that caused the litigation fade from memory.

Typically, argue Nader and Smith, lawyers often try to prevent their opponents from learning of the existence of significant documents (known only to them and their clients) and when the documents' existence is revealed, they try to block access to them. They give several examples of cases in which corporate lawyers delayed, obfuscated, and intimidated witnesses. What was worse, was that in several cases they collaborated with their clients in hiding relevant damaging evidence, a definite violation of discovery rules.

Typically, these cases pitted solo practitioners or small law firms against large corporate firms. The Nader and Smith account makes one wonder whether conservatives have been able to set the agenda of the litigation debate, around the number of cases filed, rather than the issues which Nader and Smith raise, such as the fairness of the process and the long duration of many cases, keeping in mind the motto "justice delayed is justice denied." Nader and Smith feel that lawyers are too often unprincipled advocates, and not, as they supposed to be, officers of the court whose first allegiance is to the pursuit of justice, not to their clients. Nader and Smith feel that judges and ethics boards need to take action against this type of abuse of the process if it is to stop. Until that point, however, corporate entities that retain large corporate law firms may have an unfair advantage.

There may be a reason why a plaintiff presses a lawsuit even when the chance of winning is not very high. Litigation is like war; a strict rational-choice perspective on both of the types of conflict can only account for some of the story. Such a perspective does a better job when both sides of a lawsuit are corporate entities, but an imperfect one even in that case.

An emotional reaction to a perceived wrong may be a the primary motivator behind some lawsuits. For instance, a franchisee who has been terminated, or an employee who has been fired, often feels that an injustice has been done to them. This injustice may be a moral one, not a legal one, but in the mind of the plaintiff, there is little difference.

The formal equality between parties in the courtroom is one of the only places in the society where a very large actor, such as a large corporation or the government, can be “called on the carpet” on an equal footing with an individual. This is why some social activists, notably Nader, are vehement in defending the rights of individuals to go to court. Of course, in practice, the footing may not really be equal–for instance, judges may be more favorable to corporate parties–but for some plaintiffs the fact that they have their day in court, even if they lose, is some vindication. After all, they at least got their adversary’s attention, and cost them some time and legal fees. Tyler [224] finds that those people who feel that procedural justice, which is in part constituted by the ability of disputants to express themselves and be fairly heard, was done are more satisfied with the workings of the justice system, even if they did not win.

Chapter 2

Literature Review

2.1 Research on Litigation

Macaulay's early (1963) research [139] on automobile manufacturers and dealers found that business people placed high value on their long-term business relations. Often they would adjust the terms of a contract or be flexible in their dealings with one another in order to preserve their relationship, which was profitable for both sides over the long term. Lawyers and litigation were only a last resort. To some extent, Macaulay's picture is of an "old world" of American business dealings; however, to some extent, the phenomena that he describes persist today–people still enter into long-term relations, although perhaps not with the frequency that they did in the early 1960s. The increase in contract litigation that occurred in federal court through the 1970s and 1980s may have been the result of rougher, more competitive business conditions [83].

Engel [58] studied the attitudes of the residents of a rural Illinois county toward personal injury litigation in the late 1970s. He found that residents strongly disapproved of such lawsuits, despite the fact that contract, property, and family lawsuits were much more common. Residents attributed a perceived increase in such lawsuits to outsiders who had relatively recently arrived in the community, such as Latinos and manufacturing workers. They bemoaned the destruction of traditional local norms against the filing of personal injury lawsuits, and longed for the "good old days" when such things did not happen. On the other hand, they had no problem with the much more numerous contract actions, because these were mainly collection actions filed by established members of the community. Thus, only more powerful actors found that their assertion of rights were met with approval by the community.

The attitudes of these residents may be symptomatic of a general social disapproval of personal injury litigation, rooted in conservative attitudes toward this subject. This is consonant with Galanter's observation that although conservatives want to restrict torts, they have no problem, in general, with contract actions [80]. It also is consistent with the commonly held notion of a harmonious social order that supposedly existed in the past. On the other hand, there is something in the idea that increased urbanization, which brings people of different types more frequently together, and creates anonymity, can engender conflict and thus ultimately litigation (or crime and violence), because the tighter social control possible in a small community is more difficult to enforce in a larger, more diverse place.

Long-term studies have often failed to document any litigation explosion in the state courts (where over 90 percent of cases are filed). For instance, the St. Louis courts were studied by McIntosh over the period 1820 to 1977 [148]. This study found that rates of litigation dropped during the 1800s, then fluctuated somewhat during the twentieth century, but not substantially. The largest spikes in litigation rates, however, were coincident with economic downturns in 1820 and 1840. The peaks of these spikes, at about 70 cases per 1000 population, were substantially higher than the 1970 level of about 20 cases per 1000. Also, many of the cases later in the period were family law cases; much of the caseload by the 1970s could be attributed to the increase in divorce rates.

Friedman and Percival's study of the courts of Alameda County (which contains Oakland and Berkeley, California) and rural San Benito County, also in California, between 1890 and 1970 found a decline in the prevalence of trial [73]. Specifically, the share of lawsuits in their sample that went to trial declined from 36 to 16.1 percent over the period in Alameda County, and from 25.8 percent to 10.7 percent in San Benito County. This result is consonant with the general view of scholars that adjudication rates have been falling and that courts increasingly promote bargaining between the parties and out-of-court settlement; this goes on in the shadow of potential adjudication, rather than actual trials. The courts increasingly take on simple administrative duties. However, as far as the composition of cases goes, Friedman [72] notes that:

> Compared to the nineteenth century, commercial cases and ordinary property cases account for a lesser share of the caseload of the state courts. Personal injury cases, family law cases, and public law cases have increased in number and percentage. Courts have been spending less of their time on market-oriented disputes, and more on disputes that have an expressive, personal element.

This shift is at the root of the conservative reaction to litigation.

In an 1983 article, Galanter [77] gives his view of the state of knowledge (at the time) about our supposedly litigious society. He utilized data on dispute processing to show that only a small number of injuries and other troubles become disputes, and only a small number of these become litigation. He introduced the concept of the "dispute pyramid" to characterize this process. At the base of the pyramid are contracts and other potential dispute-generating relationships, which vary from arms-length to ongoing. Some of these are transformed into informal grievances, then some into formal disputes. Some of the formal disputes become filed lawsuits. Some of the lawsuits are settled at various points in the litigation processes. Some are adjudicated, and some of the adjudicated cases are appealed. Galanter's characterization of disputes in terms of this pyramid is related to, and compatible with, Felstiner, Abel, and Sarat's characterization of disputes in terms of "naming, blaming, and claiming." On this model, "naming" occurs when one party comes to believe it has been harmed; "blaming" is the step of attributing blame for this harm to another party, and "claiming" occurs when the other party is asked for redress [63].

Most of the cases filed are settled or abandoned well before full-scale adjudication. There has been a recent rise in litigation rates, but current rates are not unprecedented, indicating that rises and dips in litigation patterns is a familiar historical pattern. Comparisons with other countries indicate that litigation rates are similar to other countries in the Anglo-American world, such as Britain, Canada, and Australia, but are higher than those found in other industrialized countries. In addition, "changes in patterns of governmental activity, in the organization of legal work, and in the relation of the media to the law combine to enlarge litigation as a symbolic presence even when direct personal experience of full-blown adjudication has become relatively less frequent." Galanter suggests that current patterns of disputing represent a relatively conservative adaptation to changing conditions. Perceptions by elites, and the public, of "litigiousness" reflects underlying weakness in legal scholarship, with its focus on doctrine and anecdote rather than empirical facts.

The reason that many cases are settled is due to agreement of the parties (or their attorneys) over the monetary worth of a case, or at least the ability to reach a compromise on what the case is worth. If the plaintiff makes a demand that is less than the defendant is willing to pay to make the suit go away, the matter is settled. Given that litigation has costs that may be borne by both parties, which tends to increase as the process continues, each party has some incentive to exit the litigation process. However, the presence of uncertainty can drag the process out, if it causes the expectations of the parties to be sufficiently different from one another [69].

Fournier and Zuehlke considered the relationship between the probability that a case was settled, the mean trial award awards for cases of that type, and the amount of damages that the plaintiff was seeking. They found that both of the latter factors increased the probability that the case was settled. They suggest that the higher stakes increased the incentive for the parties to reach a settlement [69].

In an 1988 article, Galanter [78] argued that increases in the federal court caseload do not reflect an increased "litigiousness", but are due to increases in specific case types, and these increases have specific causes. He pointed out that a "big six" of case types, which are civil rights cases, prisoner petitions, social security cases, recovery (mainly of student loans and overpaid veterans benefits), other contracts (that is, contracts that do not fit into a specific category like insurance contracts), and torts, account for much of the volume of federal civil litigation. Some of these were (at the time) increasing, and some were decreasing. So one needs to look at the situation on a much more fine-grained basis if one wants to make effective policy on case volumes.

In 1991, Galanter et al. [81] discussed the Wisconsin project to study the organization and delivery of legal services to business clients, and the determinants of business demand for legal services. When this paper appeared, there had been a shift in the use of law by business, at least since the early 1970s. There had been an increase in demand for legal services, especially in the area of contracts, and in contract disputing. There had been changes in the way that companies purchase legal services. There had been an increase in the use of alternative dispute resolution. There had been an increase in the amount of competition among businesses and in the structure of businesses themselves. The two research projects undertaken by the Wisconsin project were: a study of the transformation of the large law firm (later described in Galanter and Palay's book *Tournament of Lawyers* [82]), and a study of the transformation of business disputing (the results of which were reported in Dunworth and Rogers [50] which was discussed in Section 1.1).

Also writing in 1991, Galanter and Rogers [83] noted that there had been a growth in the number of federal civil cases involving business firms in the period 1960-88. Contract cases grew the most, but torts also grew substantially. In addition, cases filed as a result of "diversity jurisdiction" (where the litigants were citizens of different states) also grew substantially. There was evidence that cases have gotten more complex, as well. There had been also been an increase in intellectual property, bankruptcy, and RICO cases. These statistics referred only to the federal courts; it is difficult (due to a lack of uniform record-keeping) to get similar statistics for the state courts, but there are reasons to believe that these caseloads had been increasing as well.

At the time the authors wrote, businesses were making increasing use of arbitration and other forms of alternative dispute resolution. Corporate law firms were large and growing, as are corporate law departments and overall consumption of legal services.

The authors reviewed a neoclassical economic model of the decision to litigate. They noted that litigation is best understood as a choice between alternative governance mechanisms (such as community norms, firm alliances, etc.) They listed some economic factors that may contribute to an increase in litigation, which were: increased competition, product specialization, complexity of contracts, reduction in long-term business relationships, spatial and cultural dispersion of parties, higher-stakes transactions, price instability, and the rate of economic change. In other words, changes in the business climate contribute to litigation, not an increase in "litigiousness."

Changes in the US economy are very likely to have contributed to the increase in litigation that was most notable in the 1980s. First, there is increased internationalization, which increased levels of competition. Declining US economic performance during certain periods may also have contributed, in that there is an atmosphere of injury and blame in a period of decline. There has been an increased emphasis on services, including financial services, and the latter involve complex contracts and financial instruments that are likely to lead to disputes. Finally, there had been a growth in, and changes in, government regulation over this period, which may increase enforcement activities against business, both by government and "private attorneys general." Industry has responded to these trends in various ways. The authors built a statistical model to test some of these hypothesis. The results of the model were consistent with, but did not confirm, their hypotheses.

Friedman's review article [72] examines sociological research about litigation, contrasting it to most legal scholarship, which consists of analysis of legal doctrine and theory and political/philosophical argument about such doctrine. First, it gives a clear definition of litigation in the context of disputing. It then discusses dispute-centered vs. court-centered research. Dispute-centered research focuses on the transformation of disputes into lawsuits, and the factors that mediate whether or not such a transformation takes place, whether they be structural, institutional, or cultural. Court-centered research focuses on disputes that reach a court, and on what happens to them there. Long-term studies of this type have found fluctuations in volumes of cases, but no "litigation explosion," for the most part. However, they have found a shift in the composition of the caseload over time. There is no simple relationship between numbers of cases and economic development. Research on the outcomes of cases has been quite minimal; what there is, Friedman describes. The literature on the impact of litigation on society is also limited; there is some ethnographic literature on the role of courts in communities, some "impact" studies of particular well-known decisions (for example, the ban on school prayer), and the outpouring of invective from the "tort reformers", who claim that litigation stifles innovation, causes costly "defensive medicine," and is very costly in itself. Friedman notes that "litigation" is not a unitary phenomenon, so it is not likely to have unitary causes or effects.

Clermont and Eisenberg [39] review much of their own work, and that of others, in the empirical study of litigation. They have studied the effect of forum on win rate. When a case is removed from state court to federal court, the plaintiff's chances of winning are substantially lowered. The plaintiff's win rate is also lowered when venue is transferred from one federal court to another. This explains why there is so much disputing over venue during litigation; in fact, business lawyers typically draft contracts with such possible disputes in mind. It is also consonant with what I found in my examination of the case files.

They note that in the federal courts, as reflected in the AO data, there is significant delay between the filing of a case and its termination. This delay does not appear to have increased recently. The trouble with any policies that tend to reduce delay is that a decrease in delay increases the chances that parties will litigate cases and therefore will result in an increase in case volumes.

They note that all the available data indicates that the slope of the dispute pyramid is quite shallow; that is, significant proportions of disputes do not make it further up the pyramid at each stage. Both survey data (from a study by Trubek et al. [223]) and the AO data on dispositions indicate this; the former with respect to all disputes, and the latter with respect to litigated disputes in the federal courts. Moreover, there has been a trend away from adjudication toward settlement.

Priest and Klein [178] have theorized a 50% plaintiff (and defendant) win rate for adjudicated cases, under conditions in which the parties have equal stakes and behave "rationally" (see Section 2.2 below for more details on this). Clermont and Eisenberg note that there are at least two other factors that can drive win rates away from from the theoretical value. One is that the parties do not have the same perceptions about "the prevailing standard of decision." (This could be due to information problems.) The third factor is that the underlying stream of cases making their way to adjudication may be weaker or stronger, and the mechanisms filtering them toward settlement operate imperfectly. Because settlement has such a strong effect on win rates, Clermont and Eisenberg caution against the use of win rate data without keeping settlement in mind. Selection biases are critical; thus if there is a way to control for selected attributes of cases using regression techniques, so much the better.

Clermont and Eisenberg note that the civil trial has been in decline, whether or not such a trial is before a jury or before a judge. They also note that classic survey research from the 1950s found that there was a high degree of agreement between juries and judges on what the correct outcome of cases should be [100]. However, their own (more recent) research found that there were discrepancies between the win rates before judges and juries in product liability and medical malpractice cases, with plaintiffs in both types of cases doing, surprisingly, much better before both judges than juries [38]. Selection of cases probably played a major role here.

Clermont and Eisenberg find that the data do not bear out the common perception of a rapid increase in awards of damages. They find that foreigners do very well in U.S. courts, and hypothesize this is because foreigners' fear of U.S. courts lead them to bring only the strongest cases. They find that appeals courts have a very high rate of affirmance of lower court decisions. At first blush, this makes sense, except that one might think that selection processes should operate on appeal much as they do earlier, weeding out all but the more competitive cases. They suggest a reason that non-competitive cases are appealed is because appeals are not very costly compared to trials. I would add, following Kagan [114], that U.S. courts have widely varying decision standards, much more than in other countries , so it may be rational for appellants to try their luck in a different court.

Clermont and Eisenberg have also found that defendants are more successful than plaintiffs on appeal. They suggest that appellate judges may view the district courts as being pro-plaintiff. If appellate courts are anti-plaintiff, as they appear to be, they find this “troublesome.”

Two varieties of litigation, contract and tort, comprise significant fractions of the caseload both in the state and federal courts, and they have varied over time in their relative volume. In a 2001 article [80], Galanter discussed the state of knowledge. at the time, about contract litigation. He notes that many earlier studies found that contract litigation often dominated dockets in the 19th century and was always a significant factor, and remained significant in the early part of the 20th century. One factor is the decline in debt collection activity, due to the rationalization of the provision of credit. In the mid-twentieth century (approximately from 1930 to 1960), he finds that there was a decline in commercial litigation. After this, there was a boom in contract cases, apparently comprised primarily of businesses suing one another. Contract cases in federal court declined in the 1990s, perhaps because of the increased popularity of alternative dispute resolution (ADR). This occurs both before the parties get to court (and is often required by mediation or arbitration clauses in contracts) and once they do (so called “court annexed” ADR). However, he finds that ADR appears unlikely to account for the entire drop in the 1990s. He suggests that more cooperative governance mechanisms, such as those being adopted in the automobile industry (according to an article by Kenworthy, Macaulay, and Rogers [120]) may play some role.

Galanter notes that contract cases are, according to a Bureau of Justice Statistics (BJS) report on litigation in the 75 largest counties in the country [47], dominated by suits by buyers, fraud claims, employment suits, suits by sellers, rental/lease suits, and mortgage foreclosures. The first three categories of suits typically have individual plaintiffs; the second three, organizational, including corporate, plaintiffs. The former are typically represented by contingency-fee lawyers in small law firms; the latter, by hourly-fee lawyers in large, corporate-oriented firms. Thus individual plaintiffs are typically fighting an uphill battle. Thus Galanter separates contract cases into "uphill cases" and "downhill cases."

Contract cases are less likely to be settled than tort cases. The number of settlement offers made during the settlement process is higher for contract cases than for torts. "Uphill" cases are more likely to be taken to trial than "downhill cases." The decline in contract filings has been accompanied by a decline in the adjudication rate. According to Gross and Syverud [93], plaintiffs win more than the value of the last settlement offer in 80 percent of adjudicated contract cases, as opposed to 40 percent of tort cases. This may account for the higher percentage of contract cases going to trial.

According to BJS statistics, plaintiffs win higher compensatory damages in contracts than in torts. They are also more likely to win punitive damages. The latter are mainly awarded to "uphill" plaintiffs (individuals). Punitive awards, however, are frequently reduced in practice as a result of subsequent judicial, settlement, and collection processes. Approximately one out of every seven or eight contract verdicts is appealed.

2.2 Economic Theories of the Litigation Process

A simple, but classic, microeconomic theory of litigation was advanced by Priest and Klein [178]. Their model was based on a simple decision equation modeling the costs and benefits of the decision to litigate, as follows

$$P_p - P_d > \frac{C - S}{J}$$

where P_p is the plaintiff's estimated probability that a judgment will be awarded for the plaintiff and P_d is the defendant's estimate of this same probability; C is the combined litigation costs of the parties, S is the combined settlement costs (and thus $C-S$ is the difference in the costs of litigating and settling; it is (reasonably) assumed that C will exceed S). $J$is the expected judgment (for the plaintiff); symmetric stakes are implicit here, because separate values for the stakes to plaintiff and defendant are not modeled. Priest and Klein also assume that that the ratio $\frac{C-S}{J}$ will be less than one (and greater than zero), because there is no way that $P_p - P_d$can be greater than one, since they are probabilities. The equation is used to model the plaintiff's decision to litigate; if the inequality is true, the plaintiff will proceed. Under perfect information, p_p would equal p_d. Thus the left side of the equation would be zero, and litigation would never occur. Uncertainty must be present in order for lawsuits to occur, on this model. Errors on the part of one or the other party must occur; each party must determine that the case lies on a different side of the decision standard in order for the case to go forward. In the limit, in which the errors made by the parties are assumed to be small, the area in the case distribution becomes more rectangular, and the number of cases won by each side approaches 50 percent.

The Priest and Klein model may be inaccurate for a number of reasons. First of all, the stakes may not be asymmetric; asymmetric stakes are in fact common; consider the case of a physician whose reputation will be harmed by a malpractice verdict. Second, errors may not be small. Third, there may be non-cash motivators on the part of the parties.

Cooter and Rubinfeld [41] point out that a simple decision-based model such as that of Priest and Klein does not take into account strategic behavior. Litigation can be like a game; often in settlement, for instance, there is a sequence of offers that go back and forth during negotiations. Unfortunately, except in experimental situations, it is difficult to gather the data to model such a game, and it is difficult to build an experimental situation which captures the richness of real-world litigation. The most general game would be two-sided, have asymmetric and imperfect information, and involve bargaining. Some economists have modeled such games. Their models have varied in complexity; for instance, P'ng has modeled disputes as three stage games [172]. Some of these models find that under some conditions it is possible for the plaintiff to sue simply to extract a settlement offer [15, 42]. Other formal economic models of the litigation process include those of Bebcuk [14], Salant [190], Schweizer [196]. Chatterjee and Samuelson [34], Daughety and Reinganum [46], and Kim and Kim [121],

2.3 The New Behavioral Economics, Law, and Litigation

Many scholars have been increasingly looking toward the "new behavioral economics," which brings to bear experimental research on human behavior and decision-making in economic contexts and finds results that differ from the utility-maximizing assumptions of standard economics. Much of this has implications in the context of law, and in the study of litigation. What follows is greatly condensed and abridged from the account of this field given by Jolls, Sunstein, and Thaler [113].

People tend to be overly optimistic; that is, they tend to overestimate the probability of good events and underestimate the probability of bad events. This means that litigants will be more likely to think that they will win lawsuits than they actually will, and that they will win bigger awards.

People tend to hold a norm of fairness, which they are willing to enforce even to their own detriment. This means that litigants may often pursue what they think of as a fair outcome in litigation, even if it ends up costing them in the long run. For instance, a party to a contract may pay her lawyers more than the contract is worth to enforce, if she thinks she has been unfairly deprived of her rights under that contract. Or a member of a minority group may sue for employment discrimination if he thinks he has been treated unfairly, even if his lawyer advises him that he cannot prove the facts of his case. People sometimes want to punish others if they feel they have been treated unfairly, even at their own expense.

People tend to see things in a light favorable to themselves. This may lead litigants to interpret the facts and law of a particular case in the light most favorable to themselves, and therefore go forward when a less biased would urge otherwise.

People are boundedly rational; they have limited thinking power and memory. This causes them to usually make suboptimal decisions.

People have bounded willpower. It is often difficult for them to defer the receipt of one dollar today to get two dollars in a year, despite the very high effective interest rate this implies. Their discount rates are not what traditional economic theory predicts.

People dislike a loss of one dollar more than they enjoy a gain of one dollar. There are "endowment effects;" this means that people resist giving up tangible assets with which they have been endowed for an overall cash gain; thus the Coase theorem is incorrect in many circumstances (since it says that initial endowments of assets don't effect their eventual assignment, in the absence of transaction costs and wealth effects). This also means that that people may more readily go to court to protect pre-existing endowments (such as the right to, for instance, a business franchise) than to gain new ones.

This perspective is in harmony with perspectives from empirical game theory. Bowles and Gintis [23] report on various psychological experiments in which subjects were willing to forgo higher payoffs to themselves in order to punish fellow players that they felt had violated norms. Litigants, especially individuals, may be likewise willing to engage in the negative-sum game of litigation if they feel that doing so will punish someone who has wronged them.[1] We see this also in divorce court, where one spouse may insist on airing dirty laundry in court just to embarrass the other, even if both end up embarrassed in the end. The termination of a long-term business relationship can be like a divorce in this respect.

2.4 Litigation and the Supply of Lawyers

Some observers have attempted to attribute high levels of litigation in the United States to a high per capita supply of lawyers. America is so commonly thought

[1] Litigation is a negative-sum game if one considers only the litigants as players; if the lawyers are also considered to be players, then it is closer to a zero-sum game, since the litigants are transferring money to the lawyers. However, if you then add in the lost time of the litigants, the time of the court, and other related costs, it becomes negative-sum again (although, ironically, it adds to GDP).

to lead the world in the supply of lawyers, so much so that this is taken as an article of faith. However, as August points out, it is difficult to make cross-national comparisons in this area, because the definition of a "lawyer" varies from country to country. In Britain, for instance, a country with a legal system similar to that of the U.S., there is a distinction between barristers and solicitors that does not exist in the American system. There are also some British law graduates that do not go on to qualify as either barristers or solicitors, but they may take jobs similar to that of in-house counsel in British firms. Most other countries have systems that are even more divergent with that of the United States. August has estimated that a more realistic statistic to compare is a count of "law providers;" he has computed a table of these on a per-capita basis, and the U.S. does not rank particularly high; when he made his list in the early 1990s, the U.S. ranked 28th of 100. It was outranked by many countries, including Italy, Belgium, Sweden, and Japan [11].

A solid underpinning of law–specifically enforcement of contracts and of property rights–is a necessity for economic growth in a capitalist society, because capitalists will not invest if their contracts are not upheld and their property rights taken away.[2] A certain amount of litigation is to be expected under a system that provides such an underpinning. Cross, in his review of the relationship between law and economic growth notes that many scholars have observed that such a rights regime is essential to economic growth [45]. It is probably no accident that economic growth first took off in those countries–England and the United States–with the most stable constitutional regimes; this is what the theories of Douglas North suggest [163].

Some economists have claimed that there is a negative relationship between the

[2]Eastern Europeans became acutely aware of this fact after the fall of the Soviet Union; "free markets" did not function without the necessary underlying institutions.

supply of lawyers and economic growth (for examples, see Magee et al. [143] and Murphy [155]); however, this is disputed (see Cross [44] and Epp [59]); and this is further subject to the difficulties in defining and measuring legal service provision cross-nationally, as noted above.

Chapter 3

Methods

This thesis employs several methods, which I describe in this chapter.

The core data set that I use is the AO database described in Section 1.1, both in its original form and with the additional F2000 information added by the Business Disputing Group. The AO data is not survey data; it is kept for administrative rather than social science purposes. Nevertheless, because of its extensiveness–it contains all the cases of the district courts and the non-specialized appeals courts in the federal system–it has been the most popular data source for studying litigation. Eisenberg and Schlanger have studied the reliability of the database and have concluded that the data is basically usable and reliable; they paid special attention to to plaintiff win rates and to median amounts awarded [57].

Other than the three introductory chapters (this chapter and the two prior), the chapter that gives general results, the chapter containing a general discussion of labor and employment litigation, and the concluding chapter, the remaining fourteen chapters of this thesis are each descriptive of a particular case type, which each corresponds to a single nature-of-suit code in the AO database, I begin each of these case type chapters with a brief description of the law(s) that are covered by that case type code.

I then offer some descriptive statistics to characterize the case load for that particular case type. I present depicting graphs of the number of cases filed over time and the share of the overall case load that that case type represents. This is to determine whether this particular case type is becoming more or less significant. I attempt to explain any trends I find with reference to secondary literature; for instance, antitrust case filings began to fall around 1980 and never recovered. Many observers attributed this to changes in federal policy under Reagan.

I examine trends in the plaintiff win rate, and attempt to explain these as well, although usually such explanations are more speculative.[1] I also examine the win rate by the disposition; the disposition can be a consent judgment, a default judgment, a judgment on a pretrial motion, a judgment after a court (bench) trial, and a judgment by a jury, among others. The case types vary substantially in their composition of different such dispositions, and such dispositions, within any case type, vary substantially in terms of the plaintiff win rate.

In order to access the stakes associated with each case type, I examine the median amount demanded (where there was a demand), and the median amount awarded (where there was an award). I find that some case types have values for these variables which are much higher than the overall medians, and others have values that are lower.

[1]The AO database allows for three values for the variable which indicates who won a case. These are: the plaintiff, the defendant, and both. When both win, presumably each of them won one or more of their motions in the final ruling. However, this happens only rarely, in 4.6 percent of adjudicated cases, and it is unclear how one would include them in the analysis of win rates. So, I have dropped them from the analysis of plaintiff win rates.

I attempt to explain such differences.

3.1 The F2000 Database

For the 1971-1991 period, the AO database was enhanced by the Business Disputing Group (see Section 1.1). This was done by a combination of automatic and manual techniques. As a result of the identification of F2000 parties, it was possible to determine what F2000 companies were mega-litigants, both globally and by case type. However, this introduces a bias, because this method is unable to identify mega-litigants who happened not to be members of the F2000.

I used the F2000 data in the chapters on the case types in order to characterize the activity of the F2000 companies during the 1971-1991 period. For this thesis, I lacked the resources to repeat these techniques to extend the enhanced data to a more current date; however, to compensate for this, I used more automatic methods to detect mega-litigants, which I refer to as the single word frequency method and the adjacent word pair frequency methods, which I describe in detail below. These techniques computed the frequency of single words and of adjacent pairs of words in the party strings, for the period 1971-2001.

3.2 The Single Word and Adjacent Word Pair Frequency Methods

For each case type of interest in the data set, I compiled a list of the frequency of single words in the party names, and sorted this list in descending order, omitting common words such as "the", "corp", "corporation", "in", and "inc." I then searched for each of these words in the subset of cases associated with that case type, and "eyeballed" the cases, looking for frequently occurring party names. In this manner, I believe I did a good job of identifying the most frequently occurring parties in each case type of interest during this time period. In addition, this procedure is less biased than the procedure used on the 1971-1991 period, which focused on the F2000 firms, because this procedure can identify any firm or organization which appeared frequently, whether or not it was a member of the F2000.

Of course, since the method is partially dependent on my own judgment (in "eyeballing" the lists for frequently occurring firms or organizations), it is not totally objective. Also, since I only consider the top matched words, I may be missing significant companies. However, I have found that identifying frequently occurring firms within lists matched on single words is not difficult to do. To distinguish this method from the earlier method ("the F2000 method"), I refer to this as the "single word frequency method."

I also looked at the most frequently-occurring pairs of adjacent words. To even a greater extent than the single word frequency method, this gave, for the most part, clearly identifiable parties. I refer to this as the adjacent-word-pair frequency method. I ended up relying much more heavily on this latter method than on the single word method, because the word pairs were much more likely to represent companies, which usually have more than one word in their name. Also, the single word method often revealed commonly-occurring surnames, such as “Smith;” for instance, many people named Smith are plaintiffs in employment discrimination cases, but this is not a particularly interesting result.

3.3 Using Published Cases to Characterize the Activity of Mega-Litigants

There were therefore three main methods that I employed to identify mega-litigants within each case type. The first group of mega-litigants were F2000 companies. The second group were companies that were identified using the adjacent word pair method. Thirdly, but much less significantly than the other two, there were mega-litigants identified using the single word method.

Note that the identification of mega-litigants within each case type was very helpful in identifying what industries dominated a given case types. All case types had certain industries which were over-represented; for instance, pharmaceutical companies are over-represented in patent litigation.

Once these mega-litigants were identified, however, there was not much information in the Administrative Office database about the substantive content of the cases in which they were involved. It was not practicable to obtain the case files of the cases for the cases for a particular company, because these are (except for the most recent cases) stored at the Federal Records Centers around the country. Instead, I relied on the published cases involving a particular mega-litigant in Lexis/Nexis. There is a selection problem here (for a discussion of this, see Section 3.6), but many of the mega-litigants themselves (the ones identified through the single-word and adjacent word pair methods) were identified in an unbiased manner.

For instance, I identified that Disney was a mega-litigant in copyright cases. I then did a search using a query of "Disney and copyright" in Lexis/Nexis's Federal District Court database, and identified copyright cases in which Disney was a party.

I then read these cases and used them to characterize the nature of the copyright litigation involving Disney. A similar method was used throughout the thesis with other mega-litigants. Although it is possible that the published cases mis-characterize the overall caseload of a particular mega-litigant, it did not seem likely to me that the degree of such a mis-characterization would be severe, because when I did examine unpublished cases, they were not seriously different in flavor in most cases from the published ones.

For a few of the cases I read–ones that raised particular questions not available in the record–I interviewed the attorney(s) involved.

3.4 Examining Unpublished Cases

In order to characterize the caseload as a whole within each case type, without particular reference to mega-litigants, I examined a sample of unpublished case files for five of the fourteen case types discussed in this thesis. I examined 50 cases for each of these five, for a total of 250 cases. I describe the methods used in more detail and the general results in Section 4.7; results specific to each case type are given in the chapter corresponding to the case type in question.

I also made some use of the federal courts' Public Access to Court Electronic Records (PACER) database,[2] which lists every case, published or not. This database, unlike the AO database, contains information about the items placed on the docket for each case. I used this database to compile docket lengths for a sample of cases; these docket lengths were used as a proxy for the burden that a given case places

[2]pacer.psc.uscourts.gov

on the courts. This research, and the methods involved, are described in detail in Section 4.8.

3.5 Other Qualitative Research

For many of my case type studies, I relied on published theories and accounts in academic journals, law reviews, legal periodicals, trade periodicals, newspapers, and magazines. These are cited throughout, as appropriate. Often such accounts would reveal trends within a particular case type that appeared important, even though in many cases it was not possible to measure this importance quantitatively.

3.6 A Note on Published versus Unpublished Cases

It is much easier to find out about those cases that are published on the two major commercial legal information services, Lexis/Nexis and Westlaw, than unpublished cases. Information on unpublished cases can be found primarily in the case files, or by interviewing the parties and/or attorneys. The case files are kept at each federal court for some time (typically about two years after the case is closed), and then are sent to regional Federal Records Centers. Published cases are on-line and searchable and thus a much more attractive target for research than are unpublished cases. A good deal of research, including some of the research reported herein, has been based on published cases, because of this easy accessibility. However, a study of actual case files will give the researcher a more accurate picture of the underlying case filings. In addition, looking only at published cases may lead to some misleading conclusions about the overall picture of cases. In particular, looking at published cases in order to compile quantitative data can be quite misleading. Siegelman and Donohue [205] give several examples in which authors making use of published cases to draw quantitative conclusions led to questionable results.

However, much as adjudicated cases are unrepresentative of cases that are filed but not adjudicated, and filed cases are unrepresentative of disputes that never reach a court filing, published cases are unrepresentative both of adjudicated cases and of other cases or disputes that are closer to the base of the dispute pyramid, Siegelman and Donohue [205] point out.

They compared a group of published and unpublished employment discrimination cases. They observed that theory would predict that the selection of cases for publication out of the total volume of cases is not random. The cases selected for publication (that is, cases in which a written opinion was submitted to Lexis and/or Westlaw) tend to be the more interesting, important, and complex cases. They define importance is terms of both legal importance and importance in terms of the consequences of a decision. For the period and court that they studied, the Northern District of Illinois from 1972 to 1986, the overall publication rate was 20.1 percent. However, the publication rate had been rising over that period, perhaps because judges are more likely to submit cases or that the online services are more energetic in collecting or soliciting them.

They found that the publication rates were not uniform among a sample of seven districts. The publication rate (again for employment discrimination cases) ranged from 30.1 percent in the Southern District of New York to 5.5 percent in the Eastern District of Louisiana. This indicates that published cases will be skewed geographically; they found, mainly, to northern, urban districts.

They found that the process that leads to publication runs through a familiar winnowing process. Of all cases filed, 40-60 percent are adjudicated in some form (on a broad definition of adjudication given by Kritzer [128]). Settled cases are less likely to be adjudicated, and therefore less likely to appear in the published record in any form. For about 35 percent of cases, there is a written decision of some form. For 12-22 percent of cases, the judge submits it for publication. Almost all of the decisions submitted for publication are actually published online.

They found that, for their sample of employment discrimination cases, published and unpublished cases differed in many respects. For instance, the file was almost twice as thick in published cases, and the average amount awarded was substantially higher (about $600,000 as opposed to about $12,000). There were many more plaintiffs per case in published cases. There were differences in the distribution of plaintiffs by occupation and by economic sector between published and unpublished cases. Published cases were more likely to be certified as class actions. The published cases have more causes of action attached to them, including claims under state law. In addition, plaintiffs made a wider variety of demands in published cases. Also, plaintiffs had a higher win rate in published cases, about 35 percent as opposed to 25 percent. (They note that according to the Priest/Klein [178] hypothesis, which seems plausible to them under these circumstances, these low win rates would indicate that the stakes to the defendant companies exceed those to the plaintiff employees.)

I have not yet been able to examine the unpublished case files for all of the case types that I have studied; I have looked at a sample of unpublished cases for five of the case types described herein–copyright, patent, ERISA, civil rights in employment, and "other" contracts (business contracts that are not of a specific type; for example, insurance contracts are excluded). So, except for these five types, the work herein is subject to the limitations of other work which uses published cases. However, I have used a hybrid method, since I have used the AO database, which holds all the cases, published and unpublished, and have identified major litigants in each case type by string-matching methods. Thus my identification of litigants is relatively unbiased. Only then have I looked at published cases involving these litigants, which I already know to be high-frequency in the underlying population, so my selection of cases may be more representative of the case load as a whole.

Chapter 4

General Results

This chapter results on results of my work that are not specific to a particular case type, or that compare various case types, or that use several case types as an example of an overarching phenomenon. The chapters that follow this one all focus on results from particular case types.

4.1 The Uneven Nature of Litigation

The result is, when we look at the volumes of cases by case type both among the F2000 companies and among the all cases, we find a highly uneven pattern, as reported earlier by the Business Disputing Group [50]. For instance, among the cases involving a F2000 company, case type 190, "other contracts," in which most business contracts fall, is the most common case type, with a total of 77,115 cases in the database, or 14.9 percent of the cases in the database. The second most prevalent case type is insurance contracts, with 47,308 cases, or 9.1 percent. The third most prevalent case type is asbestos product liability, with 38,470 cases, or 7.4 percent. The fourth most common type is personal injury cases (excluding motor vehicle cases, product liability, and other specialized personal injury cases). The fifth most common case type is product liability (excluding asbestos), with 31,605 cases, or 6.1 percent, and the sixth most common case type is discrimination in employment, with 29,212 cases, or 5.6 percent. Collectively, these six case types account for 43.1 percent of the cases, out of over 80 possible case types. Thus, we see that the F2000 cases are highly unequally distributed by case type. We will see that they are also unevenly distributed by industry.

Some case types that are highly interesting from an intellectual and policy standpoint are not highly represented in the database. For instance, F2000 intellectual property cases, which are composed of copyright, patent, and trademark cases, are represented by 3,052, 5,779, and 6,944 cases respectively; these represent 0.6, 1.1, and 1.3 percent of the cases in the database. There were 8,562 antitrust cases, or 1.7 percent of all F2000 cases. Despite the relative numerical insignificance of these cases, they may be more important than their numbers suggest, because even a single important case (for instance, the AT&T, IBM, and Microsoft antitrust cases) can have a major impact on the governance of an entire industry. Not only that, a complex antitrust or patent case may take up much more of a court's time, and often have more at stake, than a relatively simple contract case. Thus, we look at some of these case types in more detail, because of their inherent interest. Like all other case types, they are themselves each uneven in terms of their representation by industry and by individual firm, and the specifics of this uneven helps characterize each case type.

The F2000 are quite unevenly distributed in terms of both assets and the number of cases that they are involved in. Since all the companies did not exist in the same form in a single year, we consider only the assets for a subset (922 of them) of the companies that were present in a particular year (1987). There is substantial variability in the assets of these companies; the assets ranged from \$203 billion (for Citicorp) to \$95 million (in 1987 dollars). The mean asset value was \$7.5 billion and the standard deviation (although the distribution is not even approximately normal) was \$15.6 billion.

One might think that there would be a relationship between the assets of a company and the number of lawsuits it is involved in, but our data show no evidence of such a relationship. Regression analysis reveals that almost none of the variation in the number of lawsuits a F2000 company is involved in as defendant is accounted for by variation in its level of assets. A scatter plot of assets versus number of lawsuits as defendant reveals data points sprinkled almost uniformly across the plot. Thus it must be the characteristics of companies other than their raw size that determine their rate of participation in litigation. It seems likely, given my investigations herein, that what industrial sector a company is in is more likely to affect its participation in litigation rather than its size alone, although we have my regression results (yet) to confirm this.

The pattern of cases among all business cases[1] (including the F2000 cases, which comprise about a fifth of all cases) is somewhat different than it is among the F2000. The top six case types found among all cases are: first, "other" contracts (a catch-all for most business contracts, other than specific types of contracts such as insurance contracts), with 398,180 cases, or 14.3 percent of the total (similar to the rate (14.9

[1] By this, I mean all business cases, as defined using the restrictions described in Section .

percent) experienced by the F2000); second, "other" civil rights cases, with 176,247 cases, 6.3 percent of the total (these are civil rights cases that do not concern matters that have their own case code, such voting, employment, housing and welfare; an example is a lawsuit over a public accommodation or a suit against a school); third, civil rights in employment cases, with 136,179 cases, or 4.9 percent of the total; fourth, motor vehicle personal injury cases, with 134,967 cases, or 4.8 percent of the total; fifth, foreclosure cases, with 117,994 cases, or 4.2 percent of the total; and sixth, other personal injury cases, with 117,794 cases, or 4.2 percent of the total. Collectively, these six case types account for almost 39 percent of all cases. The profile for all business cases is somewhat different than that for the F2000 because the F2000 tend to be frequently involved in insurance contracts, product liability, and asbestos cases, which do not appear in the top six for all business cases but do for the F2000. This is because the F2000 contains large insurance companies, makers of many important products, and the major manufacturers of asbestos.

Another way to look at evenness and unevenness in the case loads is by looking at Gini coefficients. The Gini coefficient for a distribution is zero if the quantity in question (here, case loads by case type) is equally distributed (that is, if there were equal numbers of cases in each case type). It approaches one if it is completely unequally distributed (here, if all the cases were in one case type).

The Gini coefficient for the distribution of cases by case type among F2000 defendants in the 1971-91 period is 0.78. The coefficient for F2000 plaintiff cases in the same period is 0.84. The coefficient for all business cases, again in the same period, is 0.70. So this is another way to see that case loads are unevenly distributed among case types, and the F2000 cases are slightly more unequally distributed than all cases.

Part of the reason for this may be the uneven distribution of firms and assets in the F2000 itself. The Gini coefficient for the distribution of numbers of firms in the F2000 by two-digit Standard Industrial Code is 0.58. The coefficient for distribution of assets in the F2000 by two-digit SIC is 0.82 (here using data for those firms that had assets reported by *Fortune* in 1987).

Table 4.1: Top Case Types among All Business Case, 1991-2001 (with comparative statistics and ranks from 1981-2000 and 1971-1980)

	1991-2001			1981-2000		1971-1980	
	Percent	Cumul.	Rank	Percent	Rank	Percent	Rank
Civil Rights Employment	11.1	11.1	1	5.5	3	4.0	6
Other Contract	10.5	21.6	2	15.7	1	12.8	1
Other Civil Rights	9.7	31.3	3	6.4	2	6.2	3
Product Liability	7.8	39.1	4	3.3	10	1.9	20
ERISA	6.0	45.2	5	3.3	11	0.3	43
Other Statutory Actions	5.4	50.5	6	4.1	7	2.3	16
Other Personal Injury	4.8	55.4	7	4.2	6	4.0	7
Insurance Contract	4.6	59.9	8	4.3	5	3.2	11
Asbestos	3.9	63.8	9	4.1	8	0.1	60
Foreclosure	3.1	67.0	10	4.8	4	3.5	9
Motor Vehicle PI	2.7	69.6	11	3.9	9	6.2	2
Bankruptcy Appeal	2.3	71.9	12	2.4	15	0.6	35
Trademark	1.8	73.8	13	1.4	22	1.0	26
Marine Contract	1.7	75.4	14	2.9	12	4.2	5
Marine PI	1.5	77.0	15	2.6	14	5.7	4
Copyright	1.4	78.3	16	1.3	23	1.0	25
SEC	1.3	79.7	17	1.8	20	2.1	17
Patent	1.2	80.8	18	0.7	31	0.9	27
Labor-Management	1.2	82.0	19	2.2	17	3.7	8
SEC	1.1	83.1	20	1.5	21	1.5	22

4.2 F2000 Plaintiff versus F2000 Defendant

The F2000 database contains 10,046 cases in which both the plaintiff and the defendant have been both identified as belonging to the F2000. These cases allow us to study some matters that cannot be addressed with the rest of the data. First of all, we can see how these cases are distributed by case type, and see whether this distribution differs significantly from all the F2000 cases, and from the distribution among all business cases. On the face of it, one might think that the circumstances under which one F2000 company will sue another F2000 company would be different than the circumstances in which at least one of the parties to the suit is a smaller company or individual. In these cases, one would expect a more even playing field, if it is true (as our data tells us) that "the haves come out ahead."

In at least one respect, these cases are somewhat different than the rest of the cases in the database. As Dunworth and Rogers noted, in cases in which there is only one F2000 party, the F2000 party tends to prevail, if there is a judgment. When the F2000 company is the plaintiff, it wins 78.7 percent of the time; when it is the defendant, it wins 61.3 percent of the time. In the cases in which both parties are F2000 companies, the plaintiff wins 52.7 percent of the time, the defendant 38.9 percent of the time, and there is a divided judgment (the plaintiff won on some issues, and the defendant, counter-suing, on others) in 8.4 percent of the cases. Thus, apparently, the playing field is more even. In Galanter's [76] typology, in these cases, both parties are "repeat players" as opposed to many cases with only one F2000 party, or no F2000 party, in which one or more of the parties is a "one-shotter." It may be the case that even within the F2000, the size of the company has an effect. We can examine this by seeing whether the difference in the assets of the two F2000 parties has an effect on who wins; I have not yet done this test.

These cases, it turns out, also provide more evidence for the uneven nature of litigation. Examination of a table (not shown here) with the two-digit Standard Industrial Code (SIC) of the plaintiff on one dimension and the code of the defendant on the other reveals a mainly empty table except for some concentrations in some particular SIC pairs. The top 25 SIC code pairs account for a quarter of the cases, and the top 103 SIC-code pairs account for fully half of all the cases, and there are thousands of possible pairs. Since there are 83 valid two-digit SIC codes, there are 83 times 83 or 6,889 possible SIC pairs, so most cases are accounted for by a small fraction of the possible pairs. The top 10 pairs are shown in Table 4.2.

We can see from Table 4.2 that much of the disputing between F2000 companies occurs within single industries, or between industries that do a lot of business with one another. For instance, banks buy a lot of insurance, which accounts for the cases with SIC 60 for the plaintiff and SIC 63 for the defendant. Food and chemical companies do a lot of shipping, which accounts for the cases with railroad plaintiffs and food or chemical defendants. And insurance companies buy insurance from one another, and engage in disputes involving who should provide coverage for a particular event.

Like F2000 cases in general, the cases in which both parties are F2000 companies are highly unevenly distributed with respect to case type as well as industry. Table 4.3 shows the top five case types for all F2000 cases and cases in which both parties were F2000 companies.[2]

[2]The last two categories listed in Table 4.3 for all F2000 cases–"other personal injury" and "personal injury/product liability"–are all such cases that do not involve airplanes, automobiles, sea-going craft, medical malpractice, Federal Employers' Liability Act cases, asbestos, assault, libel, and slander. They are "rump categories."

Table 4.2: Top SIC Pairs in Cases Where Both Parties are F2000 Companies

Plaintiff SIC	Description	Defendant SIC	Description	Number of Cases
63	Insurance Carriers	63	Insurance Carriers	290
60	Depository Institutions	60	Depository Institutions	188
40	Railroad Transportation	28	Chemicals and Allied Products	155
20	Food and Kindred Products	20	Food and Kindred Products	149
60	Depository Institutions	63	Insurance Carriers	137
28	Chemicals and Allied Products	28	Chemicals and Allied Products	125
13	Oil and Gas Extraction	13	Oil and Gas Extraction	114
63	Insurance Carriers	60	Depository Institutions	106

Table 4.3: The Top Six Case Types in All F2000 Cases (Cases With At Least One F2000 Party) Versus the Top Six Case Types in Cases Where Both Parties are F2000 Companies

Case Type	Number of Cases	Percent	Case Type	Number of Cases	Percent
"Other" Contracts	71115	14.9	"Other" Contracts	2395	23.8
Insurance Contracts	47308	9.1	Insurance Contracts	1206	12.0
Asbestos	38470	7.4	Commerce and Interstate Commerce Commission Rates	1174	11.7
Other Personal Injury	34033	6.6	Patents	872	8.7
Personal Injury/Product Liability	31605	6.1	Trademarks	554	5.5

We can see that the two listings are similar as far as the first two case types are concerned, except that these two case types dominate the second listing to a greater extent. After that, the two diverge, with the first being dominated by liability cases of various kinds, while the second is dominated by cases that involve property rights (patents and trademarks) or regulation (in the case of Interstate Commerce Commission rates).[3]

A topic for possible future research is the following: we can compare the plaintiff SIC vs. defendant SIC table with a input-output table which shows the degree to which one SIC supplies to each of the others. One would expect that there would be a positive correlation between the cells of these two tables, because according to the characterization of disputes in the "dispute pyramid," [77], lawsuits are the result of transactions gone awry, and a pair of industries, one of which supplies to another, is involved in a number of transactions that is positively related to the dollar amount of the amount supplied. A small proportion of transactions lead to disputes, and a small proportion of those disputes lead to litigation.

However, in some cases the plaintiff is a supplier, in some cases a customer, and in some cases a competitor of the defendant. Competitors are in the same industry, and therefore these cases would not be reflected in the input-output table. Thus the correlations between the cells will not be perfect. In addition, our data does not indicate whether the plaintiff is the supplier or the customer firm; thus we need to correlate the litigation matrix with the input-output table, and also with the result of flipping the input-output table across its diagonal. Another reason why the correlation is likely to be imperfect is the fact that the input-output table reflects the

[3]The ICC cases date from the period in which freight rates were highly regulated; the ICC was abolished in 1996, and much freight deregulation occurred earlier.

entire economy, rather than just large companies.

4.3 Examining Adjudication and Win Rates Over Time

As Figures 4.1 and 4.2 show, there has been a decline both in the share of cases that are adjudicated and the plaintiff win rate. The former declined from a peak in the low forty percent range in the late 1970s/early 1980s to the low twenty percent range by the end of the century. The latter was stable in the 60-70 percent range throughout the 1980s and then fell down below 50 percent in the 1990s. It is possible that there is a relationship between these two trends. Increased pressure to settle cases and to use alternative dispute resolution may have winnowed out all but the more competitive cases, lowering both the adjudication rate and the plaintiff win rate. However, we have no direct evidence of this, just corresponding trends.

What about the effect of default judgments, which have an extremely high plaintiff win rate? If the composition of cases with respect to such judgments changed over the period, this could have affected the overall plaintiff win rate. It turns out that the share of dispositions that are defaults has declined (in the early period, this fluctuated around about 0.30, and later around about 0.22), but this is not enough to account for the declining win rate. Even if default judgments are left out, the win rate still declined from about 0.5 or slightly higher in the early period to below 0.35 late in the period. Thus there appears to be little convergence to the 50 percent level predicted by the Priest and Klein theory [178].

Figure 4.1: Percent of Cases Terminated in 1979-2001 that Were Adjudicated

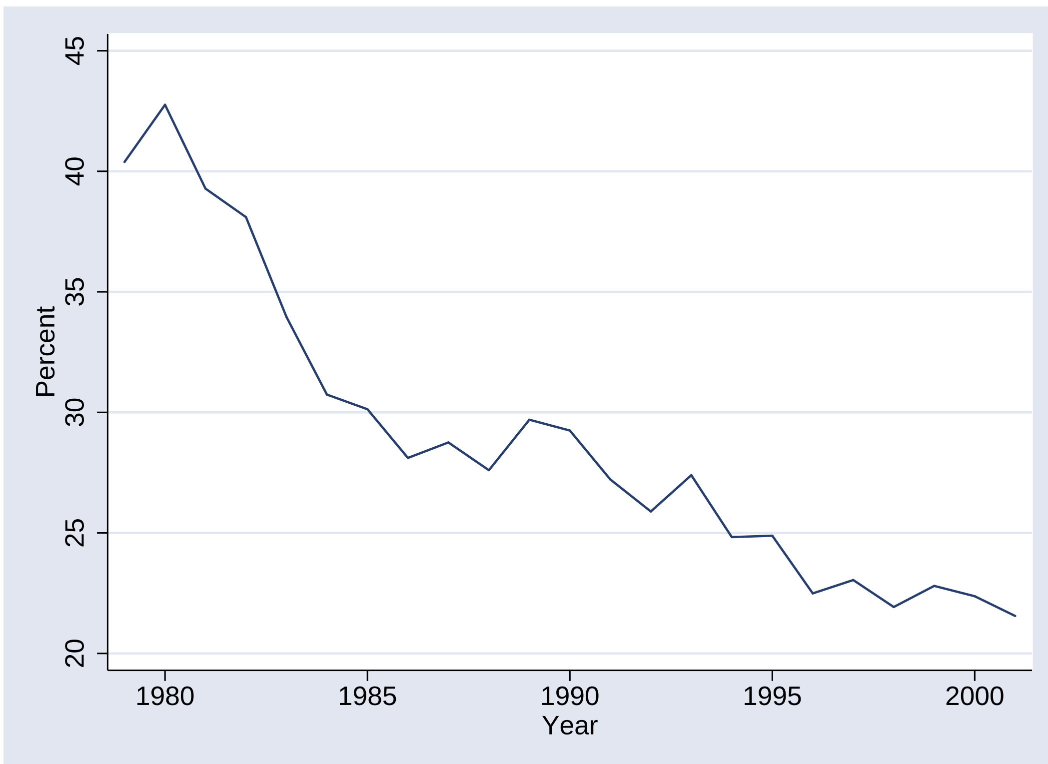
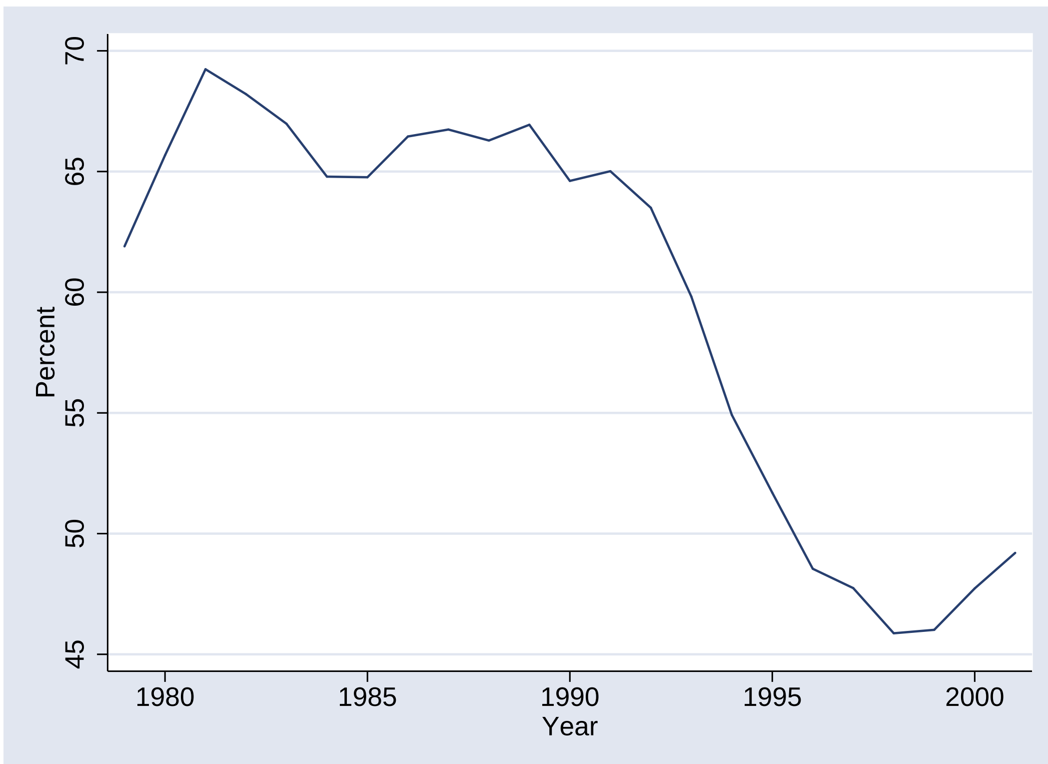


Figure 4.2: Plaintiff Win Rate, Adjudicated Cases Terminated 1979-2001



4.4 Variability of Win Rates By Case Type

Tables 4.4 and 4.5 show that win rates tend to vary substantially by case type. The winner, for adjudicated cases, began to be recorded in the AO database in statistical year (SY) 1979. The overall plaintiff win rate, for all case types shown, is 60.7 percent. Figure 4.3 shows the distribution of these win rate rates across all case types; it is not normal; there is more activity to the left (below the mean). One factor that most likely contributes to the variability in win rates by case type is the proportion of plaintiffs that are companies as opposed to individuals. Another factor is the variability in the distribution of dispositions within case type. For each of the individual case types that I consider in this thesis, I often consider these two factors in accessing plaintiff win rates.

4.5 Modeling Win Rates Using Case Type and Disposition

I built three simple logit models to explore the relationship between the plaintiff win rate, the case type, and the disposition. The win rate variable was represented in each model as a simple binary dummy variable, which was one if the plaintiff won, zero if the defendant did. There was a dummy variable for each case type save one, which served as the baseline; each of these dummies was one if a particular case fell under the corresponding type, and zero otherwise. Thus the case type is represented by a bit vector in which only one bit is activated. The disposition was represented in a similar fashion, except that the only dispositions that were represented by dummy variables

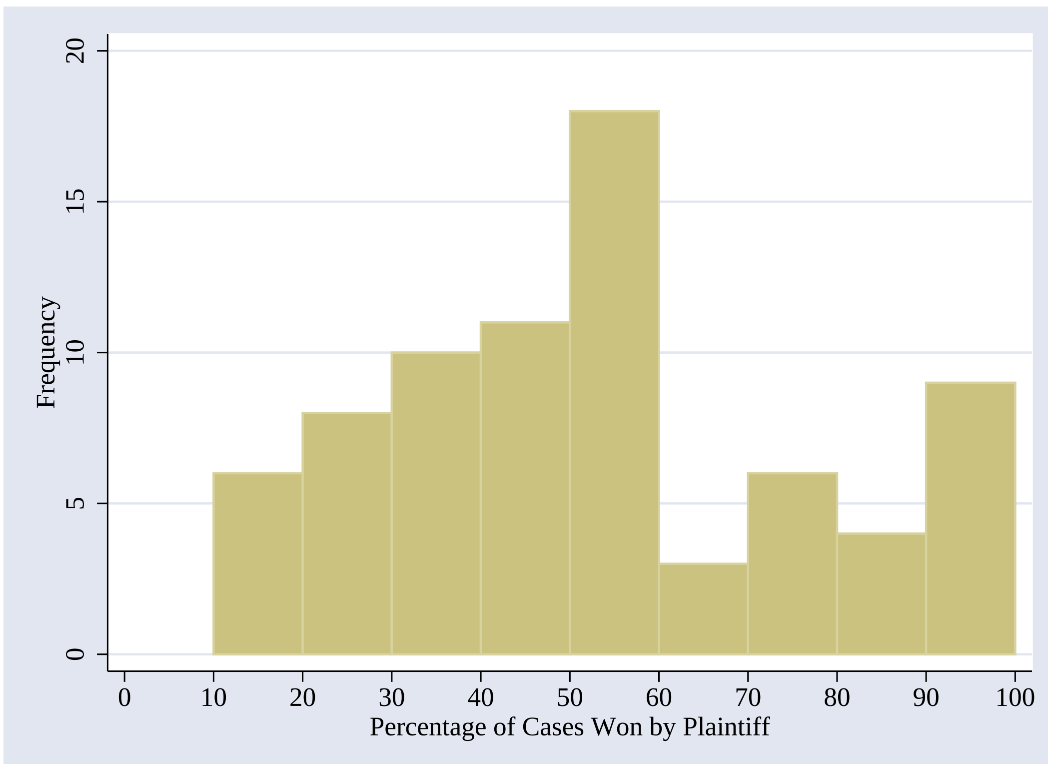
Table 4.4: Plaintiff Win Rates by Case Type, Aggregate for Terminations in SY 1979-2001 (Part 1 of 2)

Case Type	Share Won by Plaintiff
Appeal of Fee Determination	10.0
Customer Tax Challenge	10.1
Freedom of Information Act of 1974	11.2
Other Civil Rights	15.6
Civil Rights Employment	16.2
Soc Sec-DIWC	19.9
Railway Labor Act	21.0
Assault, Libel, and Slander	23.3
Selective Service	24.4
Personal Injury- Medical Malpractice	25.1
Land Condemnation	27.0
Bankruptcy Appeal	28.2
Personal Injury- Product Liability	28.4
Motor Vehicle PL	29.9
Constitutionality of State Statutes	30.4
Tort Product Liability	31.1
Airplane PL	32.9
Antitrust	33.6
Other Personal Injury	33.8
RICO	34.3
Property Damage Product Liability	35.4
State Reapportionment	38.2
Economic Stabilization Act	39.0
Stockholders Suits	39.7
Truth in Lending	40.7
Welfare	42.7
Airplane PI	42.9
Energy Allocation Act	43.4
Labor Management Reporting and Disclosure	44.0
Civil Rights Housing	44.2
Torts to Land	45.9
Civil Rights Voting	45.9
Insurance Contract	46.0
Marine PI	49.1
Other Personal Property Damage	49.8
Banks and Banking	50.0
Soc Sec-Black Lung	50.0

Table 4.5: Plaintiff Win Rates by Case Type, Aggregate for Terminations in SY 1979-2001 (Part 2 of 2)

Case Type	Share Won by Plaintiff
Commerce/ICC/Rates/etc.	50.6
Other Labor Litigation	51.3
Internal Revenue Service-Third Party	52.3
All Other Product Liability	52.5
Contract Product Liability	53.1
Other Statutory Actions	53.2
Bankruptcy Withdrawal	53.3
Other Fraud	53.6
Labor Management Relations	53.7
Taxes	54.4
Insanity	55.7
Motor Vehicle PI	57.7
Securities, Commodities Exchange	57.8
Agricultural Acts	50.0
Federal Employers Liability	58.1
Marine PL	59.0
Patent	62.6
All Environmental Matters	64.9
Agriculture	69.3
Liquor	70.2
Asbestos Personal Injury Product Liability	71.5
Other Contract	76.0
Miller Act	77.5
Fair Labor Standards Act	77.8
ERISA	79.6
Rent Lease and Ejectment	80.7
Marine Contact	83.1
Copyright	86.8
Trademark	88.0
Drug Forfeiture	93.8
Air Line Regulations	94.3
Negotiable Instrument	94.7
Miscellaneous Forfeiture and Penalty	95.0
Occupational Safety/Health	95.4
Railroad and Trucks	95.5
Food and Drug	95.8
Recovery of Overpayment and Enforcement of Judgment	97.7
Foreclosure	98.2

Figure 4.3: Distribution of Win Rates over Case Types



were default judgments, consent judgments, judgments on a pretrial motion, jury verdicts, and court (bench) verdicts.[4] These five dispositions dominated adjudicated cases. All remaining disposition were set to be baseline.

The first logit model regressed the win rate variable on all 74 case type dummy variables. The second regressed the win rate variable on all five disposition dummy variables. The third logit model regressed the win rate variable on the disposition dummy variables and the case type dummy variables, for a total of 79 variables. Of course, there are many other possible models, such as models that include multiplicative terms between the disposition dummy variables and the case type dummy variables. However, a model containing all such multiplicative terms would contain (5+74)+(5*74)=449 independent variables, so I chose not to run such a model.

The first logit, the one on case type alone, the regression coefficients on most of the case type dummy variables were highly significant. This is because the number of adjudicated cases observed was very large, almost 900,000. The regression coefficients associated with these dummy variables reflect whether a particular case type makes a win more or less likely. For instance, copyright cases have a high plaintiff win rate of 86.8 percent, compared to a plaintiff win rate of 60.7 overall. The regression coefficient for this dummy variable is 1.66, meaning that the log odds of a plaintiff win is additively boosted by this amount for copyright cases. The pseudo r-squared for this logit was 0.30.

For the second logit, the one on disposition alone, all five disposition dummy variables resulted in highly significant regression coefficients (p values nearly zero). Again, this is because of the large number of adjudicated cases. The results fit in with

[4] The regressions involving disposition were only run for cases terminated in 1979 or later, because disposition data was not recorded in this detailed a manner prior to 1979.

my findings in the case type chapters. A default judgment additively boosted the log odds of a plaintiff victory, relative to other dispositions, by a beta of 4.24. A consent judgment boosted the log odds by a beta of 1.86. The remaining three dispositions, pretrial motions, jury verdicts, and court trials, lowered the log odds by -0.79, -0.09, and -0.15 respectively. The pseudo r-squared for this logit was 0.32.

This regression is simply another way of expressing the fact that the five dispositions have significantly different plaintiff win rates, and the win rates for default and consent judgments are higher than the others. Plaintiffs win percent of 60.7 of judgments overall; they win 98.6 percent of default judgments, 86.6 percent of consent judgments, 31.3 percent of judgments on a pretrial motion, 47.7 percent of jury verdicts, and 46.4 percent of court verdicts.

The third logit included all the 79 dummy variables described above. The betas for the disposition dummy were still highly significant (p values nearly zero), as were most of the case type dummies. The pseudo r-squared increased to 0.44. The betas were shifted to some extent due to the separate effects of disposition and case type. For instance, the beta for copyright cases was only 0.89, as opposed to 1.66 in the logit on case type alone. This is mainly because copyright cases have a different distribution of dispositions than other cases; the most notable difference is a much larger share of consent judgments, which of course, as we have seen, are related to a higher win rate, so some of the relationship is captured in the beta for the consent judgment dummy variable.

4.6 Amounts Demanded and Judgments Awarded

Tables 4.6, 4.7, and 4.8 show the median amounts demanded (when there was a demand) and awarded (when there was an award) for each case type, sorted by declining median award, and the correlation between these when they are both present.[5] Overall, the correlation between these medians is only 0.21, which is rather low, and for many of the case types it is even lower. Some case types have higher values, but many of these involve relatively small groups of cases. Thus, overall, it does not appear that the demand is a good predictor of the award, in the cases where both are present.

Note that, as shown in Figures 4.4, 4.5, and 4.8, the distributions both of the amounts demanded and the amounts awarded are highly skewed to the left, which means that most demands, and most awards, are relatively modest compared to the huge awards which are typically reported in the press; these latter awards mischaracterize the population of cases.

4.7 Examination of Unpublished Cases

As noted above, I have examined unpublished case files for five of the case types studied herein–copyright, patent, ERISA, civil rights in employment, and "other" contracts. It is logistically difficult to examine unpublished cases, because the case files are stored at the courthouse where the case took place for a year or two (it varies, depending on the courthouse) and then they are shipped off to various regional Federal Records Centers around the country.

Ideally, one would want to draw a random sample of cases for a given case type in

[5] All demands and awards were adjusted to 2001 dollars before these correlations were done.

Table 4.6: Median Amounts Demanded and Median Judgments Received by Case Type in Thousands of 2001 Dollars, Sorted by Declining Median Judgment, 1971-2001 Aggregate (Part 1 of 3)

Suit Type		$ Demanded		Judgment Amount		Correlation	
Name	N	1000$	N	1000$	N	r	N
All Cases	3894150	103.0	1434123	40.0	404512	0.21	175456
Asbestos	116428	81.8	69543	3962.7	1230	0.22	587
Soc Sec-Black Lung	18	23.4	7	3416.2	4	-1.00	2
Airplane PL	4342	408.0	2173	492.7	190	-0.03	89
RICO	11936	1130.0	4452	424.0	787	0.27	257
Antitrust	25350	544.0	6050	286.3	932	-0.01	222
Medical Malpractice	18483	438.0	9505	255.0	849	0.04	428
Stockholders Suits	4699	257.9	1460	217.5	259	0.32	98
Product Liab.	133931	272.0	59127	202.5	3571	0.14	1817
Motor Vehicle PL	13192	322.5	6910	199.0	527	0.11	263
SEC	60238	292.5	16264	179.3	4264	0.16	1352
Banks and Banking	10704	215.0	3627	165.0	1065	0.32	483
FELA	51815	584.0	25041	163.2	2124	0.12	1044
Tort Product Liability	1668	161.8	921	161.3	76	-0.07	40
Patent	33832	120.0	2052	148.8	1200	0.37	96
Energy Allocation Act	1010	86.5	137	140.0	50	0.88	15
Marine PL	2187	311.0	1432	132.9	284	0.27	231
Property Damage	9618	131.0	5485	106.8	475	0.31	293
Contract Product Liab.	9903	165.0	5621	106.1	878	0.14	516
Econ. Stabilization Act	1354	273.5	144	103.0	43	-0.16	12
Airplane PI	14251	369.0	6059	94.0	620	0.20	290
Marine PI	109064	584.0	58985	93.2	6203	0.08	3957
Insurance Contract	164240	105.6	62355	75.0	10300	0.19	4849
Other Personal Injury	165896	292.0	81425	74.1	8743	0.07	4589

Table 4.7: Median Amounts Demanded and Median Judgments Received by Case Type in Thousands of 2001 Dollars, Sorted by Declining Median Judgment, 1971-2001 Aggregate (Part 2 of 3)

Suit Type		$ Demanded		Judgment Amount		Correlation	
Name	N	1000$	N	1000$	N	r	N
Taxes	63199	42.1	15172	71.0	6030	0.16	2575
Motor Vehicle PI	154921	251.1	80241	70.2	9207	0.13	5283
Environmental Matters	19168	82.5	2885	66.4	2108	0.23	490
Other Contract	504175	96.6	256745	59.9	91906	0.23	54385
Other Pers. Prop Damage	41269	87.8	21406	58.7	3214	0.09	1905
Assault, Libel, & Slander	19637	445.0	9602	56.0	872	0.03	434
Torts to Land	11572	134.3	5479	55.9	675	0.03	397
Foreclosure	156329	60.5	87176	55.4	38967	0.22	25450
Railway Labor Act	5167	155.5	847	53.7	86	0.68	27
Rent Lease & Ejectment	9484	63.0	2970	52.6	940	0.07	463
Civil Rights Employment	285890	309.0	63717	49.9	9262	0.09	2169
Marine Contract	106262	44.1	62308	47.6	12366	0.28	7899
Other Fraud	51471	108.8	20358	46.5	4451	0.21	2197
Constitut. State Law	9123	211.2	828	38.9	88	-0.06	18
Labor Mngmt Reporting	5416	146.2	778	38.5	297	-0.01	83
IRS-Third Party	6252	36.0	385	35.0	140	0.12	58
Miller Act	29413	34.3	16870	33.9	3353	0.03	1989
Liquor	494	128.3	9	33.2	8	-0.49	3
Agricultural Acts	8325	48.7	2387	33.0	1245	0.09	644
Negotiable Instrument	79129	46.6	44879	33.0	29524	0.30	20149
Other Civil Rights	296973	468.0	91878	31.2	8682	0.09	3532
Food and Drug	15071	39.5	698	30.0	795	0.35	150
Other Statutory Actions	164283	81.9	34274	28.5	13307	0.17	5080
Trademark	59366	116.0	7959	26.4	3342	0.04	562

Table 4.8: Median Amounts Demanded and Median Judgments Received by Case Type in Thousands of 2001 Dollars, Sorted by Declining Median Judgment, 1971-2001 Aggregate (Part 3 of 3)

Suit Type		$ Demanded		Judgment Amount		Correlation	
Name	N	1000$	N	1000$	N	r	N
Bankruptcy Withdrawal	12515	23.4	1171	25.7	734	0.35	266
Bankruptcy Appeal	75644	120.5	651	25.5	619	0.97	85
Land Condemnation	38374	77.2	750	23.9	6246	0.01	198
Civil Rights Voting	5249	282.6	330	23.4	97	0.21	15
Customer Tax Challenge	582	45.8	44	23.2	13	0.83	4
Other Labor Litigation	34437	68.0	8698	23.1	3827	0.03	1288
Selective Service	1160	73.0	34	22.9	7	1.00	2
Soc Sec-DIWC	1257	29.7	23	22.5	14	0.01	5
ERISA	150971	26.7	39260	22.1	32806	0.08	9280
Labor Mgmt Relations	85822	43.0	14474	20.4	8511	0.07	2240
Drug Forfeiture	15901	27.2	1376	19.8	1366	0.03	191
Civil Rights Housing	14900	150.0	3413	17.8	747	0.08	203
Misc. Forfeit. & Penalty	57833	17.5	7872	17.8	8078	0.02	2962
FLSA	47933	30.0	7464	17.2	7124	0.14	1145
Welfare	4287	130.0	455	15.0	79	-0.13	17
Copyright	50338	109.0	11271	14.3	8202	0.02	2052
Railroad and Trucks	512	9.1	210	10.8	172	-0.04	92
Agriculture	2840	18.1	678	10.0	535	0.35	230
Comm./ICC/Rates/etc	51304	13.1	21202	8.8	5043	0.03	2436
Freedom of Information	9893	120.8	466	8.6	91	-0.10	14
Truth in Lending	5697	16.4	2031	6.8	306	0.11	124
OSHA	2997	4.3	909	4.8	798	0.02	346
Air Line Regulations	1873	5.0	750	3.3	456	0.18	244
Insanity	748	39.0	67	2.9	37	-0.08	23
Recovery, Enforcement	68651	2.1	34948	2.2	31043	0.16	19150

Figure 4.4: Distribution of Median Amounts Demanded by Case Type, Thousands of 2001 Dollars

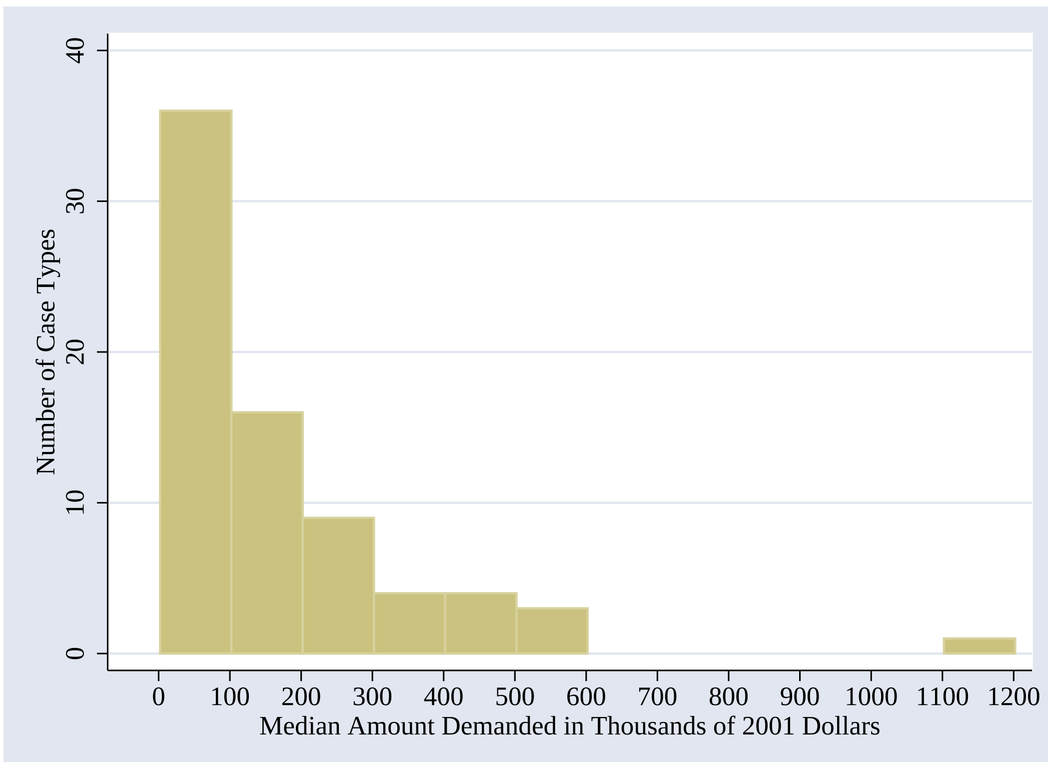
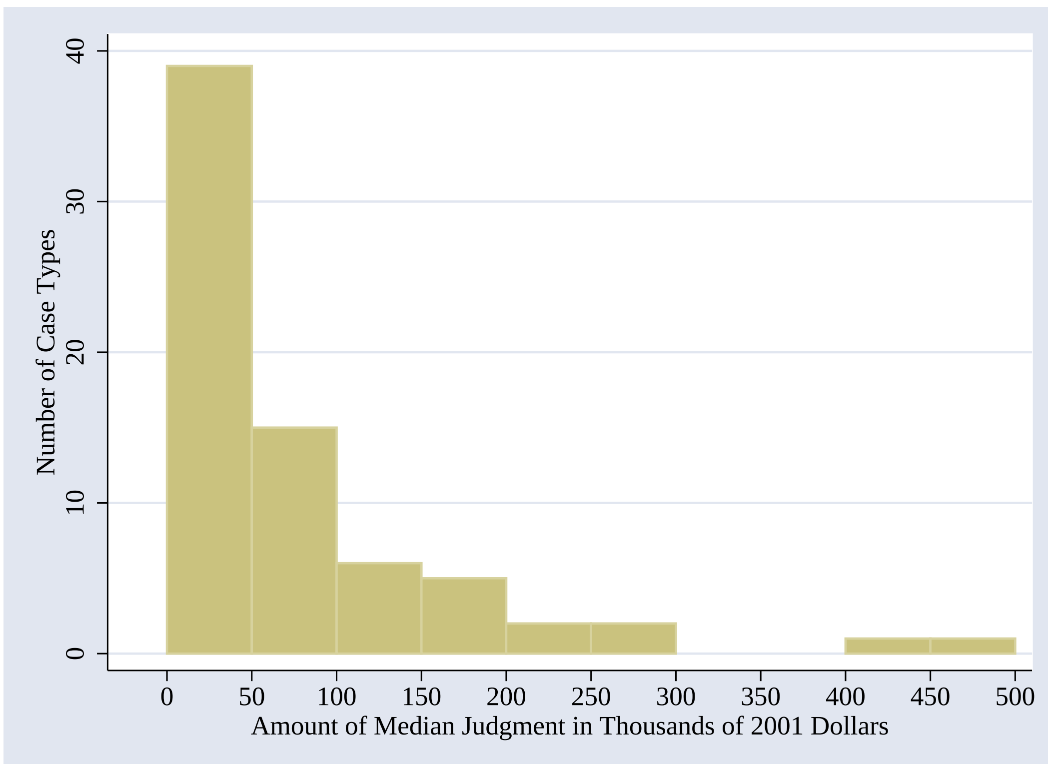


Figure 4.5: Distribution of Median Judgments Awarded by Case Type, Thousands of 2001 Dollars (Two Outliers Excluded)



a given time period from all the cases in all the federal district courts, but this would require a lot of travel and money, which was not at my disposal. Instead, since I wrote this dissertation while residing in Wisconsin, I drew on cases from three federal district courts– for the Eastern and Western districts in Wisconsin in Milwaukee and Madison respectively (which, between them, cover the state), and the Northern District of Illinois, Eastern Division (which covers the Chicago area; the court is in Chicago).

For three of the case types, I used the Madison district court–ERISA, civil rights in employment, and "other" contracts. Because there were insufficient patent and copyright cases in Madison, and for variety in courthouse selection, I went to the district court in Milwaukee for the patent cases and the district court in Chicago for the copyright cases. For each case, I examined the case file, with all the briefs, depositions, rulings, etc. I looked at 50 cases for each case type; thus, I examined a total of 250 cases. I simply looked at a set of cases that were continuous in time–that is, starting with the oldest case of a given type still at the courthouse, I looked at all the cases of that type in consecutive ordering of filing after that case. I looked only at closed cases, because I wanted to see complete files.[6] I cannot claim that this is a representative sample of all the cases of a given case type, but it is also not completely unrepresentative; that is, I believe we can learn things even from a somewhat problematic sample.

There are several general observations that one can make from an examination of the case files. First of all, the number of cases is a very poor measure of the actual

[6]Note that a the closing of a case at a particular district court is not necessarily the end of the proceeding; sometimes it is appealed, and sometimes it is transferred to another jurisdiction, either a state court or another federal court.

burden on the courts. Some cases are basically open-and-shut, and have a case file that consists of a few pieces of paper. (There are many different reasons why this can happen, of course). Other cases are voluminous, and require the clerks to roll out all the materials on a cart. Two potential proxies for how much of an impact a particular case makes are the number of items in the file and the number of days from filing to closing. These are both imperfect, of course, because, for instance, if the legal issues in a case are complex, it may take up a lot of the time of the court even if the file is not particularly voluminous.

Also, the federal courts eat up a good deal of their time on disputes over choice of venue. The laws governing the choice of venue, and the related issue of jurisdiction, are complex. Lawyers spend a lot of time briefing judges on why the forum should be changed (typically to the other party's federal district) or why it should remain the same, and judges spend a lot of time ruling on whether or not to change the venue. It seems to me, from a policy perspective, that this is highly wasteful. Each party usually prefers its home jurisdiction, and will be inconvenienced in the sense that they will have to fly in with their lawyers, which is why they often try to get the jurisdiction changed. Forum shopping is also a factor. It seems like it might be fairer simply to flip a coin on venue; it certainly would save the courts a lot of time. However, this might disadvantage the lower-resourced litigant, who may not have the resources to play on the other's turf, if his opponent wins the toss. A solution to all of this might be technological; teleconferencing and videoconferencing, electronic filing of documents, etc. The courts are moving in this direction, some more rapidly than others. Another solution might be to simplify the rules, so litigants are clear on where they should file a case, and there is less opportunity to dispute it.

4.8 The Uneven Distribution of Case Lengths

Most writing about litigation's burden on the courts measures this burden in terms of the number of cases that are filed (which is commonly referred in shorthand as the caseload); typically, one reads reports that say that the caseload went up by some factor. But cases, of course, are not created equal, in terms of their burden on the courts. One long case can place the same burden on the courts that ten short ones do. Length can be measured in various ways. Two obvious ways are the amount of time (in days) between the time a case is filed and when it is closed. Another is the number of items in the docket. Both of these are imperfect, of course; much of the time within a case is simply time allotted for the preparation of briefs, the collection of depositions, etc. However, it would be difficult to measure directly the load on the courts; an ideal method would be to measure the time allocated by the various court personnel (judges and clerks) to a given case, and value this time in terms of the aggregate wage associated with It, but this would involve the collection of time tracking data that would be costly to collect.

Since such an ideal measure was unavailable, I chose to study the uneven distribution of case lengths by examining the number of items in the docket. The PACER (Public Access to Court Electronic Records) system, run by the federal courts, contains various information about cases filed in the courts,[7] available on the Web in a manner that allows searching by such fields as case type and district. I decided to select three of the case types that I studied in detail in this thesis: specifically, employment discrimination (nature of suit (NOS) code 442), "other" contract (NOS=190),

[7]The majority of the courts are covered in the Pacer Index, except for six district courts, six bankruptcy courts, and four courts of appeals.

and copyright (NOS=820). Note that these are widely disparate in subject matter, so that there is no particular reason to be believe that they will be similar in terms of their average docket length, time from filing to termination, or other measure of burden on the courts. For each of these, I downloaded the first fifty cases that were available in PACER, starting with a filing date of Jan. 1, 1999. Some cases were listed in PACER, but their full record (which allows access to the numbered docket and thus the number of items in the docket, which is what I was looking for) was missing, so I skipped these cases. But most cases were available, so I have no reason to believe this is not a more-or-less representative sample of the underlying population of cases in the courts.

Table 4.9 summarizes the docket lengths and the number of days that each case is open for this population of cases. We can see that copyright cases remain open for a shorter period and have a slightly shorter docket. The two measures of the burden of each case are moderately correlated, ranging between 0.43 and 0.67, with an overall correlation of 0.59. On average, the cases are open between about 6 months to a year, depending on the case type and whether you look at the mean or the median; the overall median is 260.5 days, or almost 9 months. One of the most notable results of this examination of cases is the uneven distribution of the docket lengths. For each of the three case types, it takes only about a fifth of the cases to account for fifty percent of the total docket items found in all cases. Less than half of the cases account for 75 percent of the docket items. This suggests a straightforward policy intervention for those who want to reduce the load on the courts; attempt to identify these cases likely to become high-burden ones at the outset, and concentrate energy on settling them before they erupt into full-scale litigation. However, there may be some difficulty in doing this, because these are likely to be the highest-stakes cases, and might not have gotten into court unless there was a lot of uncertainty about their outcome, which would work against their being settled.

Table 4.9: Docket Lengths and Days from Filing to Closing, Three Case Samples

	Employ. Discrim.	Copyright	Contract	Combined
N	50	50	50	150
Mean Days	346.6	285.9	363.7	332.1
Median Days	274.5	201	288	260.5
Mean Docket Length	30.8	26.2	29.3	28.8
Median Docket Length	23.5	19	21	20.5
Correlation, Docket & Days	0.67	0.43	0.67	0.59
N, half of docket items	10	11	10	30
N, 75% of docket items	20	23	23	64

4.9 New Case Types as Social Movements

Consider the case of the government pursuing an antitrust suit against a company, such as Microsoft. If it is successful, it is likely (as has been the pattern with cases against other companies) that it will be followed by a slew of private suits pursuing damages on the theory established by the government. If it is not successful, suits are likely to dry up, although some will continue, hoping for success in another forum, or on a different set of facts. The decision to litigate and the assessment of the chances of success do not exist in the vacuum of a single case, but are best thought as the result of a process of social learning. The outcome can be thought of as being capable of triggering something akin to a social movement, although this something is actually different in nature.

A social movement occurs when people join together to achieve a shared goal (see, for instance, see Olson [164] and Marwell and Oliver[147]). Thus, members of the environmental movement share the goal of improving the environment, and members of the women's movement share the goal of improving the situation of women. The goals of social movements typically benefit a broad class of people and, in some cases, (as in the case of the environmental movement) *all* people. Thus social action within a social movement is not necessarily purely self-interested, and social movements suffer from free-rider problems, in which benefits accrue to those who have not participated in the movement.

While fads, like social movements and other social phenomena (such as information transmission), spread within social networks and mass media, fads differ markedly from social movements in their nature. Fads typically are based in individual consumption, although there may be an aspect of display that goes along with this consumption (e.g. fans of a rock band that all wear the same outfits). Fads, of course, tend to be transient. Another interesting thing about fads is that the utility of consumption is related to the number of other people who are also consuming and who they are (that is, if they are "hip" or its opposite).

Innovations in markets, like fads, tend to be based in consumption, but they tend to be more permanent, until they are supplanted by something new. For instance, the evening newspaper was an institution in many cities for years before it was largely displaced by television and by the twenty-four news cycle associated with cable television. The telephone has survived, but the telegram has been almost completely replaced by electronic mail and the fax machine, and the fax machine is in decline. However, these things have a much longer life cycle than fads.

Innovations in markets can also be examined from the production side; one or a few early innovators enter a market, capture monopoly rents for a period, and then more firms enter, increasing competition. Competition will usually settle at some level between perfect and oligopolistic competition.

All of these social processes, social movements, fads, and new markets, have some characteristics in common. They all have a small number of people or organizations that start them off. These initial actors inspire imitators, who inspire other imitators. In other words, in each of the cases, the probability of a new actor entering an arena is related to the number of actors that are already in that arena. They then all follow some sort of growth pattern. Eventually, many of them die out (in the case of fads, often rapidly), although they have widely varying life cycles, and some of them have life cycles that are very long, often so long as to make them effectively an institutionalized part of society (e.g. the paper or the soap industry).

A new variety of litigation follows a similar type of life cycle. Early entrants test the water, with a new legal theory. For instance, some obese people have been alleging that they have been discriminated against in hiring [91]. They either complain that they have a disability (obesity) which is not being accommodated under the Americans with Disabilities Act, or alternately, they complain that they do not have a disability but are being treated as if they cannot do the job in question when they actually can do it. If some obese people are successful with this theory, it will encourage others to do the same, and the phenomenon can snowball. Usually, when a new possibility for litigation is tested, there is a backlog of possible cases in that there were grievances that were not litigated in the past. If plaintiffs do not win their early cases, either they try new legal theories until one is successful, or the cases die out.

Thus, for instance, when and if the first obese person wins a case of this type, some proportion of all the obese people who had such a grievance, subject to the governing statute of limitations, file cases. Presumably, the probability of filing is higher the more recent the grievance. This "catching-up" phenomenon interacts with the growth of the case type brought about by its propagation in social networks, as to increase the number of cases at the beginning. Eventually, after the backlog of cases is dealt with, the situation reaches an equilibrium, in which the number of cases brought is related to the number of underlying grievances as well as other factors (for example, in the case of employment cases, the unemployment rate; obese people may be less likely to file cases if they can file other jobs easily, and employers may be less likely to discriminate during a tight labor market).

New types of litigation can be distinguished on the basis of the barriers to entry faced by plaintiffs. The obesity discrimination cases presumably have a relatively low barrier to entry; a case simply needs to be built based on the particular circumstances of the plaintiff and what information can be gathered, through depositions and discover, on how obese and non-obese people have been treated in the past. One could imagine this could be undertaken by a small to medium size law firm with experience in employment cases, since the stakes are relatively small in any particular case.

Complex class action litigation faces higher barriers to entry. We will see that such litigation exists in employment discrimination and on behalf of allegedly defrauded shareholders. In both of these, we have a large entrepreneurial law firm that is the leader, and develops much expertise in pursuing such cases.The barriers to entry are much higher because these cases are so heavily litigated, since so much is at stake. One would expect these barriers to have significant effects on the number of cases brought. With high barriers and relatively high stakes, there are relatively few players in the game, and the volume of cases is determined by the particularistic decision-making of these players. With lower barriers, and relatively lower stakes, there are more players, which tends to smooth out the noise stemming from such particularistic decision-making.

In the next section, I develop a model of the creation of a new case type.

4.10 A Model of a New Case Type

As we have seen in the previous section, when a new case type comes upon the scene, due to a a new legal theory, a change in the law (either due to a court decision or legislative action), or a change in social norms that allows previously unexpressed grievances to be filed in court, or both, there is typically a backlog of accumulated grievances that have not been expressed in litigation. In Figure 4.6, the smoothly increasing curve represents the number of grievances that would be brought into court if there were no barriers due to legitimacy, lack of a legal theory for bringing them into court, or problems in dissemination of that legal theory through the legal community and to potential plaintiffs.

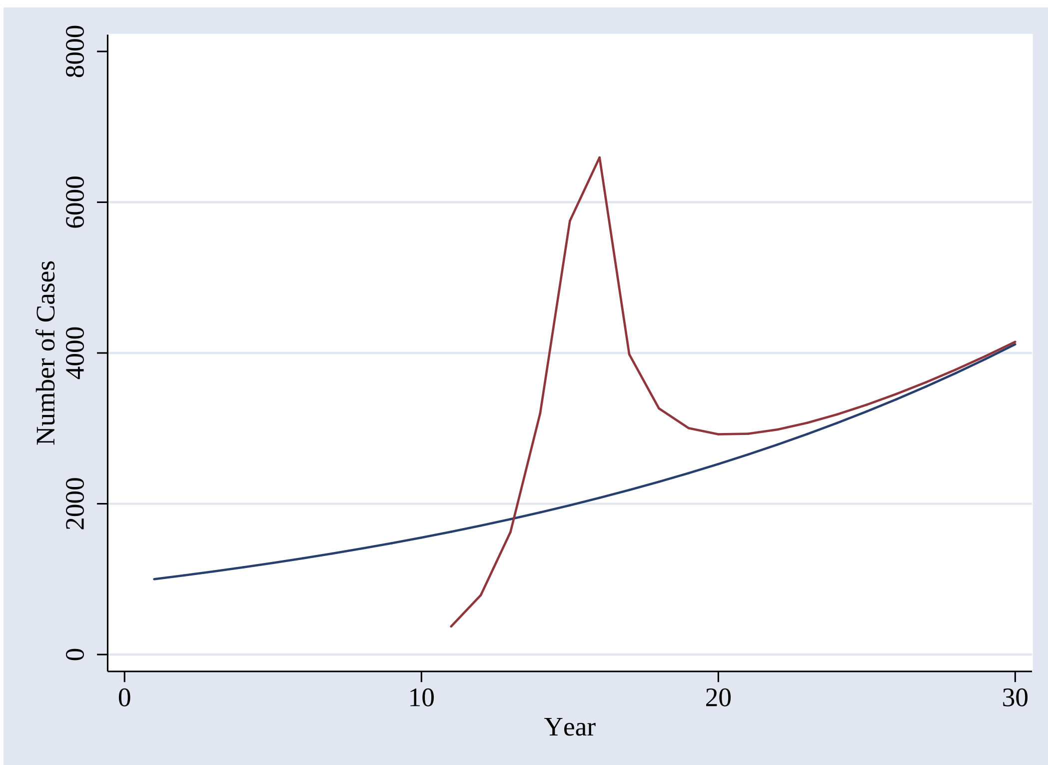
Here, I assume a 30-year period, with 1000 potential cases in year 1, and a 5 percent annual growth rate, which means there are about 4100 cases in year 30. I assume that in year 11, a new legal theory is introduced (or first becomes acceptable to the courts) that allows that allows these cases to be be brought into court, or a social stigma is removed, so that the filing of these cases becomes legitimate. This results in the curve that contains the spike that peaks around year 15.

There are three parameters that govern the behavior of these curve. The first is the discount parameter d, which I have set to 90%. This means, for instance, that, in year 11, 100% of the remaining potential cases from year 11 are eligible for actual filing, 90% from year 10, 81 percent from year 9, 72.9 percent from year 8, etc. The second is the initial uptake parameter u, which I have set to 4 percent. This means that 4 percent of the these eligible cases are actually filed in year 11. The third is the growth parameter g, which I have set to 2. This means that the uptake parameter doubles each year, until it it is capped at 100 percent. Thus the uptake parameter is 8 percent in year 12, 16 percent in year 13, 32 percent in year 14, 64 percent in year 15, and 100 percent in year 16 and thereafter. The spike is caused by the system taking in the backlog of cases. After the backlog of cases is largely exhausted, the curves asymptotically approach each other. Variation in the parameters can make the spike shallower or steeper and can affect the amount of time it takes the curves to approach each other. But the underlying idea of the process remains the same.

4.11 Examples of Case Congregations

In order to make the idea of a case congregation more concrete, and to illustrate how a social change can lead to such a congregation, the following sections discuss various such case congregations. Some of these congregations were brought about by various changes in parts of the social environment, while others are a result of underlying, ordinary processes in the economy.

Figure 4.6: A Model of a New Case Type, with a New Legal Theory Introduced in Year 11 of a 30-Year Period



4.11.1 HMOs as Defendants

Health Maintenance Organizations (HMOs) have become much more prevalent in the last twenty years; a movement away from indemnity insurance and fee-for-service medicine has been driven, in part, by the desire of companies to control rapidly growing health care expenditures. Because of the rapid growth of HMOs in the last 10 to 20 years, there have been an increasing number of cases involving HMOs. Thus this litigation can be thought of as stemming from an change in the governance of medicine. Since HMOs often focus on "cost-containment," they deny care under certain circumstances. Such denials of care, if they lead to disability or death, can lead to lawsuits. Some HMOs require that a dispute over denial of care be taken to arbitration, so this can sometimes create an obstacle to litigation. However, courts are finding that if HMOs actually impose control over doctors, which they typically want to do, they can be held liable for bad decisions.

In addition, the way doctors are paid has changed in many cases. In the traditional fee-for-service model, doctors were paid based on the number of services that they provide, thus giving them an incentive to provide lots of treatment. For instance, studies have shown that doctors tend to fill the available hospital beds in a community, irrespective of the per capita bed availability [65]. In some cases, they undertook unnecessary procedures. HMOs either employ doctors directly or pay them a flat fee per patient covered. Under the second arrangement, known as capitation, doctors have an incentive to minimize the services given.

Note that the rise of HMOs and capitation payments, as compared to a fee-for-service model, has increased the potential for conflict in the provision of health care. Therefore, it is not "litigiousness" per se that creates litigation in this area, but rather the essentially conflict-promoting nature of the institutional arrangement.

Since HMO coverage is typically provided as part of an employee benefits plan, which is regulated by ERISA (the federal Employee Retirement and Income Security Act), cases against HMOs typically end up in federal court. This new litigation differs from traditional malpractice litigation, in which doctors are accused of providing improper care. Here, often the doctor was willing to provide the care, but the HMO refused to pay for it.

Because ERISA allows the employee denied benefits to recover the value of the benefit but not compensation for other losses such as lost wages, death, or disability, some federal judges have been urging Congress to change the law, feeling that their hands are tied in cases where an HMO should be held liable. For instance, a New Orleans woman who lost a fetus after her health insurer refused to hospitalize her during her high-risk pregnancy found no relief in federal court.

A July 1998 New York Times article cited eight federal judges who complained of the restrictions on relief for liability placed by ERISA [168]. Partly in response to such equity-based complaints, Congress is considering legislation that may open up HMOs to liability and remove the ERISA roadblock, but given the numerous advocates of tort reform in Congress, and the political clout of the health insurance industry, advocates of this legislation have been having difficulty getting it enacted. It seems that it is more likely that a mechanism will be set up to appeal denials-of-care to review boards outside the HMO. However, if the barrier to full liability created by ERISA is lifted, we will likely see a large number of denial-of-care lawsuits. However, some other legal theories of liability have already been developed to circumvent around ERISA limits in some circumstances, so there is already a growth in the number of cases.

The move to HMOs has changed the relationship between doctor and patient. The doctor is now often an employee of a large organization; fewer doctors are self-employed or in partnerships that they control. And the patient may not have a long-term relationship with the doctor. This may increase the propensity to sue, according to one defense attorney, since patients may not be worried about damaging a long-term relationship [181].

4.11.2 Foreclosure Cases: Lomas and Nettleton Mortgage Investors and Federal National Mortgage Association (Fannie Mae)

Lomas and Nettleton Mortgage Investors was a large financial services company based in Texas which specialized in financing mortgages. It subsequently restructured and changed its name, but it was known as Lomas and Nettleton in during the 1971-1991 period.

Lomas filed 1723 cases as plaintiff in the 1971-2001 period. Practically all of them–1658, or 96.2%–were foreclosure cases. Virtually all of these were filed in federal court because of the diversity of citizenship of the parties. Lomas, as a mortgage company, makes an economic judgment as to when to foreclose a mortgage. Thus foreclosures are part of the ordinary way of doing business. Since a mortgage holder is required to use the power of the state to enforce its foreclosure, filing cases in court is necessary. Most of Lomas's cases were terminated early in the process, either by dismissal or by default judgment. The vast majority of the judgments were for Lomas, since these tend to be rather open-and-shut cases; that is, Lomas holds the mortgage, the mortgagee hasn't made the payments, the foreclosure is ordered.

Lomas's cases, as well as foreclosure cases in general, were not distributed uniformly over time. There were enormous surges of cases in 1981-82 (during the recession of the early Reagan years) and then again in 1985-88. This later surge corresponded to a large increase in the overall mortgage foreclosure rate in the mid- and late 1980s. Some of this resulted in depressed housing prices causing homeowners to "walk away" from their mortgages [122]. A great deal of this foreclosure crisis occurred in Texas, where a wave of speculation, and depressed oil prices, caused the bottom to fall out of the real estate market. A certain level of foreclosures are the result of the ordinary course of doing business; however, these foreclosure cases were a temporary shock to the courts, caused by a temporary economic change. By 1989, the price of oil had risen again, and the foreclosure rate was down [17]. Thus, there were only 93 Lomas foreclosure cases in statistical year 1989, as opposed to 342 in the year before. Thus we see that the volume of litigation can be highly sensitive to underlying economic conditions.

A similar situation held for mega-litigant Federal National Mortgage Association (Fannie Mae), another major financier of mortgages. It is plaintiff in 1,253 federal cases, of which 1,135 are foreclosure cases.

There are many other mortgage companies that presumably file many of the foreclosure cases in the database. Presumably, the number of foreclosures is related to the state of the economy, interest rates, and the housing market. Thus, a number of cases are generated "automatically" by this process in federal court, any time a mortgage company and a mortgagee are located in different states (which is very common, since the mortgage market is national), and one of the litigants takes the case into the federal court.

4.11.3 Year 2000 (Y2K) Litigation (The Case Congregation that Didn't Happen)

Occasionally bursts of litigation are expected in advance of their actual occurrence, and sometimes everyone guesses wrong. The most notable recent example of this was year 2000 litigation, caused by what some people referred to as the "millennium bug." Like asbestos litigation, and other temporary litigation, it was thought that the millennium bug would cause a spike of lawsuits, and then gradually die down over time. Some of these lawsuits would have been consolidated into class actions.

When many large computer systems were programmed in the 1960s, 1970s, and 1980s, programmers allowed only two digits to represent the year-the last two digits, for example, 79. As a result, many computer systems active in the 1990s would have malfunctioned in the year 2000, because they would have behaved as if it is actually earlier than 99, since the year would have been set to 00. The cost of retrofitting these systems in order to avoid this malfunction was massive. And the cost of rapidly fixing those systems that did in fact malfunction in the year 2000 would also be large.

This is because this requires hand-checking of many long computer programs. Such hand-checking is prone to human error, so there is no guarantee than any fixes that are applied will be effective. The only alternative to such hand-checking is to completely rebuild systems from the ground up, which is very expensive and is likely to introduce new bugs.

This bug had the potential to inconvenience or even injure many people. For instance, it could have grounded planes because of scheduling problems. Or it could have caused bank computers to malfunction, making it difficult for people to cash checks or to withdraw money from ATMs. Or it could have caused medical devices to malfunction. Given the reliance of the entire industrialized world on computers, the number of potential aggrieved parties was huge.

Two basic types of lawsuits could have been filed; companies suing computer services firms and computer manufacturers for malfunctioning software, and customers of institutions suing those institutions. This could have created a chain of liability, that follows the supply chain within industry, and which ultimately ends up in the hands of the liability insurers of the computer companies. As a result, there could have been a large number of disputes with insurance companies, as the companies attempt to limit the scope of their policies and their liability.

Before the bug was scheduled to hit, Lloyd's of London estimated the total cost of the litigation would be $1 trillion [151]. Some firms estimated the costs of year 2000 compliance in their mandatory Securities and Exchange Commission reports. Extrapolating from these reports, one estimate of total engineering costs of fixing the problem was $50 billion [214].

Some suits were filed in advance of the bug's arrival, since the plaintiffs anticipated problem. For instance, the law firm of Milberg Weiss Bershad Hynes & Lerach, which specializes in class action shareholder suits against technology companies, filed, in California state court, two class actions, one against a maker of accounting software, on behalf of its small business customers, and one against a maker of anti-virus software, on behalf of consumers of its software [94].

In addition, Milberg Weiss sued Intuit, the maker of a popular personal finance program, because its software failed to handle the year 2000 properly in one context. Another year 2000 suit occurred when a grocery store sued the manufacturer of its cash register when it failed to properly process a credit card with an expiration date in the year 2000. Large law firms, anticipating a rash of business in the year 2000, assigned teams of lawyers to prepare for these cases. The cases would have been relatively simple, since the bug is easily described and documented; either the software functions or it doesn't (although the it would have been necessary to explore this in detail). Thus liability would be easy to establish, and the cases would have been governed by standard commercial law.

Because of the large and increasing number of computer systems, the potential number of defendants could have been large; basically every large institution in the country, including banks, airlines, hospitals and clinics, insurance companies, and government agencies. This situation would have differed from that concerning asbestos. There were a small number of asbestos manufacturers and a large number of similarly-situated plaintiffs, so that the cases could be consolidated into class actions and then taken into bankruptcy court as judgments were entered that bankrupted the asbestos manufacturers. In the case of the Y2K bug, there could have been a large number of defendants, including institutions and computer service plans, and there could have been diverse circumstances under which they have been injured (although all stemming from the bug). So, while some cases could be consolidated, there probably could have been many consolidations instead of just a few. And relatively few firms could have been forced into bankruptcy. Insurance policies could have covered many firms for Y2K liability, although this could have generated the disputes between companies and their insurers.

Much ink was spilled on the potential for litigation, as reflected in all the anticipatory thinking I summarize above, but the millennium bug failed to materialize in any substantial way, and therefore neither did the expected litigation. There were a few isolated incidents of system failures, but the vast majority of systems continued to function, due to the large amounts invested in retrofitting them. This is an example where the tort system may have contributed to the continuing functioning of the economy, in that the *fear* of torts gave strengthened the incentives for firms to retrofit their system.

4.11.4 Sea-Land Corporation

Sea-Land Corporation,[8] an F2000 company, is engaged in containerized shipping. Containerized shipping is a huge industry, accounting for most of international trade which is carried by sea.

Sea-Land appears as plaintiff 1615 times during the 1971-1991 period. Most of these cases–1252 of them, or 77.5 percent–are marine contract cases. There are also 148 ICC cases and 63 miscellaneous contract cases.

Many of Sea-Land's contract cases appear to be with companies that are likely to use containerized shipping, such as shoe companies, clothing companies, auto companies, chemical companies, import companies, food companies, etc. Many of these cases, if the published cases are any indication, are disputes over bills for shipping.

Sea-Land brings these cases fairly steadily over our period, with some fluctuation

[8]Information about Sea-Land was obtained from the company's web site at www.sealand.com; the company merged with a Danish company to form Maersk Sealand, but was independent during the 1971-91 period.

from year-to-year. Since interstate and international shipping is regulated by the federal government, these cases end up in federal court. Of the marine contract cases, Sea-Land won 314 of the 333 that were decided. Most of them ended up either being dismissed (presumably because they were settled by payment of disputed amounts, or in another way) or a default judgment or consent judgment was entered.

The volume of cases that Sea-Land is involved in is due to its status as the largest U.S.-flag marine containerized shipping company. In 1982, roughly at the midpoint of the 1971-1991 period, Sea-land reported revenues of $1.6 billion, over twice that of its nearest competitor. Since it is involved in large amounts of shipping, it forms many contracts, and some small proportion of these result in disputes. This is permanent litigation in the sense that one should expect a continuous flow of it as a result of everyday business activities.

Chapter 5

Some Trends in Labor and Employment Litigation

Chapters 6 through 11, which follow this one, discuss six varieties of federal litigation related to labor and employment. In this chapter, I provide a brief overview of some trends in this area.

Trends in caseloads in the labor and employment area have been varied. Not all forms of labor litigation have increased over this period, despite the large increase in employment. For instance, the number of cases brought under the Fair Labor Standards Act decreased from 2,149 in 1971 to 1,898 in 2001. OSH cases and Labor-Management Relations Act (LMRA) cases also decreased. Thus there is no necessary direct relation between the raw number of employees in the economy and the number of labor cases brought. Various processes intervene that are specific to each type of labor case.

However, employment discrimination suits have surged. Larger social trends are behind this; stated intolerance to discrimination has become a generally-accepted norm, even for conservatives (who use it to defend their opposition to set-asides), so discrimination suits have continued unabated (and have even increased markedly, as we will see). (Of course, if the norm was fully adopted, the suits wouldn't be necessary.)

However, the suit types other than discrimination suits, especially the OSH and LMRA cases, have been to some extent dependent on the trade union movement, which has been in decline, except for some growth in services and in the public sector. Thus we have seen a displacement of labor law, which was mainly administrative in its settlement of disputes, by employment law, which often settles disputes by litigation.

5.1 A Movement to Due Process in Employment?

There has been a substantial disagreement between the political left and the right over recent developments in employment law. The left has applauded any movement from an "employment-at-will" doctrine to a doctrine that requires just cause for discipline or dismissal. In addition, the left has generally promoted the advancement of workplace non-discrimination claims based on an expansive set of protected categories, including gender, race, age, disability, pregnancy, sexual orientation, religion, ethnicity, etc. The right complains that these protected categories are used as excuses by employees who have actually been dismissed or disciplined for just cause. Both sides are guilty of "argument by anecdote," wherein they select the most egregious or controversial cases in order to make their point, rather than looking at the overall population of cases. If, in fact, one does look at the population of cases, or at least the published ones, one finds–as I do in the chapter on employment discrimination cases–a situation that is much more complex and nuanced, since the cases that do come to judgment are often the ones that are the least clear, the others having been settled before judgment.

Weiler [238] makes some arguments for a movement away from "employment-at-will" to a doctrine based on just cause. He points out that employees often have substantial investments in their jobs that cannot be readily ported to another firm, much as long-term participants in a marriage have invested in the relationship. Society does not encourage the easy abandonment of marriages, and it should not do so in the case of employment relationships. Acceptance of the employment-at-will doctrine creates an imbalance of power in the workplace; the power to discharge at will gives the employer too much power, and this power is often abused.

The bureaucratic model of employment, with a career track for employees, and enhanced responsibility, salary, and benefits over the course of a career, has been adopted by many large modern corporations. Although this model is not as important as it was in, say, the 1950s and 1960s, it is still important. A job in an organization like that can be a valuable possession, and a possession not to be taken away lightly. If the organization wants the employee loyalty and productivity that can be gained by entering into such a long-term implicit contract, Weiler and others argue, it should have to pay by protecting the employee from arbitrary discharge. The employee cannot readily place herself in the same position in a new organization , unless she has substantial skills that increase her bargaining power. (However, Weiler does not believe in an absolute right to a job, at least not in a particular firm; companies still have the right to lay employees off under adverse economic circumstances, but workers can protect themselves from layoffs by acquiring seniority, a principle that Weiler says the courts should, and often do, respect.)

Ironically, as has been noted by observers on both the left and the right, one way to drastically reduce the number of employment lawsuits that are brought is to introduce unions into non-union workplaces. This is because union contracts typically handle, using administrative mechanisms, problems (such as alleged discrimination or unjust discharge) that, at a non-union workplace, can only be handled by the courts or an internal bureaucratic mechanism that is likely to be company-controlled.

The right doesn't want to bring unions back in, but some observers, such as Olson [166], nevertheless admit that unions can efficiently handle disputes. Of course, administrative mechanisms could be introduced without bringing in unions; for instance, joint worker-management committees mandated by law could handle problems. The right, and companies, generally want to replace litigation with the types of administrative procedures–mediation and arbitration–typically found in union contracts, but without having to bring unions back in.

It is undoubtedly the case that the adoption of a just-cause standard for discharge and discipline would create more causes of action for lawsuits, and therefore more lawsuits. However, this is would not necessarily be a worse situation than under employment-at-will. Instead, injustices will be addressed that were not addressed before, on one view. Litigation would not only address these injustices, but would also incentives to employers to avoid creating such injustices to begin with, on this view. The number of employment lawsuits may be large and growing, say supporters of employee rights, but it is still small compared to the millions of employees in the U.S., and is a small price to pay to guarantee employee rights. Moreover, even though commentators such as Olson [166] argue that the new workplace environment, oriented toward more due process, has put a chill on productivity, the U.S. has been in a boom period in the 1990s, despite the cost of employment lawsuits, and lawsuits in general. So the phenomenon has not been significant enough to threaten this boom.

A survey of human resources professionals done by HR Focus magazine in 1997 [89] found that the following eight areas were their main legal concerns: use of contingent/contract employees, sexual harassment, age discrimination, wage and hour concerns, protection of intellectual capital, mandatory arbitration, mental and emotional illnesses, and affirmative action. The concern over contingent employees stems from a case where workers which Microsoft claimed were independent contractors were found to be employees by a court and thereby entitled to benefits such as pensions and stock options that had been denied. Many firms make use of such contractors. This is a growing phenomenon and is therefore likely to generate more litigation.

5.2 Alternative Dispute Resolution in Employment

As has been the case in other areas of litigation (for example, franchisor-franchisee disputes, which we discuss in Chapter 16), large companies have been advocating the use of alternate dispute resolution mechanisms, such as mediation and arbitration, to solve employment disputes. While large companies have been successful in enforcing mandatory arbitration clauses in other areas (again, for example, franchising), with the help of the Federal Arbitration Act (FAA), they have been less successful in the area of employment law. This is for two main reasons. First of all, Congress wrote the FAA to apply to relationships between merchants, not between employer and employee. Secondly, there are multiple protections granted to employees by federal statute that avoided using a contract [32].

Because of these facts, it appears that the volume of litigation in employment may be reduced by ADR, but if it is, it will be often done on a voluntary basis. A General Accounting Office study found that almost all employers with 100 or more employees use some form of ADR, but the focus is on the use of mediation and informal counseling and negotiation, rather than arbitration [130]. Kuenzel argues that it is easier to get new employees to agree to mandatory ADR in case of a dispute, but it is more difficult to convince incumbent employees, and companies are reluctant to do so because of the effects on morale. The ability to get existing employees to agree to such a clause in their contract or employee manual is likely to be related to the unemployment rate, employees bargaining power relative to employers, and conditions in each industry.

A survey done by the Society for Human Resource Management of 616 corporate human resources specialists in 1997 found that most employers avoid the formal use of ADR, with only 14 percent of companies including an ADR clause in employment agreements. Only 25 percent of respondents felt that ADR reduced the number of lawsuits, with 55 percent saying that it had no effect. The ADR techniques used by the respondents employing ADR included an "open door" policy for complaints (54 percent), arbitration (45 percent), mediation (44 percent) and fact-finding (28 percent).

In some cases, judges have allowed mandatory arbitration clauses in employment contracts to stand. In Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991), the Supreme Court allowed a claim under the Age Discrimination in Employment Act

(ADEA) to be subjected to mandatory arbitration, as required by the employment contract in question. However, an employment contract or some of its terms can be held to be null and void if the employee can show that she was never made aware of the terms in question. For instance, in Prudential Ins. Co. Of America v. Lai, 42 F.3d 1299 (9th Cir.1994), the court found that since the plaintiffs were not given the opportunity to read the terms in question, they were not enforceable [126].

Chapter 6

Employment Discrimination Cases

6.1 Legal Background

Employment discrimination lawsuits can be brought under a variety of federal statutes. One of these is the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, sex, religion, and national origin in the provision of public accommodation (facilities open to the public) and employment. It established a federal agency, the Equal Employment Opportunities Commission (EEOC) to enforce the law with regard to employment. The 1964 law allowed for the remedies of back pay and reinstatement. A 1976 law amended it to allow for the possible award of attorney's fees to the prevailing party (thus adopting an optional "English Rule").[1]

In 1972, the law was extended to the federal government and to state and local governments. The case law invalidates any employment practice that has a "disparate impact" on a protected group (the first Supreme Court case that offered this analysis

[1]In Great Britain, the prevailing party pays the attorney's fees of both sides; in most U.S. jurisdications, parties pay their own attorneys.

was Griggs v. Duke Power Company, 401 US 424, 1971). In the 1980s, a more conservative Supreme Court imposed tighter requirements to demonstrate discrimination, requiring aggrieved employees to show that a particular, allegedly discriminatory, business practice did not have a legitimate purpose. Congress reacted to this by passing the Civil Rights Act of 1991. The 1991 law shifted the burden of proof from employee to employer, requiring the employer to show a legitimate business purpose for a practice that had a disparate impact on different groups. It also granted either party a right to a jury trial, and allowed for the possibility of compensatory damages, and punitive damages in the case of intentional and malicious discrimination. These compensatory damages went beyond the original remedies of back pay and reinstatement found in the 1964 Act, and included compensation for future pecuniary losses as well as non-pecuniary losses such as emotional suffering and pain. However, compensatory damages were capped depending on the size of the employer in terms of number of employers, with smaller employers having a lower cap. The 1991 law also extended all of these rights to those suing under the Americans with Disabilities Act (see below).

The Age Discrimination in Employment Act (ADEA), which was first enacted in 1967 and subsequently amended, prohibits age discrimination against those over forty. ADEA effectively banned mandatory retirement. The Americans with Disabilities Act (ADA), enacted in 1990, extended the same protections of the Civil Rights Act of 1964 (against discrimination in public accommodation and employment) to the disabled. This led immediately to litigation over who precisely qualified as disabled, and what accommodation needed to be made, and under in what circumstances.

Because the civil rights statutes prohibit sexual discrimination, litigation over sexual harassment has arisen, which has come to be defined, in the case law, as a form of such discrimination. This often involves an employer who tries to require submission to sexual demands in order for an employee to keep a job, get a raise, or be promoted. It can also involve an employer that makes repeated sexual advances after being rebuffed. It also applies to the creation of a "hostile work environment" through the creation of intolerable conditions in the workplace (for instance, constant sexist jokes or put-downs), although this latter version of sexual harassment is more controversial than the former two versions.

There are many state and local laws against discrimination which are similar in nature to the federal laws. In many cases, it is required, under the law, for an aggrieved employee to go first to a state or local authority.

The EEOC, which is charged with the enforcement of all these laws with respect to employment, has a complaint procedure. It investigates complaints. Complaints are required to be lodged within a fixed time period since the alleged discriminatory action. Some of the disputes brought to the EEOC are resolved through mediation. The EEOC investigates complaints, and makes a determination as to their merit. Whether the EEOC finds merit in a case or not, the complaining party can still bring a lawsuit in federal court. The EEOC also brings suit on behalf of the complainant for a proportion of the complaints that it found meritorious.

6.2 Some Underlying Factors Driving the Employment Discrimination Caseload

Acts of discrimination, perceived and real, are the basic cause and source of employment discrimination litigation. While there may have been some improvement in creating a bias-free workplace, such a workplace is still not the norm, at least as perceived by potential litigants. For instance, a survey of African-American professionals in American corporations done for *Fortune* magazine in 1998 found that 81 percent of respondents felt that discrimination is common, while only 13 percent felt that it was rare. Only 19 percent felt that business was being fair in promoting blacks [24]. The sociological literature also supports the thesis that there is continued discrimination; studies which send in pairs of similarly-qualified individuals to apply for jobs find a discriminatory effect [66]

In addition, a "glass ceiling" against the advancement of women continues to be perceived in many American companies. As we will see, this is the inspiration for many of the class action lawsuits brought by the more entrepreneurial employment law firms, and they are recently having some success in extracting settlements and injunctive relief. A survey of over 300 male CEOs and over 400 female executives indicated that men and women disagreed about why woman fail to move up in large numbers. The chief executives felt that there were not sufficient women in the pipeline to top management. The women, however, felt that they had been held back by misconceptions and stereotypes about them [146]. Almost half of them also felt that exclusion from corporate networks was an important factor limiting their advancement. One interesting fact about this survey was that both male CEOs and female executives agreed that there were structural problems in companies impeding the advancement of women. It is precisely these structural problems that can result in individual or class-action litigation.

In 1997, HR Focus Magazine surveyed employers about their concerns with respect to employment law. Sexual harassment is a concern due to several high-visibility cases, such as the Mitsubishi case and the Clarence Thomas-Anita Hill dispute. Age discrimination is a concern for companies that are downsizing and eliminating older workers, many with years of service, and because the baby-boom workforce is graying. Wage and hour complaints are a concern for companies that may be incorrectly classifying workers as exempt from overtime pay requirements. Intellectual property concerns stem from a workplace more strongly dependent on technology and workers that are less committed to a single firm Mandatory arbitration is of interest because employers want to reduce legal costs. Mental and emotional illnesses are a concern because courts have been finding that employers have to accommodate them in some cases. Affirmative action is a concern because of possible litigation if found in non-compliance. [89].

Siegelman and Donohue [206] found that there were counter-cyclical effects on rates of employment discrimination litigation; that is, that there are more lawsuits during downturns in the business cycle. They found that during such downturns, the plaintiffs win less frequently, there are more settlements, and the awards to successful plaintiffs are higher. This may because employers find it less expensive to indulge their "taste" for discrimination during slack periods in the labor market, since they have a wider choice of workers. In addition, during boom periods, workers can more easily get another job if they lose theirs for a discriminatory reason, so they are less likely to sue. The higher awards are due to the fact that spells of unemployment for individuals are longer during downturns, and they were studying cases during the period, prior to the enactment of the 1991 reforms, in which damage recovery was limited to back pay.

Siegelman [204] also points out that there is no clear relationship between the amounts of the awards given in successful discrimination lawsuits, and the number of lawsuits filed. Large awards may increase the number of lawsuits because plaintiffs expect a higher award when they sue, but it may also decrease the number between it acts as a disincentive to employers to engage in discriminatory behavior.

Two aspects of the social environment are relevant to employment discrimination cases, and their volume. The first is the political climate. This can be roughly divided into three periods; the activist period from the late 1960s to mid-to-late 1970s, the conservative period of the 1980s, in which affirmative action and quotas were first questioned, and the period of the 1990s, in which there was a renewed emphasis on equity. The 1990s did not represent a full return to the activist spirit of the 1960s and 1970s. There was a substantial shift in the attitudes of official Washington toward discrimination litigation in the 1980s, and the number cases leveled off and declined somewhat during this period.

The numbers of minorities and women in corporate employment can have two effects on the number of disputes. Obviously, the more employees there are, the more potential grievances or plaintiffs. In addition, there may be a "social learning" effect; if one person files a complaint, this may raise consciousness of conditions, or transform consciousness, and lead to further complaints. It is more difficult to be the first person to raise a complaint than the tenth. When a class action lawsuit was filed on behalf of a group of Amtrak employees and two proposed classes (of employees and employment applicants), the plaintiff attorney's reported that they received a large number of phone calls from additional aggrieved Amtrak employees. On the other hand, if there are too few minority and women employees, in comparison to the general population, this itself can be a source of complaints.

Wood [241] found that the political climate had a significant effect on the actions of the EEOC, confirming what is commonly believed by politicians and the public. He found that both the political philosophy of the president and that of Congress both had effects. While EEOC budgets increased throughout the period that he studied (1973-87), they increased more rapidly during the Carter years than during the Nixon-Ford period or the Reagan period, with periods of stagnation or slight decrease during the Reagan years (despite overall increase over the Reagan period). EEOC personnel rose through the Nixon-Ford and Carter periods (1972-80), then declined in the early Reagan period, and then stabilized (at the lowered value). Like other regulatory agencies, the EEOC was affected by the more radical appointees of the early Reagan period. The most significant of these was the appointment of Michael Connelly to become general counsel of the EEOC. Wood shows that Connelly managed to significantly reduce the number of lawsuits initiated by the EEOC. They picked up again after his departure. Clarence Thomas, who became EEOC chairman in 1983, chose to focus the attentions of the agency on individual complaints, rather than the earlier pattern of going after companies for patterns of discrimination, and marshaling statistical evidence. Reagan's followers saw this earlier pattern as social engineering. However, the number of lawsuits that were initiated by the agency rose significantly after Connelly's departure, and actually significantly surpassed the level of the end of the Carter period. In part, Wood argues, this was due to an adverse reaction by Congress and civil rights groups to what had happened under Connelly's tenure, and a reluctance by the Reagan administration to further antagonize these actors.

Wood points out that a measure of the EEOC's effectiveness is the number of charges that it resolves. He found that charge resolution performance declined in the Reagan period, perhaps in part because of the reduction in staff. Since fewer charges were resolved in a given period, the agency's backlog tended to increase.

In addition, the number of cases settled declined under Reagan, indicating the agency was less effective in getting some remedy for the complaining party. Also, the number of complaints rejected by the agency for "no cause" increased under Reagan, although such determinations had been increasing under Carter as well.

EEOC performance may affect the courts in two ways. Insofar as the EEOC takes leadership in filing lawsuits, it may embolden private parties to do so on their own. On the other lax, if EEOC enforcement is lax and its litigation activity is lackluster, this may also encourage private parties to take matters into their own hands by filing private lawsuits without the assistance of the EEOC.

The second aspect of the social environment affecting the volume of cases is the legal aspect. In this, new legislation was critical, especially the Civil Rights Restoration Act of 1991 and the Americans with Disabilities Act. In addition, interpretations by the courts can lead to changes in the amount of litigation filed. For instance, courts have recently been making a narrow reading of mental and emotional disability. This will adversely affect the number of lawsuits filed in this area, as plaintiffs discount their expected return on such lawsuits.

6.3 Overall Caseload Trends

Employment discrimination defendants are often large unionized companies, such as General Motors or AT&T, government or government-related entities such as Amtrak, the Postal Service, and the Veterans Administration, which have traditionally employed disproportionate numbers of blacks, or large retailers, such as Sears or Publix, which employ large numbers of women. However, these defendants win high percentages of their individual cases; they appear to fare less well in class actions, especially more recently, during which the firm of Saperstein Goldstein, which specializes in such cases, has succeeded in getting large settlements from retailers.

The large increase in the number of discrimination lawsuits cannot be accounted for simply by the increase in the size of the workforce. Over the period 1971 to 2001, the workforce increased from 71.3 million to 131.8 million, an increase of a factor of about 1.8. Over the same period, the number of discrimination lawsuits increased from 744 to 20,187, an increase of a factor of about 27. This increase is probably due partly to an expansion of the law and partly due to an increased consciousness of discrimination or willingness to make claims. It seems unlikely that discrimination itself increased over this period, although we have no direct evidence of this. We know that there were at least two significant expansions of the law in the latter part of this period; the passage of the Americans with Disabilities Act and the Civil Rights Act of 1991. These both contributed to an upsurge in the caseload.

There was sudden, sharp growth in the 1990s. The Civil Rights Act of 1991 allowed for punitive damages, damages for emotional distress, and jury trials (the 1964 act only allowed judges to decide verdicts). Some of the growth in the 1990s was also due to the passage, in 1990, of the Americans with Disabilities Act, which took effect in July 1992. It is impossible, with these data, which do not disaggregate the various types of employment discrimination, to determine which factor was predominant in the rise. In any case, employment discrimination lawsuits more than doubled, from 7,633 in 1991 to 20,187 in 2001, peaking at 22,683 in 1997, as shown in Figure 6.1. (The number of cases may have leveled off due to a decline in the win rate). The share of total litigation taken up by employment discrimination also more than doubled over this period (see Figure 6.2). Clearly, the American workplace had not become twice as discriminatory; instead, there had been a major shift in the incentive structure, to which the market for legal services appears to still be responding. However, a Supreme Court ruling in Landgraf v. USI Film Products Et Al., 511 U.S. 244 (1994), found that this law applied only prospectively rather than retroactively, reducing the litigation volumes. Attorneys view employment law as a growth area. In this, it is similar to franchising law, which follows another social trend, the move of many Americans into self-employment, and toward franchises as a means to self-employment that reduces risk.

The mean amount awarded (in inflation-adjusted 2001 dollars) was significantly higher in statistical year 1992, right after the Civil Rights of 1991 was passed and the Americans with Disabilities Act took effect, about $730,000, than it was in subsequent years, where it was in the $200,000 to $400,000 range. This may have been because those cases that showed the best promise for awarding of damages were filed first, by a plaintiff bar capable of prioritizing its work. The percentage of cases won by plaintiffs declined steadily over the period after passage of the 1991 Act, as shown in Figure 6.3, as one might expect as more marginal cases are brought (or, on a another interpretation, judges and juries become less sympathetic).

Two other explanations that might be given for the decline in the plaintiff win rate in the 1990s are as follows. First, a more conservative judiciary might be applying stricter standards to such cases. However this cannot be the case, since during most of the 1990s, Clinton was president, and presumably the judiciary was becoming more liberal, or at least moderate, after 12 years of Republican administrations. It is however possible, that a conservative Supreme Court and the Courts of Appeals were continuing to narrow the conditions under which lower courts could find for plaintiffs. According to Bender on Employment Discrimination, the Supreme Court continues to be active in the area, issuing decisions at the rate of at least several per year. Judges respond not only to their own ideology (which they do; see [195]), but also to the legal conditions in which they find themselves.

Second, a change in the share of cases that were adjudicated could have an effect on the plaintiff win rate. The share of employment discrimination cases that were adjudicated did fall from about 31 percent in statistical year 1990 to about 23 percent in statistical year 2001. However, one would expect that as a smaller percentage of the caseload is adjudicated, the cases that remain to be adjudicated would be the more competitive ones, so this would not fit in with a decline in the plaintiff win rate.

Experts generally believed, after the passage of the Civil Rights Act of 1991, that ambiguities in the law would lead to years of lawsuits [107]. Generally, the American system generates more uncertainty with regards to the outcome of litigation, than other, more bureaucratic systems, such as found in Europe [114]. Therefore, more litigation is generated, because cases that are uncertain in outcome are more likely to be litigated. This uncertainty is particularly acute in the case of new law, especially if it is not well-crafted; observers said that the 1991 law did not answer a number of important questions. Thus, most of the increase in litigation was probably due to the more favorable terms for plaintiffs, but some of the increase was probably due to uncertainty, especially in the early years as the legal regime was still being ironed out.

When lawyers fill out the civil cover sheet to determine the cause of federal jurisdiction, they have four choices: U.S. government plaintiff, U.S. government defendant, federal question, and diversity of citizenship. The instructions for the sheet specify that if a federal party is involved, it is coded as such, instead of one of the other two possibilities. Table 6.1 shows that the win rate for federal plaintiffs, 68.3 percent, is substantially higher than the win rate for plaintiffs when the jurisdiction is recorded as a federal question (and therefore only involves non-federal parties), only 14.4 percent. The EEOC fares much better than do private parties because it engages in a common prosecutorial practice, which one might call "creaming"; that is, it prosecutes in court only the most meritorious cases, among those it is unable to settle on terms it finds acceptable. The federal government does even better when it is recorded as the defendant; it loses only 10.8 percent of these cases. Here, the EEOC is typically not the involved party, but rather another part of the government, such as the Army.

Table 6.1 also shows that the win rate for plaintiffs is lower than that for all types of cases, uniformly across jurisdictions. However, this win rate is–of course–only among adjudicated cases; plaintiffs may be extracting favorable settlements that are not shown in the Administrative Office data. It is possible that plaintiffs are filing lawsuits despite a low win rate among adjudicated cases, because they are able to extract such settlements. Table 6.3 shows the median amounts demanded and received for employment discrimination cases. While the median amount demanded, about $309,000, is three times the amount ($103,000) demanded in all cases, the median amount received, $49,900, is only slightly higher than the median amount ($40,000) received among all cases. Thus the demand appears not to be based on a realistic expectation of what will be awarded and is likely part of the theatrics of litigation, or alternately, the plaintiff's estimate of what *should* be awarded.

Table 6.2, which contains win rates by disposition for discrimination cases, and for all cases, shows that most adjudicated cases (64.3 percent of them) end with a judgment that is a result of a motion before trial. Plaintiffs win very few of these cases (3.2 percent), indicating that most of these motions are probably motions to dismiss made by the defendant. Plaintiffs do considerably better when the disposition is default judgment (61.7 percent won) or consent judgment (88.2 percent won); however, these dispositions represent only 1.2 and 4.0 percent of all dispositions respectively (these dispositions appear much more frequently in the overall caseload). The win rates for these dispositions for discrimination cases are lower than those for all cases, 98.2 and 92.4 percent respectively. The results are intermediate for jury verdicts; plaintiffs win 40.6 percent of these, as opposed to 46.6 percent among all cases. They do considerably worse in court trials, winning only 19.9 percent of these. Jury verdicts represent 12.7 percent of dispositions in employment discrimination cases; court trials represent 9.8 of dispositions. Given this discrepancy between win rates between juries and judges, it is a bit of mystery as to why some plaintiff attorneys do not exercise the right to a jury trial in all cases; perhaps they are trying to expedite matters, or perhaps they are not fully aware of the discrepancy.

Figure 6.1: Employment Discrimination Cases, SY 1971-2001

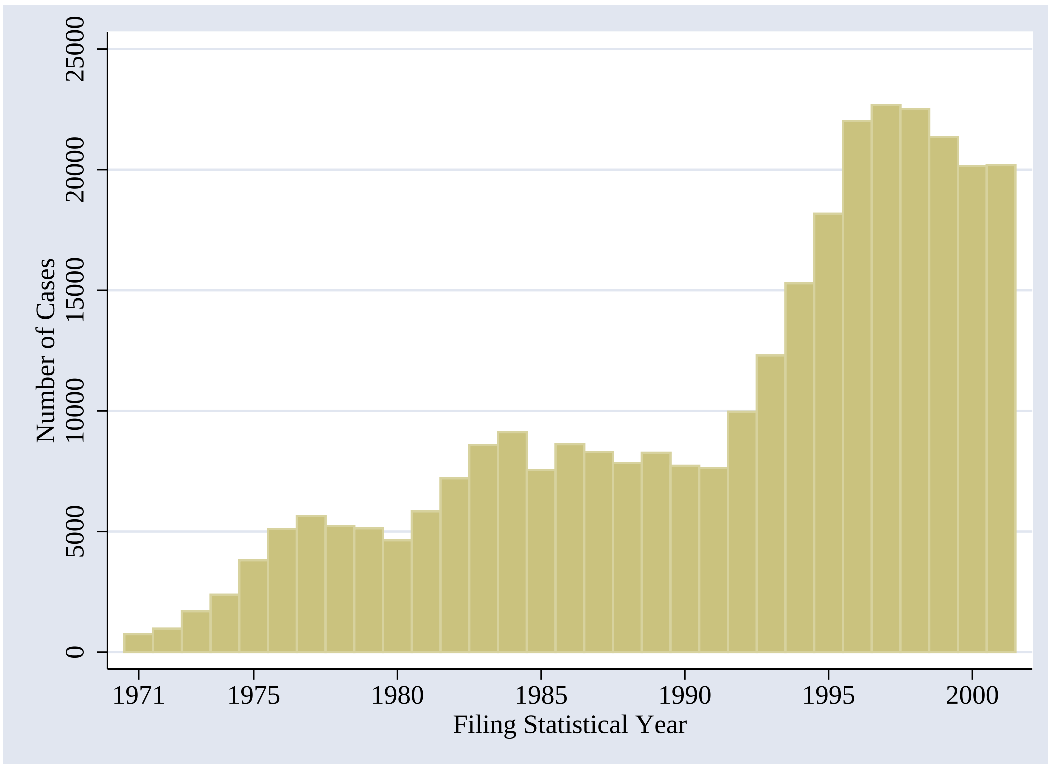


Table 6.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, Employment Discrimination Cases v. All Cases, Aggregate for Terminations in SY 1986-2001

	All Cases		Adjudicated Cases		Plaintiff Win Rate	
Jurisdiction	Discrim.	All	Discrim.	All	Discrim.	All
U.S. Govt. Plaintiff	3.3	13.6	4.0	27.4	68.3	90.4
U.S. Govt. Defendant	7.1	5.3	10.2	5.9	10.8	21.5
Federal Question	88.6	48.1	85.2	42.3	14.4	44.8
Diversity of Citizenship	1.0	33.1	0.5	24.4	9.5	61.6

Figure 6.2: Employment Discrimination Cases, Share of All Cases, SY 1971-2001

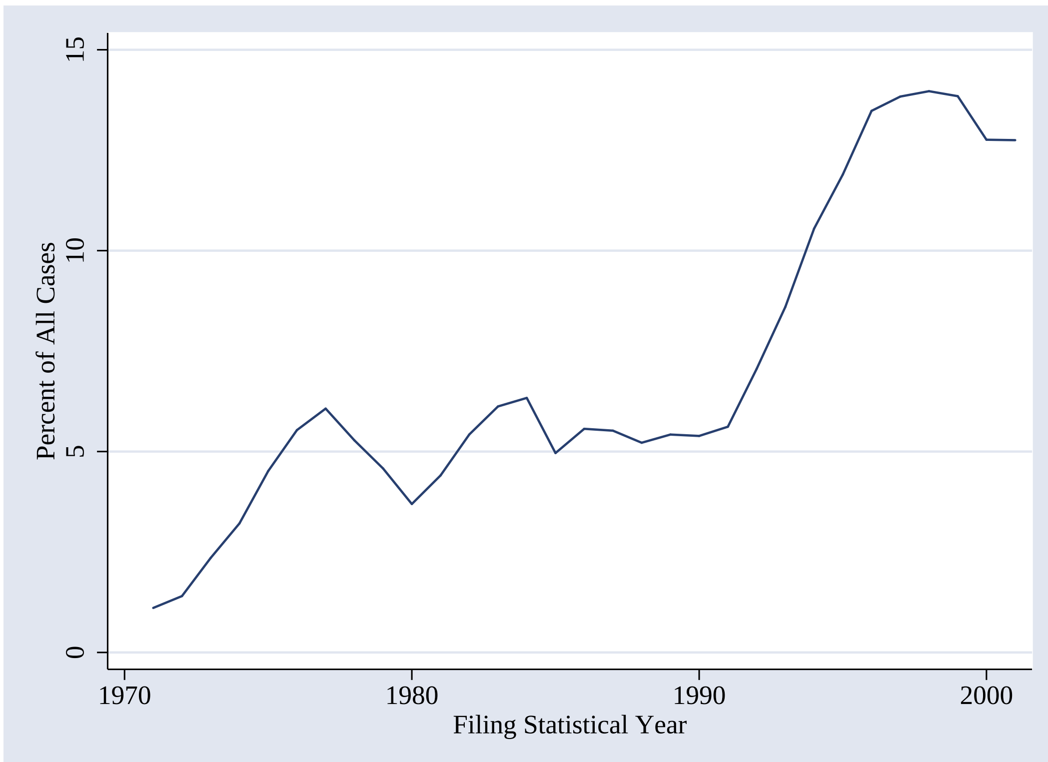


Figure 6.3: Employment Discrimination Cases, Plaintiff Win Rate, Terminations in SY 1979-2001

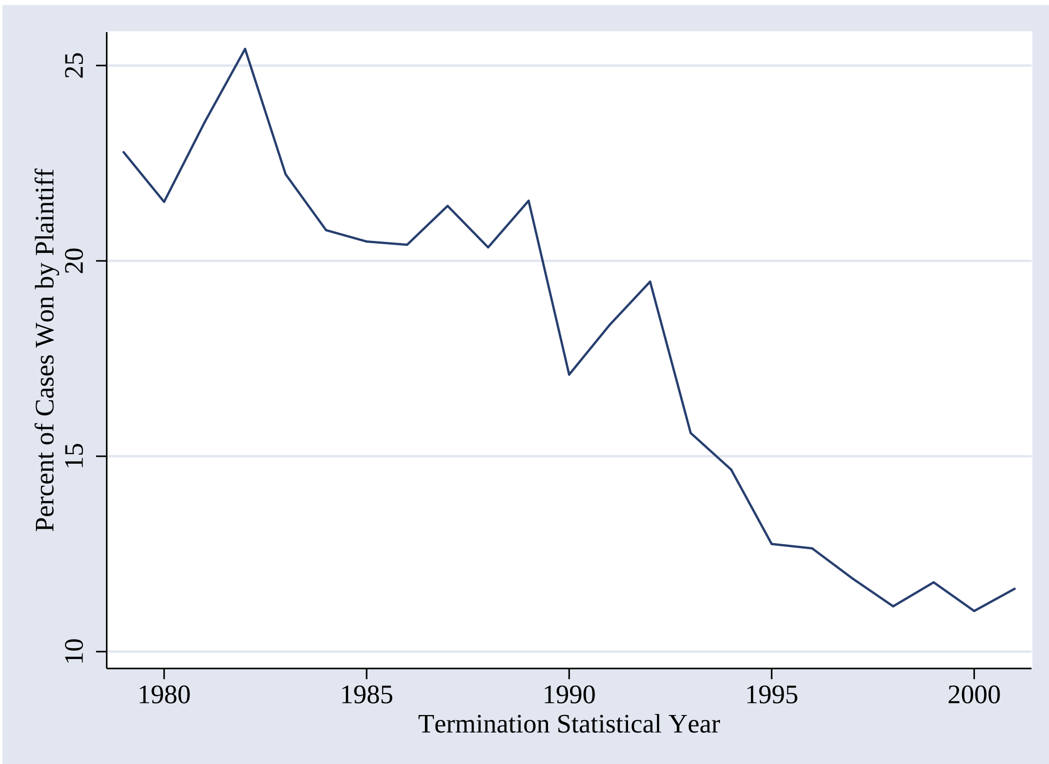


Table 6.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, Employment Discrimination Cases, Aggregate, Terminations, SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Discrim.	All	Discrim.	All
Default Judgment	61.7	98.2	1.2	25.8
Consent Judgment	88.2	92.4	4.0	10.2
Judgment on Motion Before Trial	3.2	28.0	64.3	42.3
Judgment on Jury Verdict	40.6	46.6	12.7	7.7
Judgment on Directed Verdict	8.7	27.9	1.4	0.7
Judgment on Court Trial	19.9	48.5	9.8	5.1
All Other Dispositions	15.2	47.9	6.6	8.1
All Dispositions Combined	14.6	56.8	100.0	100.0
Consent & Default	82.3	96.6	5.2	36.1
All but Consent & Default	10.9	34.4	94.8	63.9

Table 6.3: Median Amounts Demanded and Median Judgments Received for Employment Discrimination Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate

	Employment Discrim. Cases	All Cases
Sample Size	285890	3894150
Median Amount Demanded	309.0	103.0
Sample Size (Amount Demanded)	63717	1434123
Median Amount Awarded	49.9	40.0
Sample Size (Amount Awarded)	9262	404512

6.4 F2000 Companies as Employment Discrimination Defendants

F2000 companies were defendants in 28,745 cases in the database, during the 1971-1991 period. This represents about 7.3 percent of the 391,352 cases in which they were defendants. (They were plaintiffs in only 592 cases, insignificant in comparison.) We can see from Table 6.4 that among the top F2000 defendants in these cases are AT&T (a large employer of women and minorities, historically, especially women), the big three auto companies, and large retailers, such as Sears Roebuck. Safeway, and J.C. Penney. Unfortunately, the database does not disaggregate how many cases were brought by women, how many by blacks, etc. There has been an enormous increase in the number of such cases brought, a five-fold increase over the period 1971-91.

Looking at Table 6.4, we observe that virtually all of the top defendants, other than the large retailers, are unionized companies, either partly or mostly unionized. The top defendants are some of the larger companies in the F2000, but there are comparably large companies, such as large banks and insurance companies, which are substantially non-union and are not found among the top defendants. This leads one to hypothesize that the presence of unions creates awareness of individual rights which are more likely to be asserted in litigation. It also provides additional evidence that there is a substantial social role to the creation of litigation (or any other social activity); that is, that litigation does not simply arise between plaintiff and defendant, but reflects their overall social environment. People are more likely to file a lawsuit if they see their peers doing so and if there are institutions (e.g. unions) which support such action. One might think that there would be fewer lawsuits in a union environment given the availability of administrative mechanisms (e.g. union grievances and arbitration) to resolve problems. However, if these mechanisms do not resolve the problem to the employee's satisfaction, he or she may still file an EEOC complaint or a lawsuit.

Table 6.4: Top F2000 Employment Discrimination Defendants, SY 1971-1991

Company	Cases
AT&T	781
General Motors Corp.	694
Ford Motor Co	427
General Electric Co	427
Sears Roebuck & Co	390
United Parcel Service	364
AT&T Technologies Inc	338
Chrysler Corp	279
Safeway Stores Inc	269
PepsiCo Inc	262
USX Corp	252
Westinghouse Electric Corp	242
Southwestern Bell Corp	230
J.C. Penney	212
UAL Inc	212

Some of the top companies on the list were also the targets of class action litigation by the EEOC, notably AT&T (the top defendant, and before its breakup, the nation's largest private-sector employer), General Electric (number 4), and Sears Roebuck (number 5). Thus we may have a case here of state-led litigation, with private parties following up on state action (we also find this in the antitrust arena; see Chapter). A detailed look at policies of the EEOC, which we do not undertake here (but see [241]), would be required to determine why these targets were chosen. It may simply be that these are some of the best-known and most prominent companies in American life, and thus the EEOC is made most aware of conditions at these companies. These companies' union status (in the case of AT&T and General Electric) in that unions may be active in keeping the EEOC informed of potential problems, since they can act as a centralized mechanism for the gathering of complaints and tend to gather a good deal of knowledge about the advancement of women and minorities in the firm.

The presence of the large retailers, although they are non-union, may reflect both their large employment and the barriers that they have erected against the advancement of women and minorities, in their allegedly "traditional" cultures, which allegedly practice job segregation and tracking based on gender and race. Thus we have three candidate variables for the incidence of employment discrimination litigation: the total employment in the company, the union status of the company, and the "culture" of the company.

However, despite the large number of cases brought, the F2000 defendant has maintained a very high win rate. Of the 6,849 cases in which a judgment was recorded, the defendant won 5,400, or 78.8 percent. In only 704 of the judged cases, or slightly more than 10 percent, was any monetary amount awarded as part of a judgment. Most cases (64.9 percent) were dismissed. Of course, some of these cases may have been settled for a monetary amount. 3,208 cases were judged on a pretrial motion.

Depending on one's perspective, one can view this high win rate as a result of superior work by defendants' counsel, who are repeat-players in this arena, or unfair tactics by those same attorneys. Conservatives might argue that a large number of meritless cases are brought. Liberals may counter that conservative judges may be loath to find discrimination, or that the standards for proving discrimination are too stringent. Many people would agree that discrimination is often difficult to prove, since there are often alternative explanations for the employer's behavior.

In the sections that follow, we examine the cases of four major F2000 defendants: Sears Roebuck, AT&T, General Motors, and Amtrak. We also discuss the caseload of some F2000 retailers, other than Sears.

6.4.1 Sears Roebuck as Employment Discrimination Defendant

Sears Roebuck is the largest non-union company on the list of major F2000 employment discrimination defendants. It is one of the largest employers in the U.S., with large stores all around the country. It had 390 cases filed against it in our database during the 1971-1991. It won a slightly higher percentage of these than did the average F2000 defendant. The average F2000 defendant, as noted above, won 78.8 percent of the cases for which a judgment was recorded. Sears won 82 of the 100 cases for which a judgment was recorded, or 82 percent. Most cases (198 of them) were dismissed.

In 1973, the EEOC began investigating Sears for discriminating against women. In 1979, the EEOC filed suit against Sears, alleging a pattern of sex discrimination against women. At the time of the suit, Sears employed approximately 300,000 people at about 4,000 locations in the United States, including 920 retail stores. Specifically, the EEOC, while initially making broad claims, then narrowed its claims to sex discrimination against women in hiring and promotion for commission sales positions, and sex discrimination resulting in lower salaries for female managers. After a 10-month trial in Federal District Court in Illinois, which involved the presentation of extensive statistical evidence by expert witnesses, the court concluded, in an opinion written in 1986, that the EEOC did not prove its case against Sears. An interesting aspect of this case, which has captured much attention from feminist scholars, was that despite the statistical evidence presented by the EEOC that Sears had hired men to sell high-commission products typically bought by men such as heavy equipment, and women to sell low-commission products such as women's clothing, Sears offered the testimony of a historian that women had little interest in selling these products traditionally primarily bought and sold by men [31].

In EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988), the appeals court upheld the decision, and criticized the EEOC for not producing any actual, "flesh-and-blood" victims of discrimination and instead relying on statistical evidence. Employment lawyers who represent female plaintiffs were discouraged by the decision, saying that it would be much harder to prove cases if it is necessary to argue against gender stereotypes [134]. Under Reagan, and the leadership of future Supreme Court Justice Clarence Thomas, the EEOC moved away from bringing cases based on statistical evidence [4]. However, private law firms have moved to fill in the gap, as we will see, aided by changes in the law in 1991 that were favorable to plaintiffs.

Because of the extensive publicity afforded the EEOC case against Sears, one might think that the case (prior to its resolution) would have encouraged other private plaintiffs against Sears, much as, as we have seen, private plaintiffs have been encouraged by state action in other areas of the law such as antitrust. And, indeed, a larger proportion of the cases against Sears were brought in the late 1970s and early 1980s than were than the corresponding proportions for other F2000 firms. However, the relatively small number of cases against Sears in our period (it peaked at 32 cases in 1978 and again at that same number in 1982) makes it difficult to say anything definitive.

In recent years, Sears has developed an internal alternative dispute resolution mechanism within the company. This may have been an attempt to reduce the number of EEOC complaints and lawsuits filed against it. It has set up a toll-free number within the company for employees to discuss potential complaints confidentially. It encourages employees to take up problems with their manager or their manager's supervisor. Sears claims that this has reduced the number of ADA complaints made with the EEOC, and the number of lawsuits. Sears says that it also attempts to settle complaints early on in the process [216].

It is often asserted that employment law benefits employees higher up in the corporate hierarchy disproportionately. This may be the case, but there is ample evidence that employees not very high up in the hierarchy often bring suit. For instance, the plaintiffs in the ten most recent published cases against Sears (as of July 1998) that I found in Lexis/Nexis were: an automotive district business manager, an appliance salesperson, a sales clerk, a telephone sales representative, an automotive technician, a salesman, an automotive department employee, an automotive center manager, and a lawn and garden technician. Only the first plaintiff (the automotive district business manager) even approached the higher levels of management. However, the fact that lower level employees can bring suit may not do them much good. Sears won every one of these cases that had been judged, as of July 1998.

A good number of the published cases against Sears involve age discrimination, typically brought by a fired older employee or group of employees. For instance, in James v. Sears, Roebuck & Co., 21 F.3d 989 (10th Cir. 1994), the plaintiffs alleged that Sears used an employee buy-out plan to selectively force out older employees. A jury trial found damages for the plaintiffs ranging from about $54,000 to $84,000, and the appeals court upheld the jury's decision.

6.4.2 Other Retailers as Employment Discrimination Defendants

Retail stores, including general merchandise stores like Sears and K-Mart, and grocery stores like Safeway, are among the top defendants in part because of their policies toward women employees, keeping them primarily in the lower-paid jobs, while the top management jobs are dominated by men. Thus, they make good targets for class actions.

As we saw above, Sears was able to successfully defend itself by alleging that women were not interested in jobs dominated by men. A later class action suit, Stender v. Lucky Stores, 803 F. Supp. 259 (Dist. CA (N) 1992), however, brought by the well-known Oakland, Calif. law firm Saperstein, Goldstein, Demchak & Bailer against the California grocery store chain Lucky Stores resulted in a settlement of $107 million for its female employee plaintiffs [149]. Of this, $12 million went to the fees of Saperstein, Goldstein and $1.5 million to costs [6]. The rest went to the female plaintiffs. (The Lucky settlement occurred before the Supreme Court ruled that the Civil Rights Act of 1991 applied only prospectively, and the defendants were under the impression that it would apply retrospectively, having been advised so by a federal judge, so they based the calculation of the settlement on retroactive damages to all female employees in the past, even before 1991). Saperstein, Goldstein has made class actions for employment discrimination an ongoing business, mainly targeting retailers. In this, it has created a change in the legal environment through its use of an innovative strategy. It is also able to use the lessons from each case in the next one, becoming a "repeat-player." The large value of the settlements it has been able to extract is forcing American business to take a hard look at its hiring and promotion policies in order to avoid liability.

The firm made a name for itself suing California supermarkets, including Albertson's, Safeway, and Save Mart, which paid out $29.4, $7.5, and $6.5 million respectively [131]. Saperstein, Goldstein had also won large awards from State Farm insurance for sexual discrimination and from the Denny's and Shoney's restaurant chains for race discrimination. In 1994, Saperstein, Goldstein sued Home Depot in federal court in San Francisco on behalf of female employees. This case was settled in 1998 for $65 million. The firm also sued the Southern grocery chain Publix, the nation's eighth largest such chain, in Shores v. Publix Super Markets, 1997 U.S. Dist. LEXIS 16778 (Dist. FL (Middle)). This suit was settled in 1997 for $81.5 million. According to a press release from Saperstein, Goldstein, this was the largest class in history up to that time. As a result of the 1991 change in the law, and the withdrawal, under Reagan, of an active EEOC role in bringing class-action lawsuits, private law firms are acting as private attorneys-general on behalf of women in retail.

6.4.3 Amtrak as Employment Discrimination Defendant

As a quasi-public organization, Amtrak tends to be in the public spotlight more than many private companies, since it is associated with the federal government and presumably should be an exemplar of equal treatment of employees. Edelman [53] theorizes that companies that are close to the state, in that they are heavily regulated by the state or do a lot of government contracting, should be ahead of others in providing due process protections to their employees. This is because the state sets a normative example for the rest of society, and organizations close to the state are under more public scrutiny. Amtrak is a unionized company, which may make it more vulnerable to suits, because of employee mobilization through the union, or because the union provides legal resources to its members. In addition, the passenger railroad industry has historically been an employer of blacks, many of whom worked as railroad porters. In fact, the porters' union was prominent in early civil rights struggles.

Many blacks got positions in the railroad through connections with family or friends that worked there. As of 1997, 34.3 percent of Amtrak's employees were minorities [135], which is higher than the percentage of minorities in the general population (in 1997, blacks represented 12.7 percent of the U.S. population, and Hispanics 11.0 percent [226], for a total of 22.8 percent). As a result, employees of Amtrak may have a higher consciousness of civil rights than employees in other organizations. There may be a sense that black employees should be able to make it at Amtrak, given that they have been able to achieve a decent level of representation.

There have been a series of complaints against the company in recent years, some resulting in lawsuits. It has been alleged that Amtrak has not hired enough minorities and women, and that those that have been hired have not been allowed to advance advance. Amtrak management claims that it is not able to advance minority employees as fast as it would like, given the seniority rights of incumbent employees [135], and the overall environment of downsizing, given a Republican congress that wants to remove the federal subsidy from Amtrak, or to reduce it.

There have been a series of complaints against Amtrak from a variety of its offices. Sixteen discrimination complaints against Amtrak have been made in Boston in the last ten years. Six Los Angeles-based employees filed EEOC complaints. In Thornton v. Amtrak, 16 F. Supp. 2d 5 (Dist DC 1998), a group of fourteen Washington, D.C.-based current and past employees sued Amtrak, seeking $100 million in damages. One of their attorneys, Paul Sprenger, had experience suing another railroad, Burlington Northern, in the 1980s. He won a substantial damage suit in that case. The railroad industry has few minorities in senior management, while having numerous minority employees overall, and this makes it a target of such suits [183].

6.4.4 AT&T as Employment Discrimination Defendant

For many years, AT&T was the nation's largest employer. It has also been a substantial employer of women and minorities. It is also a unionized company, primarily through the Communications Workers of America (CWA). Despite, or perhaps because of, AT&T's prominence as an employer of women and minorities, AT&T was one of the first targets of class action litigation by the EEOC.

In 1970, the EEOC brought suit against AT&T, which at the time had a 55 percent female workforce. The government collected evidence that women were highly underrepresented in management. In addition, women were discouraged from seeking the higher-paying craft jobs. After long negotiations between the EEOC and AT&T, the company agreed to a consent decree, in 1972, in which it would set up an affirmative action program to attempt to redress these disparities. The program included a plan to move women and minorities into higher-paying positions. Part of the agreement included payments to employees to redress past inequities, and changes in the pay scale for different occupations within the company in order to reduce male/female inequities.

The decree was approved by a federal judge in Philadelphia. A "government coordinating committee" was set up to supervise the implementation of the decree. The decree made for sticky politics between AT&T, minority employees, and the CWA, since the CWA advocated the principle of seniority in filling positions. The company, in bargaining with the CWA, had always resisted the seniority principle in hiring, preferring to hire the best-qualified applicant (or at least use this as a justification for maintaining its discretion). In meeting the affirmative action goals set out by the consent decree, however, AT&T wanted to move to a "basically-qualified" standard, and the union agreed [138].

6.4.5 General Motors as Employment Discrimination Defendant

General Motors is the second most-common defendant in F2000 employment discrimination cases in the 1971-1991 period, with 694 cases. As we will also see in the labor-management cases against GM, the discrimination cases often have GM and the union on the same side as defendants, since both are enforcing an existing collective bargaining arrangement, which they have put in force together. For instance, in EEOC v. GMC, 1998 U.S. Dist. LEXIS 13132 (Dist. MO (E)), the plaintiffs-black supervisors for GM, two of whom were men, and the other a woman, alleged racial and sexual (in the case of the woman) harassment because a union committeeman allegedly harassed them and GM and the UAW local did not do enough to stop it.

In Woods v. GMAC, 1998 U.S. Dist. LEXIS 9419 (Dist. AL (S)). Woods claimed that she was discharged because of her race, sex, and medical disability; GMAC maintained that it discharged her because she did not return to work and did not demonstrate a medical reason for not doing so. Woods claimed that she suffered from depression and this impaired her ability to work.

The district court found that Woods had not made a timely complaint to the EEOC and had not demonstrated that she had a disability covered under the ADA, and granted summary judgment to the defendant. It is unclear why this case was brought as far as it was; the plaintiff appeared pro se, and may have been in part driven by emotion, or her mental condition. It is also possible that this was a case in which the plaintiff felt that she had not been treated fairly and was determined to drag GM into court even if she had been advised that she would be unlikely to win. Behavioral economics has found that the desire to enforce the norm of fairness, even at one's expense, is common.

6.5 Employment Discrimination Cases Viewed with the Adjacent-Word-Pair Frequency Method

The adjacent-word-pair-frequency method shows that plaintiffs in employment discrimination cases are overwhelmingly either individuals or the EEOC. In some cases, plaintiffs are state governments, city governments, or police unions. Of course, in a class-action, an individual is typically listed as the lead plaintiff.

Using the adjacent-word-pair frequency method on employment discrimination lawsuits terminated from 1971 to 2001, I found that these suits most frequently have defendant employers that are either parts of the government, hospitals, large utilities, transportation companies, grocery stores and other large retailers. Table 6.5 shows the top 80 word pairs. As one can see from the table, the top several plaintiffs are all government entities (aggregated together; the aggregation moves them higher up in the table than they would appear individually, except, probably, for the U.S. government). This is consistent with Edelman's observation [53] that government entities are more likely to be defendants in civil rights lawsuits because of a higher expectation of due process and equal treatment when dealing with the government, and is consonant with what we found when we examined the F2000 cases.

These government defendants are states, cities, counties, and parts of the federal government, such as the Postal Service and the Veterans' Administration. Schools and school boards tend to be also the targets of suits, as are universities, both public and private.

Hospital defendants are also very numerous. They appear in the database under their individual names; there is no single hospital that accounts for a significant number of cases, but the word "Children's" appears frequently, as does "St. Joseph's (items number 59 and 62, respectively, in Table 6.5); both words appear frequently in the names of hospitals.

Blacks are more likely to be veterans or in government employment. Both the armed forces and civilian government employment has historically been more open to them than many parts of the private sector. Ironically, while this allows for more opportunity for blacks, it also creates numerically more possibilities for discrimination, and may create a community of support that allows grievances to be expressed.

Table 6.5: Most Commonly Occurring Adjacent Word-Pairs in Defendant Strings, Employment Discrimination Lawsuits, 1971-2001

1	City of ...	28	Goodyear Tire	55	Greyhound Lines
2	U.S.	29	Safeway Stores	56	Consolidated Rail
3	State of ...	30	Commonwealth of ..	57	Taco Bell
4	Department of ...	31	Bank of ...	58	Kroger Company
5	Wal Mart	32	Roadway Express	59	St. Joseph's (Hospital)
6	Board of ...	33	Georgia Pacific	60	Shoney's
7	County of ...	34	State Farm	61	Bell Atlantic
8	UPS	35	Winn Dixie	62	Children's (often Hosp.)
9	University of ...	36	E. I. (Dupont)	63	Union Pacific
10	Sears Roebuck	37	Martin Marietta	64	Albertson's
11	AT&T	38	Pepsi Cola	65	Hygrade Food (Corp.)
12	Ford Motor	39	Montgomery Ward	66	Regents of ...
13	U.S. Postal (Svc)	40	Lockheed Martin	67	American Airlines
14	New York	41	Chrysler Corporation	68	Kansas City
15	Federal Express	42	Boeing Company	69	Wells Fargo ...
16	Town of ..	43	Chicago (often City)	70	Union Carbide
17	K Mart	44	Yellow Freight	71	Electronic Data (Sys.)
18	General Motors	45	Eastman Kodak	72	Denny's
19	General Electric	46	Anheuser Busch	73	Pitney Bowes
20	J. C. (Penney)	47	Pizza Hut	74	Village of ...
21	St. Louis	48	Frito Lay	75	El Paso
22	Blue Cross	49	Delta Airlines	76	Chase Manhattan
23	United Airlines	50	Trans World (Airlines)	77	Southwestern Bell
24	Coca-Cola	51	Merrill Lynch	78	Allstate Insurance
25	Los Angeles	52	US West	79	McDonald's
26	Home Depot	53	Bethlehem Steel	80	Southern Bell
27	McDonnell Douglas	54	Prudential Insurance		

Unions may also be a factor in the case of civilian government employment.

There are also significant numbers of cases in the transportation sector. Airlines, such as United Airlines, American Airlines, Trans World Airlines, Delta Airlines and delivery companies such United Parcel Service and Federal Express all appear frequently, as do Roadway Express and Yellow Freight, which are both large unionized trucking companies. There are also some railroads, such as Georgia Pacific, Consolidated Rail, and Union Pacific. The presence of unions in many of these companies (although not Federal Express) may create a community that allows grievances to be expressed, as in the case of government employment. Unions may also give the practical advantages of offering free or discounted legal representation.

There are also quite a number of government contractors as defendants. General Electric, General Dynamics, Boeing, McDonnell Douglas[2] and Lockheed Martin all appear frequently. The government may create a "social field" which extends into the contractors, which allows the cases to be brought. Often rules governing government workers are extended to the workers in government contractors. The unions may also have an effect here.

The big three auto companies, Ford, General Motors, and Chrysler (now Daimler Chrysler) all appear in the list, the first two quite near the top (number 12 and 18 respectively). While employment in the domestic auto industry has been declining recently, this is aggregate data for the entire 1971-2001 period. One would expect that these companies would continue to generate cases, if not at the same rate; they are unionized, and much of their operations are still in or around Detroit, which has

[2]McDonnell Douglas merged with Boeing in 1997 and no longer exists, but it existed in most of our period, which is why it appears on the list. Other companies on the list have also perished; for instance, Trans World Airlines (TWA), which was purchased by American Airlines in 2001.

a large African-American population. Besides selling to the consumer market, they are also government contractors.

The local and regional Bell phone companies, such as US West, Southern Bell, and Southwestern Bell, and AT&T are also well represented in the defendants. Again, this is consistent with Edelman's theory, as well as a theory which relies on the presence of unions.

Retail is one of the most significant sectors appearing in the list. Retail has very high levels of employment– Wal-Mart is now the top employer in the country. Women are over-represented in these sectors. There is also a significant level of union representation in the sector, especially in supermarkets (although not at Wal-Mart, which is virulently anti-union and has been moving into the grocery business). Also, as we have seen, there have been various high-visibility cases involving this sector (especially the Sears case), so social learning may play a role.

Some of these cases are due to the militant activity of the United Food and Commercial Workers (UFCW), as well, as we will see. The notable firms with cases in the retail sector shown in Table 6.5 are Wal-Mart, Sears Roebuck, K Mart, J.C. Penney, Home Depot, Montgomery Ward,[3] Safeway, Winn Dixie, Kroger, and Albertson's (the latter four are supermarket chains). In addition, the word "food" appears in the defendant name frequently; this is divided between large food companies (like Kraft and Tyson Foods) and many supermarkets. Again, this may be because large numbers of female employees ironically make for more opportunities for grievances.

There also are a number of chain restaurants on the list, including Pizza Hut, Taco Bell, Shoney's, and McDonald's. Like retail stores, restaurants have high levels

[3] Now defunct.

of employment and also employ large numbers of women and minorities. Unlike the supermarkets, they tend not to be unionized, which is probably one reason they appear less prominently on the list.

Food companies also appear in the list, such as Coca Cola, Pepsi Cola, Anheuser Busch, and Frito Lay. These may be akin to the cases in transportation (involving Teamsters), in that these companies employ a lot of union truckers in order to bring their products to countless outlets in the retail market.

There are also a number of companies from various industries which make the list probably mainly by virtue of their sheer size and the large number of people they employ. These companies include Blue Cross, Kodak, Merrill Lynch, Bethlehem Steel, Electronic Data Systems (EDS), Prudential Insurance. In some cases, the presence of a union may play a role (e.g. in the case of Bethlehem Steel).

6.6 Examining a Sample of Case Files

I examined a sample of 50 case files drawn from the Western District of Wisconsin filed under nature of suit number 442, "Civil Rights in Employment." This court, based in Madison, covers counties in the western half of the state. A variety of different statutes are covered under this case number, including statutes covering racial discrimination, sexual discrimination, age discrimination, and disability discrimination. (Harassment is a variety of discrimination). The cases in this sample were divided among causes of action under these statutes, with some cases alleging multiple causes of action.

From my examination of the case files, I believe that economic models of the decision to litigate, such as the Priest and Klein, with their emphasis on simple cash utility, apply badly to such cases. In such cases, the plaintiff is almost always angry, and has a desire to get compensation for the perceived discrimination not only for simple redress, as in a simple business transaction gone wrong, but also in order to punish the defendant and deter further similar behavior against others; that is, to enforce norms. Thus, if the grievance is *perceived* as valid, a lawsuit may be filed, pro se if necessary, regardless if it meets the legal definition of discrimination. This is why we see more pro se litigants in this category than, say, business contract cases.

This observation is borne out in my examination of the case files. While it is not always possible to determine from the case file who prevailed and/or what the nature of the settlement was, one gets the sense that in almost all cases the plaintiff has perceived a palpable injustice and has gone to court to redress this, often, it appears, without a good deal of regard to whether or not she will be able to prove her case. This is despite the required EEOC administrative screening of all of these cases. Or perhaps it is *because* of this screening; it may be that we see in court the relatively small number of particularly persistent litigants, who are determined to fight onward despite a EEOC determination against them.

As we have seen above, the EEOC has a much easier time proving its cases than do litigants on their own, because it has "creamed" the pool of cases coming to it. For instance, in the one EEOC-plaintiff case in my fifty-case sample, an age discrimination action, EEOC v. Village of Somerset (00-C-0584-S), the EEOC obtained a settlement for the individual in question of $37,000 in legal fees, $15,500 in back pay, $15,500 in liquidated damages, and $40,000 in medical expenses.

It is interesting that some litigants believe that they have due process rights when they are dismissed, even when they are "at will" employees. Since the various types of employment discrimination create a situation in which a large majority of the workforce potentially could sue for discrimination, this creates an atmosphere in which employees and employers become more aware of due process rights. Some liberal employment law scholars, such as Weiler[238], have argued that such rights should in fact exist, and that the law should move from an at-will doctrine to a doctrine requiring just-cause dismissal. For instance, in Kathleen Doe v. Barron County (00-C-402-S), the plaintiff, a social work supervisor, argued that she had been terminated without due process. The court found that she was an at-will employee and had no due process rights.

These case files also seem to confirm (albeit based on a very small sample) that government entities are more likely to be the targets of anti-discrimination actions; it seemed like there were more government-defendant cases than one would expect given levels of government employment. There were also a fair number of cases involving relatively high-ranking employees, although it was less clear if these types of employees are over-represented in the caseload, because there were also fair number of cases involving quite low-level employees. For instance, there was an age-discrimination case involving as plaintiffs a company vice-president and a supervisor, and another age-discrimination case involving an elementary school principal. But there was also a race discrimination case involving a Wal-Mart clerk, and an ADA case involving a teacher's aide. It is almost certain that the social class distribution of plaintiffs varies with respect to the four major types of alleged discrimination found in the files (age, sex, race, and disability). ADEA actions may have the strongest bias in favor of more-resourced, higher-social-class plaintiffs, because these types of cases often involve older white males who allege that they have been unfairly displaced by younger workers.

Discrimination is hard to prove; it occurs in many situations, only a subset of which it is possible to marshal the facts to prove a court case. After all, discrimination can occur as a mental act, with no records of it kept. For instance, one can imagine a situation in which a white employer refuses to hire a black applicant because the applicant sounds "too black;" that is, uses cadences from Black Southern English. Although the applicant's actual sentences are in Standard (Northern White) English, her accent and pronunciation are from Black Southern English. Suppose that this doesn't matter for job performance, as well, and that this applicant is as well (but not better) qualified than the applicant who is actually hired. And suppose further that this firm does not discriminate against all blacks; there are other blacks working there, but they have Northern White accents. But, in this case, the employer makes a conscious (but unstated) decision not to hire based on the applicant's speech pattern. Unless the applicant actually admits this, this case would be very difficult to prove in court, but discrimination is none the less occurring. The only way this case could be won is if a pattern could be established, but in order to do this, there would have had to be quite a few other qualified blacks with southern accents that would need to have been rejected as job applicants, and these people would need to be identified, located, and their evidence taken. Thus the playing field against any individual litigant is steep, unless there is some smoking gun of blatant discrimination. This is why, as we have seen, many discrimination cases have been brought as class actions; such actions have substantial economies of scale for the plaintiffs.

I think it is possible to construct many such hypothetical patterns of fact like the Black English one, all equally unable to prove. And of course, employers, or landlords, or other persons in positions of power, may discriminate in all sorts of small, subtle ways, each of which may not add up to much but overall may be significant. For instance, if there are two tenants living in a building, both young men, one black, one white, the (white) landlord may approach the white young man first with an opportunity to reduce the rent by doing maintenance in the building. The point of this is that more activated members of minority groups may perceive discrimination quite frequently.

One pro se case that I examined was Sheva L. Lightning v. Wal-Mart Stores, Inc. and Clinton Smith (00-C-0014-S). In this case, the plaintiff, a Wal mart employee, was demoted from a customer service manager to a cashier; as a result, she quit. Smith was her manager at Wal-Mart. She alleged in her complaint that "Wal-Mart is very racist." According to Wal-Mart, she had been demoted because of issues involving the improper handling of the cash register drawers, and because of an incident in which she had called in sick and then been seen with her kids at the county fair. In her defense, she said that her kids were "agitated" and needed to go out. Lightning's case had been found to lack merit by the EEOC, yet she had decided to sue anyway. She was probably angry, and most certainly felt she had been treated unfairly.

In Alexander v. Wisconsin Department of Health and Family Services et al (99-0-429-C), the plaintiff, an employment at a state-run center for the developmentally disabled, argued that he had been fired from his job because of his race. The judge felt that while the plaintiff had established that his coworkers were bigots, he had not established that he had been fired because of his race. The reason that the employer gave for his firing is that he had allegedly made a throat-slashing gesture to a coworker, which she reported. He denied making the gesture, saying she was lying, but was fired anyway. This case is a good example of how difficult discrimination cases can be to prove. It may be difficult to convince a plaintiff who believes that he has been discriminated against (and perhaps in fact has) that it will be impossible to prove his case.

The sexual discrimination cases seem widely divergent in merit. For instance, in Alla Wilson v. Board of Regents of the University of Wisconsin System and Gary Benson (99-C-0027-C), the court found that Benson, a tenured professor at the University of Wisconsin-Whitewater, had sexually harassed the plaintiff, an assistant professor. Benson, who had said that he "carried a firearm," was discharged. However, in Yasiri v. Board of Regents of University of Wisconsin System et al. (99-C-0051-C). the plaintiff, who had been teaching for some time at the University of Wisconsin-Platteville, and was the spouse of professor there, was not granted tenure. She claimed that this was because of sexual discrimination and discrimination on the basis of marital status; the court agreed with the defendant's assertion that she was reasonably denied tenure because she did not obtain a PhD in a timely manner.

There also were some hostile work environment cases. For instance, in Boucher v. Censtone Ready-Mix, Inc. (99-C-0042-C), the plaintiff claimed that employees at the company spoke in a sexual, offensive manner and made derogatory comments about women, leading to an environment which was so intolerable so as to lead her to quit.

There are at least as many age discrimination (ADEA) and ADA cases in the sample as there are cases alleging racial and sexual discrimination (and/or harassment). Of course, many cases allege more than one of these. (Discrimination on the basis of pregnancy, religion, or national origin are also possible.) The Administrative Office coding does not separate these, so that it is impossible to get a count of the relative numbers of each, without manual examination of the case files.

In my sample, there was one case alleging employment discrimination in hiring based on race and national origin (a pro se litigant from India). There was also one pregnancy discrimination case.

There were several ADA cases which dealt with issues like depression, chronic fatigue syndrome, fibromyaglia (which is akin to chronic fatigue), and other situations which may, in some cases, blur over onto mental illness (although mental illness is covered under the ADA) and get into more contested arenas. There were also cases involving such common medical conditions as bad backs and polycystic ovaries.

For instance, in Anderson v. Anchorbank (00-C-0346-S), the plaintiff, who suffered from chronic fatigue and depression which made it hard for her to get up in the morning, was not promoted to assistant vice president despite "excellent" performance evaluations. The bank disciplined Anderson for failure to meet start times, and then fired her. The court found that she had no redress from the ADA, and that the bank had worked to accommodate her.

In Christensen v. Eau Claire School District, the plaintiff, an asthmatic, was required to work outdoors in cold weather. The court found this was necessary for the job and that the plaintiff had no redress. It is difficult to access from this small sample the success rate of ADA or ADEA cases, especially since many of them are settled before judgment. Table 6.6[4] shows the balance in overall enforcement activity by the EEOC in 2002; I found all of these case types in this relatively small sample of cases (except that I found no case alleging religious discrimination), and this table indicates that each of them will appear in significant numbers in the overall caseload.

[4]The source of data for this table was the EEOC Web site, http://www.eeoc.gov, visited on February 21, 2004

Table 6.6: EEOC Charges Resolved and Benefits Received (outside Litigation) by Type of Complaint, Fiscal Year 2002

Type of Complaint	Charges Resolved	Benefits Received (Millions)
Age	18,673	$55.7
Disability	18,804	$55.0
Pregnancy	4,778	$10
Race	33,199	$81.1
Sexual Discrimination	29,088	$94.7
Sexual Harassment	15,792	$50.3
Religion	2,729	$4.3
National Origin	9,046	$21

Chapter 7

Labor-Management Relations Cases

7.1 Legal Background

Labor-Management cases arise under the laws governing relations between employers and unions, the labor laws. These laws include the National Labor Relations Act of 1935 (commonly known as the Wagner Act), the Norris-La Guardia Act of 1932, and the Labor-Management Relations Act of 1947 (best known as the Taft-Hartley Act). Most private-sector employers are covered by the NLRA.

Most of the relations between management and organized labor are not handled by the U.S. district courts. Instead, the National Labor Relations Board (NLRB), which is charged with administering the labor relations laws, handles complaints of "unfair labor practices" under the various acts. Unfair labor practices include such things as the refusal to bargain in "good faith" to reach a labor agreement between a recognized union and an employer. NLRB agents review complaints; if they are found to be valid, the union or employer is asked to remedy the situation. If such a voluntary remedy is refused, a case is brought before the Board's internal administrative law judges. There is a route of a appeal from there to the Board itself, and then to the U.S. Courts of Appeals. The administrative law judge or the Board can go district court to obtain enforcement of its orders, if they are not complied with.

Under some circumstances, when a complaint has been made to the NLRB and the Board feels that the situation is particularly egregious, it can go directly to a district court to obtain injunctive relief (which the Board is not empowered to give on its own).[1] This does not preclude the processing of the complaint through the usual administrative process; this goes on in due course. Thus there are two separate proceedings.

Private parties sometimes sue the NLRB in district court to get the Board to issue a complaint, or not issue a complaint. The district courts have no jurisdiction in this area; in order to change the Board's action on a complaint, one must go through the Board's own appeal process. However, cases are nevertheless filed, typically as a delaying tactic.

Section 301 of the Labor-Management Relations Act allows employers, unions, or employers to sue one another another in district court in disputes over alleged breaches of the union contract; such disputes are not normally handled by the NLRB. Under this same section, employees can also sue in district court if they feel that that the duty of fair representation (DFR) has been breached. Typically, both the employer and the union are the defendants in the latter type of cases. The charge often made is that the employer violated the union contract, harming the worker, and the union breached its duty to represent the worker's interest well in the ensuing grievance.

[1] Much of the information in this section is based on a telephone conversation with Howard Perlstein, an attorney at the National Labor Relations Board, on Nov. 19, 2003.

However, it is also possible for such situations to lead to a complaint to the NLRB, and if the Board finds merit in the complaint and decides to pursue it, it can be much less expensive for the employee, because the Board represents the employee's interest and she does not have to retain her own counsel.

Section 208 of the Taft-Hartley Act allows the President to direct the Attorney General to go to district court to impose a "cooling-off period" when there are actual or threatened strikes or lockouts that, in his judgment, create a national emergency. In such a situation, the President must first form a board to quickly advise him, and then go to court if he judges it appropriate to do so. In order for the Taft-Hartley injunction to issue, the judge must find that a substantial portion of an industry is affected and that the strike or lockout "would imperil the national health or safety."

Section 303 of Taft-Hartley allows persons who have been injured as the result of a unfair labor practice under NLRA to sue the entity that engaged in that practice in district court, and recover damages.

A secondary boycott is a boycott of a firm that is doing business with a firm with which a union is having a dispute. Much to the chagrin of the union movement (and over a Truman veto), Taft-Hartley defined these as unfair labor practices. The Board sometimes goes to district to get injunctive relief against such boycotts. "Hot cargo" agreements, in which an employer agrees not to buy goods or services from another employer engaged in a labor dispute, are also illegal, and can also be invalidated by temporary and permanent injunctions issued by a district court.

Recognitional picketing is picketing in order to obtain official recognition of a union as a bargaining representative. Recognitional picketing is illegal when there has been an election within one year or when there is already a recognized union.

When illegal recognitional picketing exists, the Board may sue in district court for injunctive relief.

As has been the case in other parts of the law, there has been a large movement toward the use of alternative dispute resolution in labor law, which is most likely reducing the caseload.

The AFL-CIO[2] and its member unions are, of course, some of the most active litigants. On the other side, the National Right-to-Work Legal Defense Foundation[3] has been active in bringing cases. For instance, it brings lawsuits on behalf of workers who want to continue to work during a strike, or on behalf of replacement workers.

7.2 The Labor-Management Caseload

Labor-management cases are one of the few major case types to not see growth from the 1970s to the 1990s,[4] although there was precipitous growth during the 1970s, followed by a steep decline starting in the early 1980s. The lack of growth is probably mostly attributable to the decline of organized labor in the private sector in roughly the same period, also starting in the early 1980s.[5] Figure 7.1 shows the number of labor-management cases filed by year from 1971 to 2001. Figure 7.2 shows the number of labor-management cases as a share of the entire caseload. It shows an even more precipitous decline, as other case types increased in number as labor-management cases declined. Union membership, in terms of raw numbers, has only declined slightly

[2] www.aflcio.org

[3] www.nrtw.org

[4] Among the case types we study herein, antitrust cases also saw a decline.

[5] Public sector unionization grew in the 1970s and remained stable, but labor relations of non-federal public employees (who comprise most public employees) is regulated by state law.

since 1971 (see Figure 7.5), but the labor movement has been increasingly on the defensive, and this defensiveness apparently is reflected in fewer labor-management relations cases. As shown in Figure 7.3, there was also a sharp decline in the early 1980s in the share of cases won by the plaintiff (and the number of adjudicated cases also fell over the period of the figure (1979-2001)). The win rate went from being favorable to the plaintiff (in the 60-65 percent range) to about 50 percent (the theoretical value from Priest and Klein [178]). This may reflect an increase in the conservatism of the courts.

Note that plaintiffs may be either labor or management, so plaintiff win rates do not reflect win rates of either group. In fact, as we will see in Section 7.4, there are substantial number of labor unions and companies among both the plaintiffs and the defendants.

Table 7.1 shows that the overwhelming number of labor-management relations cases terminated in statistical years 1986-2001 have a jurisdiction based on "federal question." Diversity of citizenship plays no role in jurisdiction here. The federal government does better than private plaintiffs; as plaintiff, it wins 75.5 percent of its cases, and as defendant, it loses only 13.5 percent. As with employment discrimination cases (see Section 6.3), the government is most likely engaging in "creaming"; that is, it only brings what it feels are the most favorable cases, which most likely include cases that it feels it can win against the small minority of intransigent defendants (since the vast majority of disputes are settled administratively). "Federal question" cases have a plaintiff win rate of 53.6 percent; these cases should involve only private parties, since labor law only involves private parties and federal regulators.

Table 7.2, which like Table 7.2 concerns cases terminated between statistical years

1986 and 2001 inclusive, shows that most labor-management cases (61.5 percent) are resolved with a motion before trial. This is higher than the 41.3 percent that are resolved this way among all cases. For this deposition, the plaintiff wins 28.9 percent of all labor-management cases, as opposed to 28 percent of all cases. Like other case types, labor-management cases have a very high win rate for default and consent judgments (97.8 and 90.8 percent respectively), but these dispositions only represent 26.2 of labor-management cases, as opposed to 36.1 percent in all cases. Court trials and jury verdicts are less common in labor-management cases than they are among all business cases, with court trials comprising 3.6 percent of all cases and jury verdicts only 1.2 percent, as opposed to 5.1 and 7.1 percent respectively in among all business cases. Labor management plaintiffs win a moderate number of these cases (46.2 and 44.1 percent respectively).

As shown in Table 7.3, the stakes in the median labor-management cases are significantly lower than in the median case drawn from the population of all business cases. The median amount demanded in a labor-management case was $43,000, and the median amount received (for those cases in which the plaintiff got an award) was $20,400. These figures were $103,000 and $40,000, respectively, for all cases. Often labor law cases involve injunctive rather than monetary relief. One reason why the awards are so low is that the law does not provide for strong remedies; for instance, improperly dismissed employees (e.g. those dismissed for union activity) can only get reinstatement and back pay. There is no provision for punitive damages.

Figure 7.1: Labor Management Relations Cases Filed, SY 1971-2001

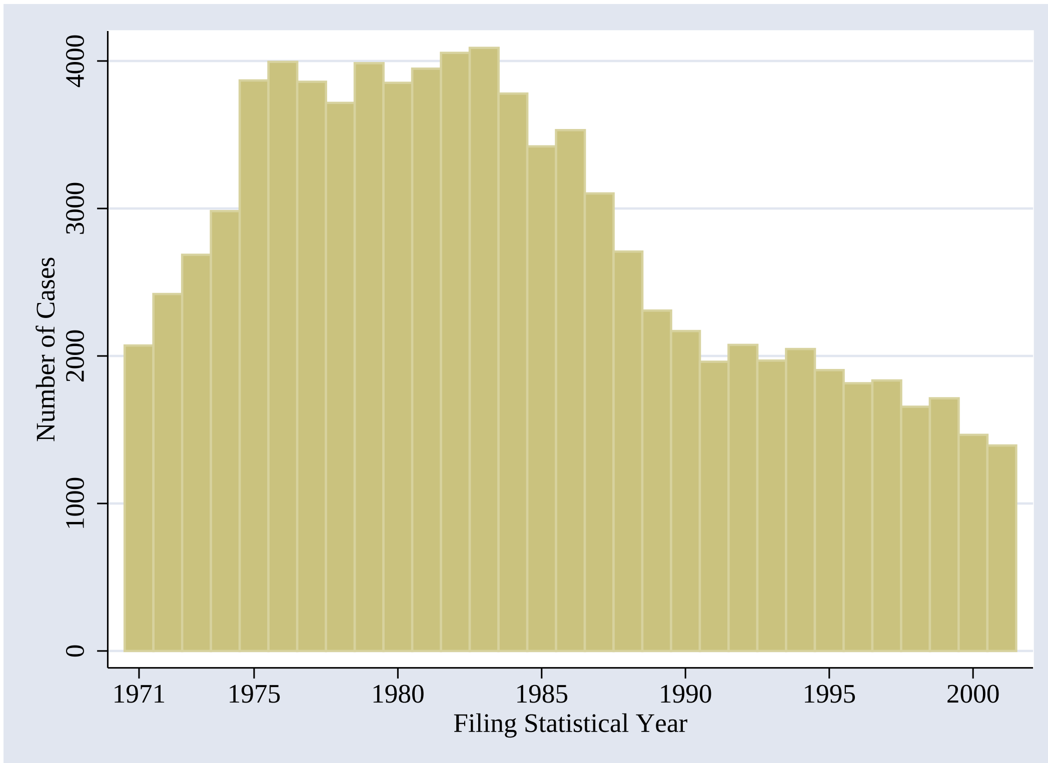


Table 7.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, Labor-Management Relations Cases, Aggregate, Terminations, SY 1986-2001

	% All Cases		%Adjudicated		%Plaintiff Won	
Jurisdiction	Lab.-Mgmt	All	Lab.-Mgmt	All	Lab.-Mgmt	All
U.S. Govt. Plaintiff	5.2	13.6	3.2	27.4	75.5	90.4
U.S. Govt. Defendant	1.2	5.3	1.3	5.9	13.5	21.5
Federal Question	93.5	48.1	95.5	42.3	53.6	44.8
Diversity	0.0	33.1	0.0	24.4	0.0	61.6

Figure 7.2: Labor Management Cases Filed as a Percentage of All Cases Filed, SY 1971-2001

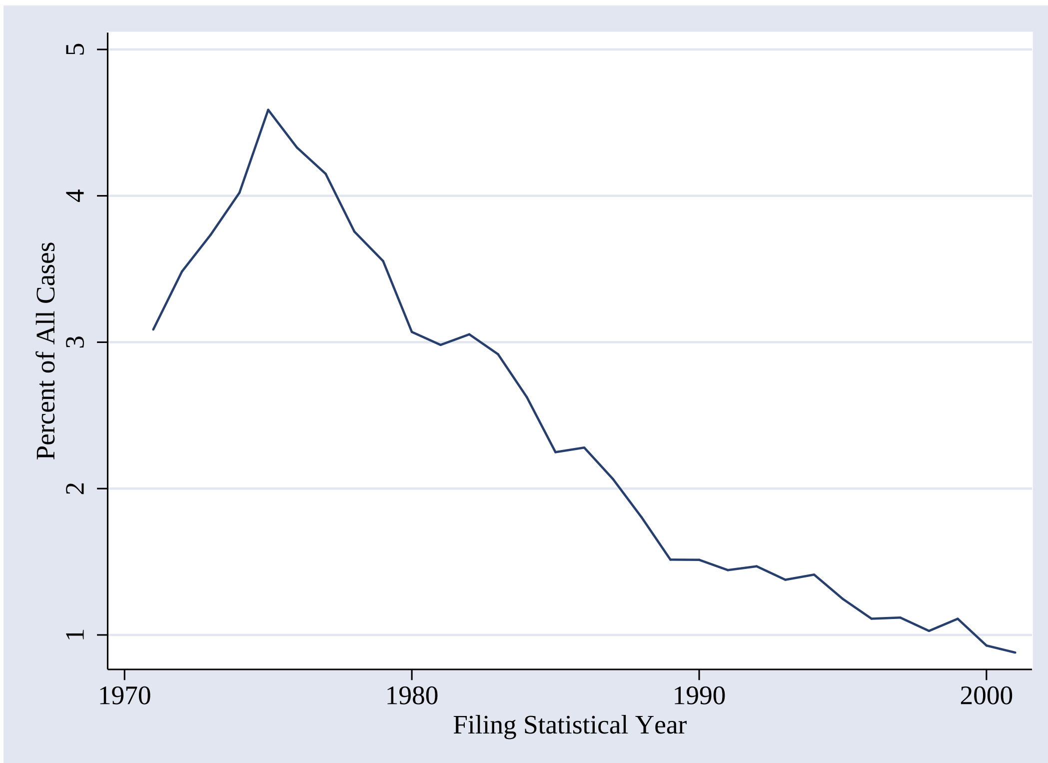


Figure 7.3: Percent of Adjudicated Labor-Management Cases Won by the Plaintiff, SY 1971-2001

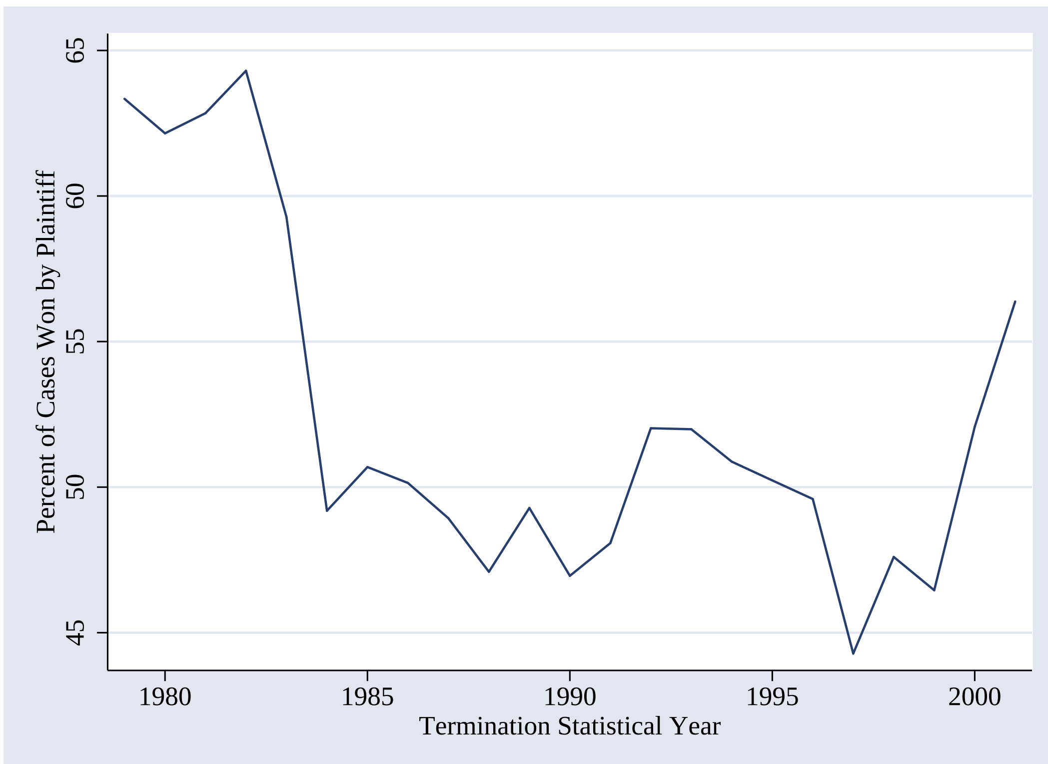


Table 7.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, Labor-Management Relations Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Lab.-Mgmt	All	Labor-Mgmt	All
Default Judgment	97.8	98.2	20.7	25.8
Consent Judgment	90.8	92.4	5.5	10.2
Judgment on Motion Before Trial	28.9	28.0	61.5	42.3
Judgment on Jury Verdict	46.2	46.6	1.2	7.7
Judgment on Directed Verdict	17.9	27.9	0.4	0.7
Judgment on Court Trial	44.1	48.5	3.6	5.1
All Other Dispositions	58.9	47.9	7.2	8.1
All Dispositions Combined	49.4	56.8	100.0	100.0
Consent & Default	96.3	96.6	26.2	36.1
All but Consent & Default	32.8	34.4	73.8	63.9

Table 7.3: Median Amounts Demanded and Median Judgments Received for Labor-Management Relations Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate

	Lab.-Mgmt Relations Cases	All Cases
Sample Size	85822	3894150
Median Amount Demanded	43.0	103.0
Sample Size (Amount Demanded)	14474	1434123
Median Amount Awarded	20.4	40.0
Sample Size (Amount Awarded)	8511	404512

7.3 F2000 Labor-Management Cases

There were 7,599 cases with a F2000 defendant under the labor laws during the 1971-1991 period, and 3,011 cases with a F2000 plaintiff.

Through examination of published cases, we find that that many labor-management cases with a F2000 plaintiff have stemmed from industrial downsizing. We also find that many cases are brought by activist unions, most notably the United Food and Commercial Workers (UFCW). Some cases are brought in reaction to union tactics; we see this most pointedly in the coal industry, where we see coal companies suing for injunctive relief against wildcat strikes staged by workers or by the United Mine Workers. Many published labor-management cases actually have the employee as plaintiff and both company and union as defendant, in that the employee has exhausted his or her administrative remedies through the union contract and is continuing to pursue his or her case, and is now accusing both company and union of unfair or illegal treatment, under the duty-of-fair-representation (DFR) requirement of the law (described above).

As Figures 7.4 and 7.5 show, the F2000 caseload rose in the early to mid-1970s, stabilized for a few years, rose again in the early to mid 1980s, and then fell again in the late eighties, falling back to the value of the early 1970s. Looking at all cases, we see that the caseload rose sharply from 1971 to 1975 and remained at a high level until about 1983, when the caseload fell just as sharply, ultimately to a level slightly lower than it had been at the beginning of the period. We will see that at least some of the high level of activity in the late 1970s and 1980s was due to industrial downsizing and the disputes that arose from it. Ultimately, as this downsizing slowed, and therefore there were fewer workers left to bring such cases, these cases diminished.

Figure 7.4: All LMRA Cases, 1971-2001, and F2000 LMRA Cases, SY 1971-1991.

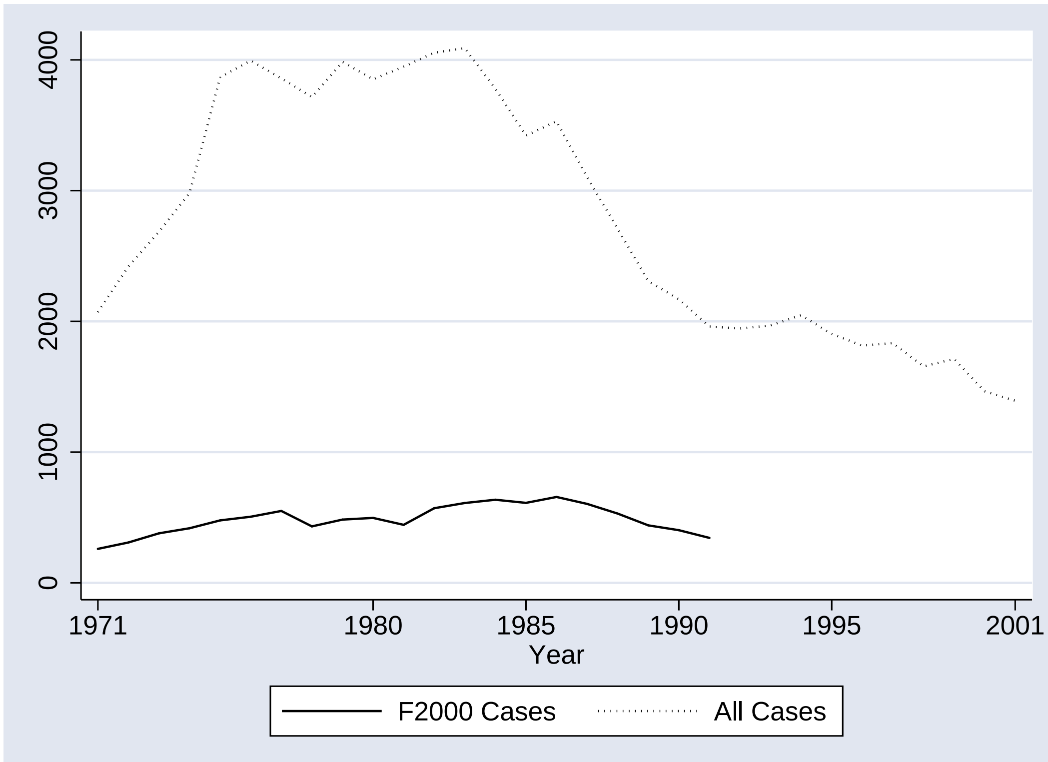


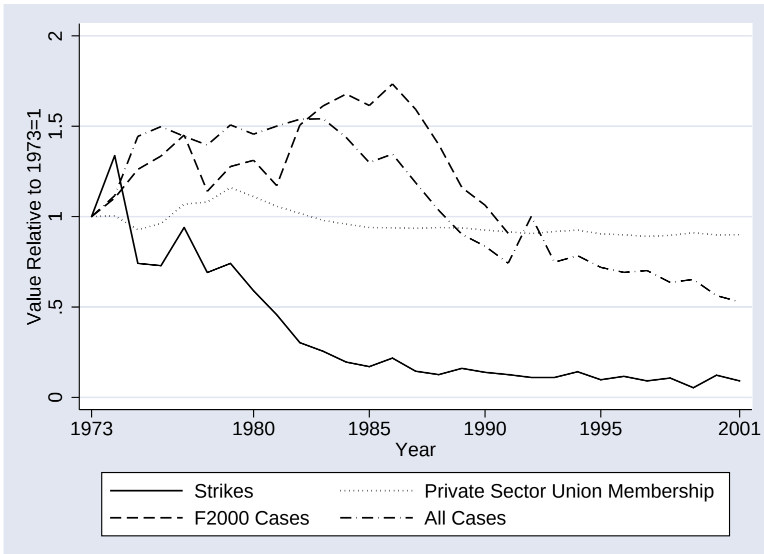
Figure 7.5 shows the relationship (if any) between union membership, strikes (involving more than 1000 workers and lasting more than one day), and filings among all business cases and in the F2000. All variables have been re-scaled so that 1973=1. Private sector union membership, which is the relevant variable with respect to LMRA cases, has declined since the late 1970s. The other three variables have also declined. President Reagan's firing of the striking air traffic controllers in 1981 had a significant effect on the number of strikes, in the opinion of a number of observers, as well as people in the labor movement. This is an example of a "symbolic effect;" Reagan's

action was symbolic, in that it indicated to everyone that, as he saw it, the rules had changed (and thus it gave the green light to business leaders to behave in a similar fashion). It was symbolic because the number of actual workers affected relative to the economy as a whole was small; but Reagan was using this group of workers to indicate to employers and unions that it was fine with the government if the balance of power in strikes and other political struggles shifted toward the employer. According to the AFL-CIO, 10,000 workers are illegally fired each year for becoming involved in union organizing drives; the best that these workers can expect under current law is back pay and reinstatement, and these may not be enough to cover legal fees, especially because such a discriminatory discharge can be hard to prove, because the employer can usually come up with some other pretext for the firing.

This is one kind of change in the political environment that can lead to a change in the flow of cases coming to court. We will see that this signal from Reagan also caused a change in the behavior of some unions, notably the United Food and Commercial Workers, which led to an increase in cases elsewhere.

Clearly, as one can see from the figure, there has been a precipitous decline in the number of strikes, starting in the early 1980s.The labor-management caseload has declined as well. The labor-management caseload for all business cases started to decline somewhat later than the strikes, after 1983. The caseload for the F2000 started to decline after 1986. This may have been due to the temporary downsizing in manufacturing. The overall decline in both cases and strikes (both of which may be seen as forms of militancy) may be due to the weakened state of organized labor in a period of internationalization and attack from the business class. We would expect to see what activity is left in these forms of militancy concentrated in the service

Figure 7.5: Union Membership, Strikes Involving Over 1000 Workers, and All Labor-Management Suits (1973-2001) and with F2000 Parties (1973-1991) (1973=1)



and public sectors, which are the sources of union growth and are least vulnerable to internationalization. Of course, public sector union militancy will not show up in LMRA litigation.

The top F2000 plaintiffs are given in Table 7.4, and the top F2000 defendants in Table 7.5. The top plaintiffs include mining and coal companies (Peabody Holding, AMAX, and Westmoreland Coal), steel companies (USX, Armco Steel, and Republic Steel) and other miscellaneous employers with unions. The top defendants include the big three auto companies (GM, Ford, and Chrysler), grocery stores (Kroger, A&P, and Safeway), military contractors (Lockheed and General Dynamics), and trucking companies (United Parcel Service and Roadway Services). These clusters of defendants are the employers whose employees are represented by particular large international unions, such as the United Auto Workers in the case of the automobile industry and the Teamsters in the case of the trucking industry.

Table 7.4: Top F2000 Plaintiffs in Labor-Management Litigation, SY 1971-91

Company	Cases
Peabody Holding Co Inc	194
USX Corp	176
Armco Steel Corp	69
Westmoreland Coal Co	68
Eastern Gas and Fuel Associates	55
Amax Inc	50
United Parcel Service	36
Safeway Stores Inc	33
Sea-Land Corp	32
Allied Corp	30
Coca-Cola Co	26
John Hancock Mutual Life Ins Co	25
Halliburton Co	23
Westinghouse Electric Corp	23
Republic Steel Corp	22

These particular international unions may pursue litigation as a strategy to advance their interests as opposed to, or in combination with, other strategies such as slowdowns, strikes, and boycotts. In addition, high levels of conflict may emerge in these particular industries because of industrial restructuring. For instance, steel companies engaged in massive downsizing during the late 1970s and 1980s, which may have led to a large number of labor-management lawsuits. Coal companies also were substantially downsized, due to the introduction of new labor-saving machinery. The auto industry also went through quite a battering for a time, affected by high gas prices and imports. It continues to restructure, moving some operations overseas. Grocery stores, as we will see below, often go through changes of ownership

Table 7.5: Top F2000 Defendants in Labor-Management Litigation, SY 1971-1991

Company	Cases
Ford Motor Co	225
Safeway Stores	199
Chrysler Corp	150
General Electric Co	143
Kroger Co	119
AT&T Technologies	113
Greyhound Corp	98
USX Corp	91
Westinghouse Electric Corp	82
ITT Corp	81
Roadway Services Inc	73
Pacific Telesis Group	71
General Dynamics Corp	70
Great Atlantic and Pacific Tea Co	69
Lockheed Aircraft Corp	65

and other restructuring (for example, closing some stores, opening others) that may disrupt ordinary labor-management relations and lead to litigation.

7.3.1 Auto Industry Defendants in Labor-Management Cases: The Case of General Motors

I will use General Motors as an example of one of the auto industry defendants. The following examination of the published cases against GM reveals the following: that GM often is allied with its union, the United Auto Workers, as defendants against an individual employee or group of employees that often are aggrieved with both the company and the union, that GM (and often the UAW) usually wins its cases, and that the cases fall into a number of categories, which will be enumerated below.

Because duty-of-fair-representation (DFR) cases are common among LMRA cases, there seem to be as many cases, if not more, where GM and the UAW are on the same side of the lawsuit (as defendants), rather than GM and UAW suing one another. When they are on the same side, GM and the UAW may win their cases because they are, in Galanter's terms, "repeat-players," because they have more resources than the plaintiffs typically have, because they are bureaucracies that typically follow their own elaborate rules in the human resources and labor-management areas, and judges may defer to their procedures, evincing a bias in favor of established institutions as opposed to the views of the individual grievant/litigant. In addition, since the labor laws require complaints to be made in a timely manner, many of the complaints are dismissed on the basis that they did not meet the statute of limitations.

An examination of the plaintiffs in the labor-management relations cases against the automakers reveals that the vast majority of them are individuals, rather than the UAW or its locals. Many of the 733 cases against the automakers were dismissed: 226 of them. Of the 246 cases that were judged, the defendant won an astonishing 227 of them, or 92.3 percent. The caseload was higher in the 1980s than it was in the 1970s, perhaps because of all the plant closings in the late 1970s and 1980s.

The low win rates of the defendants makes one question the motivation of the attorneys that brought these cases. It is possible to understand why the plaintiffs wanted to sue; perhaps many of them were angry. The attorneys' behavior is harder to understand. Perhaps they threaten to sue to extract a settlement, and many of these cases we don't see because they are settled before filing. Perhaps they bring lawsuits they are unlikely to win because they need to have a credible threat for the large majority of suits that they do settle. And perhaps the small proportion of cases that they win helps finance all the others.

In addition, we see that many of these cases result from a breakdown of normal social relations, such as a firing or a plant closing. At that point, the people who have lost out have nothing more to lose (except the cost of paying a lawyer, but they are often willing to pay this cost in order to get procedural [224] or substantive justice). In this sense, many of these cases are similar to those that occur between a manufacturer and a dealer who has been dropped.

There has been a continuous stream of closings of auto plants in the U.S. with the movement of production to locations, such as Mexico, Latin America, and parts of Asia, where labor is cheaper, and unions are often weak or absent. There has been a sharp decline in manufacturing employment in the U.S. in the last twenty-five years. The number of workers in manufacturing was 14.3 million in January 2004, off 5.2 million from the historical peak of 1979, and back to the same level it was in 1950 [40]. In addition, there has been a flight of manufacturing employment *within* the U.S. from metropolitan regions in the North to the South and to rural areas, partly as a strategy of union avoidance, and partly in seeking lower wages (these factors are related). Thus the union share in manufacturing has declined more rapidly than employment.

This has meant that millions of people have lost their jobs. There has been a massive dislocation in the lives of many blue-collar factory workers, especially union members, and to a series of cases brought by aggrieved unions and workers. As in the cases of franchise terminations I discuss elsewhere, Macaulay's theory fits; lawsuits ensue mainly when there is a complete breakdown of continuing relations. A plant-closing clearly qualifies as such a breakdown, even when the workers are offered jobs at other factories or early retirement or other buy-out packages.

Since this deindustrialization represents a structural shift in the U.S. economy, one can expect a steady stream of labor-management cases around downsizing. One would expect this to be a feature of the caseload over this period, since such cases are the result of a structural feature of the economy (in this case, declining manufacturing) which generates such cases regularly, as plants close. However, since the number of plants closing will itself decline over time, one should expect that the number of lawsuits around such closings would also decline. In addition, one would also expect that lawsuits would decline as companies figure out ways to close plants with a reduced risk of lawsuits.[6]

In Alteri v. GMC, 116 F.3d 465 (2nd Cir. 1997), a plant-closing case from Syracuse, New York, 31 hourly workers sued both GM and their union, arguing that GM, in closing the plant, had violated the collective bargaining agreement, and the union had breached its duty of fair representation. Following an agreement between GM and the union local, the plaintiffs in question had all been offered alternate employment at a plant over 50 miles from the plant in Syracuse where they had previously worked (and which was closing). The district court found that the action was not commenced within the six-month statute of limitations on such complaints, and the appeals court affirmed.

Employees sometimes sue if they feel that an agreement between the union and the company is not being administered fairly. In one case, GM and the UAW had

[6]Labor-management lawsuits are not the only kind of lawsuits that can stem from plant closings. States and municipalities can require any companies closing plants to remove all environmental and health hazards from the plant site; this is referred to as "brownfield" cleanup. For instance, when GM closed a large plant in North Tarrytown, New York, the village passed a ordinance requiring that it clean up its site, and GM initially challenged the ordinance in federal court, but dropped the challenge [25].

negotiated an agreement which created a "Jobs Bank." This allowed laid-off GM workers to do community service and volunteer work and be paid the rate that they had been receiving before the lay-off. In this case, Herrera v. UAW, 858 F. Supp. 1529 (Dist. KS 1994), the plaintiffs maintained that positions in the Jobs Bank were being given to low-seniority persons, which reduced the availability of slots for higher-seniority persons. The situation was complex, but the court ruled for GM and the union, and the decision was upheld. In a similar case, Allore v. GM, 60 F.3d 828 (6th Cir. 1995), Allore protested his exclusion from an employee buy-out program created by GM during a downsizing. Again, the specific facts were complex, but summary judgment was awarded to GM and upheld under appeal.

Another downsizing case involved skilled model makers at a Frigidaire plant in Dayton, Ohio. GM had decided in 1979 to sell its Frigidaire division and to convert two former Frigidaire Dayton plants into Chevrolet plants. The model makers were promised jobs in the Chevrolet plant with uninterrupted seniority, but since the new plant did not need models, they were moved into a different skilled-trade classification. But they were not given seniority, so they sued GM and the UAW. The case was Association of Frigidaire Model Makers v. GM, 51 F.3d 271, (6th Cir. 1995). At one point, a jury found that the defendants was liable, but ultimately, in 1995, after many legal maneuvers, the model-makers lost their suit.

The labor laws are often tied up with the employment discrimination laws. For instance, in Dittman v. GM, 941 F. Supp. 284 (D. CT 1996) some employees from the closing Delco Chassis plant in Bristol, Connecticut, sued GM and the UAW because they were over 40 but under 50 and not eligible for the early retirement deal that the company and union had worked out. They alleged reverse age discrimination, and that the union had breached its duty of fair representation. They lost their case, since the statute was found to allow discrimination in favor of older workers [75].

In another case, which did not involve downsizing, in 1990, a black welder at a GM plant in Michigan, Timothy Ray, was fired after a dispute with his supervisor. Ray subsequently committed suicide. His relatives brought suit against GM and the UAW, in Ray v. GMC, 1995 U.S. App. LEXIS 4212 (6th Cir. 1995), alleging that Ray was fired because of his race, that Ray had been discharged unlawfully since he had violated no work rule in the collective bargaining agreement, and that the UAW had breached its duty of fair representation of Ray. However, the district and appeals found no merit in their case, finding that Ray had been fired for just cause for physically assaulting his supervisor.

An examination of the published cases leads me to the conclusion that under the circumstances where an employee is in a union and is covered by a collective bargaining agreement, and things go badly for that employee, for instance, they are fired, or are injured, or become sick, or suffer emotional distress, there is a tendency for the employee to sue both the employer and the union. The union is typically sued on the grounds that it did not provide good representation (presumably, the employee has exhausted his or her avenues within the union before bringing suit), and did not enforce the collective bargaining agreement. However, in the Administrative Office database, a case may be classified as a civil rights case, an unlawful discharge case or a labor law case, defending on how the plaintiff's attorney's fills out the civil cover sheet; there is no provision for multiple coding, and no systematic way to decide which case type under which a particular case is coded.

The auto industry defendants are also involved in labor-management lawsuits are brought by the National Labor Relations Board. For instance, in 1963, in NLRB v. GMC, 373 U.S. 734, the NLRB (which was then much more liberal than it is today) sued GM, which had refused to bargain over an agency shop agreement. The NLRB believed that such bargaining was a mandatory subject under the law. The Supreme Court found that GM was obliged to bargain over this subject.

7.3.2 Labor-Management Cases against Grocery Stores

The grocery industry has been restructured many times. For instance, Oakland, California-based Safeway Co. was formerly the world's largest supermarket chain, but after a 1986 buyout, the company sold 1,130 stores, leaving it with 1,100 [108]. Such a massive restructuring is likely to cause many repercussions in people's lives. Part of the reason why Safeway has so many cases filed against it (199) in our period must be simply due to the fact that with so many stores, Safeway has a large number of employees, and many of these stores are unionized with the United Food and Commercial Workers, one of the most militant unions.

The UFCW has been bucking the tide of deunionization, growing in recent years as other, formerly-better-known, unions (such as the industrial unions) are shrinking. It has been a major player in the battles over the growth of low-wage service work and against the Wal-Marts of the world. In addition, as the strike weapon becomes less valuable, as employers make aggressive use of permanent replacement workers, unions are forced to move to other tactics. The UFCW has employed a number of tactics outside of the strike, which include lawsuits, publicity-seeking activities, and boycotts, and these tactics have contributed to the union's growth.

The UFCW's former president, William Wynn, has said that the move to a new set of tactics was deliberate, after Reagan fired the air traffic controllers in 1981 [234]. The UFCW decided at this point to stop relying on NLRB elections for union certification, and instead rely on so-called "voluntary" recognition as a bargaining agent from employers after collecting membership cards from a majority of workers at a job site. The filing of labor and employment lawsuits, under the Fair Labor Standards Act, ERISA, OSHA, and the NLRA, are all as much an organizing tool for the UFCW as they are an attempt to get a recovery for the aggrieved employees. For the UFCW, in any case, the stakes are larger than the dollar value of a particular case it files, since filing a lawsuit on behalf of a small group of workers may mean that a larger group may join the union, because potential members will see that the union will be aggressive in standing up for their rights.

The UFCW's tactics are evidence of the shift away from labor law and toward employment law. UFCW has pursued a number of labor law cases, but they have also pursued a significant number of class-action discrimination and wage-and-hour cases. In addition, the union has pursued a number of OSHA struggles over bathroom breaks and repetitive stress injuries, among other thing

An examination of the party names in the cases against Safeway reveals that a substantial fraction of the labor-management plaintiffs are unions such as the UFCW, the Retail Clerks, and the Teamsters. This is in contrast with labor-management suits against the automobile companies, which seem to practically all be brought by individual workers. Of the 199 cases brought against Safeway, 95 (practically half) were dismissed. Of the 49 of these cases that were judged, Safeway won 39, or 79.6 percent. Nevertheless, even some of these lost cases may have helped the UFCW in organizing.

In 1993, Safeway wanted to sell 24 stores in Virginia to another chain, Farm Fresh Inc. The 24 stores were organized by the UFCW, but Farm Fresh would not buy them unless they became non-union. The union and the company negotiated severance packages for the unionized workforce, but many of the workers were dissatisfied with the agreement. The UFCW filed suit in federal court, arguing that the collective bargaining agreement was enforceable no matter who owned the stores. However, the sale went through, and the stores went non-union, with a reduction in wages. The UFCW ended up picketing the stores after the acquisition.

Restructuring and the volatile nature of economic conditions in the competitive grocery store business often lead to layoffs. The situation is similar to industrial downsizing. If these layoffs are not perceived to be administered fairly, this can lead to lawsuits. For instance, in Christopher v. Safeway Stores, 644 F.2d 467 (5th Cir. 1981), two laid-off meat-cutters sued Safeway and the meat-cutters union, maintaining that they had been unfairly laid off in violation of the collective bargaining agreement. Changes to the collective bargaining agreement had changed circumstances so that the meat-cutters were properly laid off; they would not have been had the previous agreement still been in force. The jury found that Safeway had acted within the agreement and was not liable, but the union had neglected its duty to inform the membership about the change in the seniority system and was liable for back wages. The appeals court upheld this conclusion.

The grocery stores, like the automakers, have had quite a few lawsuits filed against them under labor-management statutes and other statutes by individual employees. As in the DFR cases against the automakers, the union is often named as a co-defendant. For instance, in Perugini v. Safeway Stores, 935 F.2d 1083 (9th Cir.

1991), the plaintiff said that the defendant Safeway had violated her civil rights and inflicted emotional distress upon her, and that her UFCW local, a co-defendant, had breached its duty of fair representation. She had requested (and had been denied) light duty during her pregnancy, and had subsequently lost her baby. After she did not report back to work for some months after losing the baby, she was fired. (I was unable to ascertain the outcome of this case.)

In Alizadeh v. Safeway Stores, 802 F.2d 111 (5th Cir. 1986), the plaintiff asserted that she had been fired by Safeway because of the Iranian nationality of her husband, in violation of the civil rights statutes. Safeway had a videotape, however, of her stealing money from the cash drawer. The union was set to file a grievance but withdrew it upon seeing the videotape. She sued the union and the company, but her case was found to have no merit, both by a jury, and on appeal. Again, we see a case, which on the face of it seems to have no merit (after all, Safeway had a "smoking gun" in the videotape), being brought nevertheless. This may be another case of emotion overcoming rationality, or an overwhelming desire for procedural justice even without any real remedy [224].

Some of the cases against Safeway involve arbitrations. For instance, in UFCW Local 7R v. Safeway, 889 F.2d 940 (10th Cir. 1989), the UFCW sued Safeway and one of its member/employees, Sandra Cortez. Cortez had won back pay from an arbitrator when she was, according to her and the arbitrator, laid off instead of being reassigned. The reassignment, she maintained, and the arbitrator agreed, was required by the collective bargaining agreement given her seniority. Part of the back pay had been accessed against the union for not pursuing the arbitration in a timely fashion. The union sued to have all of the back pay accessed against Safeway. The courts upheld the arbitrator's decision, however.

Some of the labor relations cases involving the UFCW and groceries stem from organizing. In 1992, the UFCW was organizing at a Meijer's store in Traverse City, Michigan. One of the employees was wearing a "Union Yes" button in support of the campaign. This was a violation of Meijer's dress code, and the employee was ordered to remove the button. Some of the employees refused. The union filed an unfair labor practice with the NLRB over the discipline of two employees for wearing buttons. Both the administrative law judge and the NLRB found a violation of the NLRA, and the Sixth Circuit in Meijer v. NLRB, 130 F.3d 1209 (1997) upheld the decision of the NLRB. Here, the court followed the Supreme Court's finding of a "near absolute right" under the NLRA to wear union insignia on the job.

Occasionally, the labor laws interact with the antitrust laws. Unions have been granted certain exemptions from the antitrust laws, although they are not totally immune from them. However, companies are not immune from them at all, although enforcement by the state and the courts may be weak. For instance, in UFCW v. Food Employers Council, 827 F.2d 519 (9th Cir. 1987), the UFCW sued a number of southern California supermarkets, including Safeway, and their area trade association, with which they had a regional collective bargaining agreement called the "Master Food Agreement." The supermarkets had won a provision in this agreement, which was called the "Most Favored Nations" provision, which allowed them to lower wages or benefits to the levels obtained by collective bargaining at independent supermarkets not covered by the Master Food Agreement. The union sought declaratory relief nullifying this provision. The union wanted to give better deals to independent supermarkets to allow them to remain competitive with the major chain stores. The

"Most Favored Nations" provision would undercut this ability. The district court found that the union lacked standing to sue under the antitrust laws because it was neither a competitor nor a customer of the defendant supermarkets. However, the appeals court determined that the question was appropriate for the district court to consider under the Declaratory Judgment Act, and remanded.[7]

Recently, the UFCW threatened to file some class-action lawsuits against Albertson's, a large supermarket chain. The lawsuits claimed that the chain had required employees to work "off-the-clock," that is, without compensation, and had broken the overtime, workers compensation, and pension laws in various ways. If employees do not get credit for all hours worked, their pensions will be reduced. Allegedly, the incentive system for Albertson's managers encouraged them to demand extra work off-the-clock. In addition, the NLRB filed a complaint against Albertson's for interfering with the union's duty-of-fair-representation, and for misusing the grievance process. The union distributed a video about Albertson's practices to customers, which angered the company. The UFCW often attempts to generate bad press about companies that are its adversaries.

Albertson's attempted to disqualify the law firm leading the class action from the suit, arguing that its other work for the UFCW amounted to a conflict of interest. The company argued that the union was using the lawsuit to promote its own organizing and that the law firm was one of its instruments in doing so. The judge hearing the case refused to disqualify the firm, but made sure that the potential class members were notified of the involvement of the union. He also designated another law firm as co-lead-counsel and instructed the firms to work together.

[7] It is unclear from the record what happened next.

In Albertson's v. UFCW, 157 F.3d 758 (9th Cir. 1998) the company counter-sued, arguing that the union had to submit wage-and-hour complaints to arbitration before bringing suit on wage-and-hour grounds. The courts disagreed with the company.

A similar class action lawsuit was filed, again with the assistance of the UFCW, against Longs Drug Stores. Longs settled with the Department of Labor, and some employees received checks for past overtime. Those who cashed the checks may have effectively settled their cases; the union pressed forward with the case, arguing that the compensation was insufficient.

Because many companies have reduced their workforce in an effort to cut costs, managers have often been demanding more of their existing workers, demanding that they put in more hours. Because of the fixed costs (from benefits, training, etc.) involved in hiring more employees, employers prefer to give incumbent workers more work. In some cases (allegedly in the case of Albertson's), there are abuses of overtime and uncompensated work. Many areas of the country have had low unemployment for much of the 1990s, so workers are less worried about getting another job if they lose the one that they have by standing up for their rights or suing. This has led to over 61,000 suits filed under the Fair Labor Standards Act from 1993 to 1997, over either overtime or minimum-wage violations. In the same period, the labor department recovered about $450 million for over 900,000 workers [117].

The UFCW also aggressively goes against non-union supermarkets, including Wal-Mart's supermarket chain and the Whole Foods chain of natural foods supermarkets. In three cities in Arizona,, the UFCW has filed suit to prevent the zoning changes that would be required to allow the opening of a large Wal-Mart supermarket, a "supercenter." In addition, in one of the cities, the union was one of the main forces behind the placing of a referendum on the ballot to attempt to overturn the zoning change that was necessary to open the store. The UFCW represents workers in three unionized supermarkets in the area [43]. Most attempts to organize unions at Wal-Mart have met with failure; the company uses sophisticated methods in opposing unions. A similar strategy has been taken by Whole Foods, and the UFCW has organized boycotts and informational pickets of Whole Foods outlets. In Long Beach, near Los Angeles, the UFCW is one of the forces that are trying to block the opening of a Super K-Mart [203].

The UFCW has gone after its opponents in the media. For instance, it helped reveal that the Food Lion chain of supermarkets had sold spoiled meat and had not paid overtime to its employees. This led to an ABC News report which led to a 30 percent fall in the stock price of a company, and a class action shareholder suit against the company. The shareholders claimed that the company should have revealed its actions [5]. These events also caused the company to sue ABC over its undercover tactics in its reporting. The company was awarded $5.5 million by a jury. This award was reduced by the judge to $315,000.

7.3.3 Coal Industry Plaintiffs in Labor-Management Cases

Coal industry companies are common plaintiffs in labor-management cases. As we will see, many of these involved the seeking of injunctions against strikes.

One of the only published decisions involving Peabody Coal Co. was Peabody Coal Co. v. Local Union No. 1670, UMW, 416 F. Supp. 485 (Dist. IL (E) 1976). In this case, Peabody requested and obtained a permanent injunction against the union local, preventing it from striking, citing a no-strike clause in the union contract. The decision in this case, however, cited several other previous cases in which Peabody requested and obtained an injunction to stop a strike. This record evinced substantial labor militancy at this particular mine and suggested that Peabody had a pattern of filing federal actions to stop strikes. This may explain quite a few of Peabody's 194 actions as plaintiff in the database.

In Westmoreland Coal Co v. International Union, UMW, 910 F.2d 130 (4th Cir. 1990), Westmoreland Coal Company sought an injunction against the Mine Workers. Because of the 1989 strike at Pittston Coal Company, miners at other companies engaged in sympathy strikes, one of which was directed at Westmoreland. These were generally caused by "stranger pickets," that is, pickets from other mines (usually Pittston) who gathered at the gates of a particular mine. When confronted by such pickets, miners would refuse to cross the picket line, and a sympathy strike would occur. Westmoreland argued that these strikes were illegal secondary boycotts under Taft-Hartley. The district court granted a broad "prospective" injunction. The appeals court found that this injunction was overly broad, and remanded the case, with instructions to focus the injunction on the specific behavior in question, on the part of specific employees. Apparently, these courts found that the law allows the imposition of injunctions, but only against such specific behaviors, and only if there is a no-strike clause in the contract, as there was in the national contract in this case. If there is an arbitration clause, the court can order arbitration in lieu of a strike under particular circumstances. The Norris-La Guardia Act restricted the federal courts' use of injunctions, but allowed them in some particular conditions. This may be one of the reasons why many lawsuits are filed.

In a somewhat amusing case from the early 1970s, Armco Steel Corp. v. UMW:

District No. 17, 505 F.2d 1129 (4th Cir. 1974), a number of mine workers, protesting federal and state regulations on the sale of gasoline during the oil crisis (which, of course, were in the main unrelated to the coal industry and their jobs), picketed certain mines, causing strikes. A number of coal companies, including Westmoreland and Armco Steel, sued the UMW over this for injunctive relief.

Looking at the Peabody and Westmoreland cases, we see that the coal companies use the federal courts to fight their labor battles. These actions are prompted by substantial militancy on the part of the UMW, which has been willing at certain times in the past to readily call wildcat strikes over health and safety or other issues.

Federal courts also have jurisdiction to review the actions of labor arbitrators. However, the scope of this judicial review tends to be narrow, to avoid ruining the effectiveness of the arbitration system. The losing party to an arbitration tends to bring the action in federal court. In Amax Coal Co. v. UMW, 92 F.3d 571 (7th Cir. 1996), Amax Coal Company appealed an arbitration. The arbitrator had found that Amax had violated the union contract in substituting one kind of worker for another. The worker who had been replaced (moved from a higher- to a lower-paying classification) filed a grievance. The arbitrator found that this worker was entitled to maintain his higher rate of pay, but the courts (first the district, and then the appeals) said that the arbitrator's finding was not drawn from the collective bargaining agreement but from the arbitrator's own equity considerations, and all arbitration decisions should be drawn from the agreement, so the arbitrator's decision was vacated. This case is unusual in that the overturning of an arbitration is a relatively rare event. Still, some of the other cases brought by the coal companies challenge arbitrations.

Much as coal company plaintiffs challenge arbitrations, they also challenge NLRB decisions. In Climax Molybdenum Co. v. NLRB, 584 F.2d 360(10th Cir. 1978), the plaintiff, an Amax subsidiary, challenged a NLRB decision in which the board found that the union was entitled to consult with employees whose conduct was being investigated prior to the investigation, on its own initiative. The appeals court finally reversed this decision, finding that the right of representation by union representatives in a investigation by the employer did not extend to this pre-investigation consultation.

7.4 Labor-Management Cases Viewed with the Adjacent Word-Pair Frequency Method

As shown in Table 7.6, application of the adjacent-word frequency method to labor-management suits indicated the dominance of a few industries and unions as plaintiffs. The unions were the construction trades (such as the Sheet Metal Workers and Operating Engineers), the Teamsters, the United Food and Commercial Workers (UFCW), the Hotel and Restaurant workers, the Steelworkers, the Mine Workers, the Retail clerks, the Soft Drink workers, the Oil and Chemical Workers, and the Communication Workers. Many of these are among the largest unions in the country, so it is not surprising to see them involved in LMRA actions. The NLRB also appears frequently as a plaintiff; as we saw in Section 7.1, there are certain circumstances under which the NLRB goes into district court.

There is a certain symmetry between the plaintiff table (Table 7.6) and the defendant table (Table 7.7), in that employers and unions appear in both tables, because

Table 7.6: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Labor Management Cases

1	Local Union ..	17	New York	33	Florence Mining Company
2	Trustees Of ..	18	US Steel	34	Communication Workers
3	Sheet Metal Wkrs	19	Writers Guild	35	Painters District
4	UFCW	20	Bethlehem Mines	36	Florida Marble Polishers
5	Teamsters Local	21	Cement Masons	37	Central States (Pens. Fund)
6	Oper. Engineers	22	Retail Clerks	38	Chgo & NE Ill. Carpenters
7	AFL-CIO	23	Board Of ...	39	Westmoreland Coal
8	Peabody Coal	24	Graphic Arts	40	Amherst Coal
9	NLRB	25	Laborers	41	Retail Store Employees
10	United Mine Wrks	26	Local 675	42	Intern Union
11	Utd Steelworkers	27	Iron Workers	43	Carpenters Hlth
12	Consolidation Coal	28	HERE	44	Painters District
13	Chicago District	29	Laborers Pension	45	Plumbers Local
14	Island Creek (Coal)	30	Soft Drink Wkrs	46	United Parcel (Service)
15	Laborers Pens Fd	31	Oil and Chem. Wkrs	47	M. Moe, OH Oper. Eng.
16	Carpenters	32	San Diego		

Table 7.7: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Labor Management Cases

1	Local Union	17	Chrysler Corp	33	Pepsi Cola
2	United Mine Workers	18	Lucky Stores	34	Saturn Corporation
3	U S	19	Roadway Express	35	Amalgam. Meat (Cutters)
4	UPS	20	Pacific Bell	36	McDonnell Douglas
5	UFCW	21	Carpenters Local	37	Iron Workers
6	Sheet Metal (Wkrs)	22	Truck Drivers	38	Boeing Company
7	Teamsters Local	23	Oil & Chem. Workers	39	Tri State (Various)
8	Ford Motor	24	Greyhound Lines	40	Communication Workers
9	United Steelworkers	25	Anheuser Busch	41	City Of ...
10	Safeway Stores	26	AFT, AFM, AFL, etc.	42	San Diego
11	AFL-CIO	27	General Electric	43	Bell Atlantic
12	US Postal Service	28	New Eng. (Hth, Tele.)	44	US Steel
13	AT&T	29	Yellow Freight	45	Coca Cola
14	General Motors	30	Albertson's	46	United Rubber
15	New York	31	United Auto Workers	47	HERE
16	Kroger Co	32	Retail Clerks	48	Peabody Coal

either employers or unions can be plaintiffs or defendants under the LMRA; for instance, either side can sue the other over an alleged breach of the agreement. However, among employers only coal companies, and United Parcel Service, appear as plaintiffs frequently in practice We have explored the activity of the coal companies further in Section 7.3.3. As one will see by examining Table 7.7, quite a few unions appear as defendants, because they are sued by employers over such things as strikes allegedly in violation of a union contract and by employees over the duty-of-fair-representation.

The numerous cases involving the construction unions are probably due to the large number of small construction firms, which apparently tend to be more erratic in their human resources practices and less financially stable than larger companies. We find a similar pattern in Chapter 8, in which a large number of construction firms were found have to been sued by unions for non-contribution to ERISA health, pension, and welfare funds.

The UFCW has filed numerous cases against the grocery stores, which is why several big grocery chains– Safeway, Lucky Stores, Kroger, and Albertson's– are listed among the most numerous defendants in Table 7.7. We have discussed the UFCW's litigation activity in Section 7.3.2; it is a major strategy of the union.

It appears that the Teamsters have also been involved heavily in LMRA litigation. They are high up in both tables, as a frequent plaintiff and defendant. Also, the companies that they organize, including United Parcel Service, Roadway Express, Yellow Freight, Anheuser Busch, Pepsi Cola, and Coca-Cola, appear as frequent defendants. The Teamsters may have been employing litigation as an organizing tactic, much as the UFCW has been.

Outside of this, some of the largest unionized companies in the country, such as

Ford, General Motors, Chrysler, Pacific Bell, General Electric, McDonnell Douglas, Bell Atlantic, and US Steel appear on the list of frequently-appearing defendants. Most of these companies experienced downsizing in the past. On manual examination of the party strings, many of the plaintiffs appear to be individuals. Thus many of these cases may be duty-of-fair-representation cases, such as were explored in Section 7.3.1, with respect to automobile industry defendants.

Notable by their absence are some other large unions, such as AFSCME and the teachers' unions (NEA and AFT). This is because these unions typically represent workers who are not covered under the National Labor Relations Act (NLRA), since the NLRA only covers private sector workers. These public-sector unions are typically covered instead by state laws which permit the organization of public employees.

Chapter 8

Employee Retirement Income Security Act Cases

8.1 Legal Background

The Employment Retirement Income Security Act of 1974 (ERISA) was a response to a perception that there existed mismanagement, and in some cases, corrupt abuse, of private pension, welfare, and health insurance plans. For the first time, the federal government took on a role in their regulation. ERISA requires those running plans to provide plan participants with certain minimal information about the plan, such as the rules of the plan, financial information, and how the plan is operated. Participants are entitled to receive a copy of the "summary plan description" or SPD, which includes information on when employees are eligible to participate, how the plan determines benefits and time of service, when an employee becomes vested, when and how benefits are paid, and the procedure for filing a claim. Each year, each participant must receive a copy of a summary annual report, which includes financial information about the plan, such as income, benefits paid, and assets.

ERISA imposes fiduciary responsibilities on plan administrators. This means that the plans must be run solely for the benefit of plan participants and beneficiaries. Administrators must manage the plan's investments prudently, which means proper diversification. A fiduciary that does not follow his responsibilities may be personally liable for losses to the plan, and may be forced to return personal profits made using plan assets. Beneficiaries may sue for breach of fiduciary duties.

ERISA exempts plans from state law, such as tort claims for injuries resulting from improper plan administration (for instance, improper denial of benefits by a health plan). This has made it more attractive to companies to establish plans. There are limits to this preemption, however: in a 2002 case, Rush Prudential v. Moran, the U.S. Supreme Court ruled that ERISA did not preempt an Illinois law which allowed HMO members to seek second opinions when they are denied access to a medical service. In this case, the Court allowed the patient (Moran) to recover from the plan (Rush Prudential) the costs of the service (a surgery).

Plans must establish grievance and appeals procedures for participants who are denied benefits under the plan. The federal courts are the ultimate route of appeal for plan participants denied benefits by plans and who exhaust these administrative appeal procedures.

ERISA has been amended frequently since its enactment. The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1986 allowed some workers to continue their benefits for a period after leaving their job. The Health Insurance Portability and Accountability Act of 1996 (HIPAA) protects workers and their families from discrimination in receiving health insurance coverage if they have preexisting conditions. ERISA was also amended by the Newborns and Mothers' Health Protection Act of 1996, the Mental Health Parity Act of 1996, and the Women's Health and Cancer Rights Act of 1998.

8.2 Understanding the ERISA Caseload

The ERISA statute was passed in 1975. The Nixon administration had been promoting the idea of HMOs, and this culminated in the passage of the HMO act of 1973. HMOs, as employer-sponsored plans, are subject to regulation under ERISA. There was a rapid increase in the number of cases filed until statistical year 1992. This corresponded roughly to a spectacular increase in the growth of HMOs in the 1980s, as employers shifted away from fee-for-service plans in an effort to contain spiraling health care costs. Since they try to control or "manage" the provision of care, HMOs generated conflict with patients who did not like the way their care was "managed." After statistical year 1992, as shown in Figure 8.1, the caseload fell off slightly, and rebounded in 2001. Because of the continued growth in the overall caseload in the early 1990s, the ERISA caseload as a percentage of the total caseload fell from a peak of about 7 percent in fiscal year to a situation in which it hovered around 6 percent; this is shown in Figure 8.2.[1]

Figure 8.3 shows the percentage of cases won by the plaintiff between statistical years 1979 and 2001 inclusive. It went up from a little over 70 percent in 1979 to over 85 percent by 1983, stabilized at that level for some time, and then fell, fluctuating

[1] The source of some of the information in this paragraph was a Web page on the history of HMOs, found at http://www.hap.org/info/main/history_hmo.php on March 4, 2004.

about 76 percent by the late 1990s. The reason the win rate was so high was the large number of default judgments; it appears, as we will see below, that many of these are caused by small construction firms not making required ERISA contributions to union-run pension funds. As Table 8.2 shows, 51.5 percent of adjudicated ERISA cases are default judgments, and the plaintiffs win 98.8 percent of these. The plaintiff win rates for most other dispositions is lower; for instance, plaintiffs win 43.7 percent of judgments that are made on a motion before trial, 57.7 percent of jury verdicts, and 49.7 percent of verdicts after a court trial. Thus the default judgments appear to represent a different population of cases than most of the others.

Table 8.1 shows that almost all of ERISA cases have a jurisdiction of federal question (because ERISA is a federal law); none are the result of diversity jurisdiction. Small percentages have jurisdictions given as federal government plaintiff or defendant.[2]

As Table 8.3 shows, the stakes in ERISA cases are lower than average; the median demand in an ERISA case was only $26,700, as opposed to $103,000 in all cases. However, the median ERISA award was $22,100, as opposed to $40,000 in all cases. Not only that, but due to the high plaintiff win rate, the plaintiff was much more likely to get her demand in an ERISA case than in the average case. And the amount awarded was very close to the amount demanded in many cases. This was in part driven by the large number of default judgments; my examination of the case files revealed that many of the amounts claimed due by the union pension funds were modest.

[2]In the coding, these jurisdictions "trump" federal question; all ERISA cases *could* be classified as federal question.

Figure 8.1: ERISA Cases Filed, SY 1975-2001

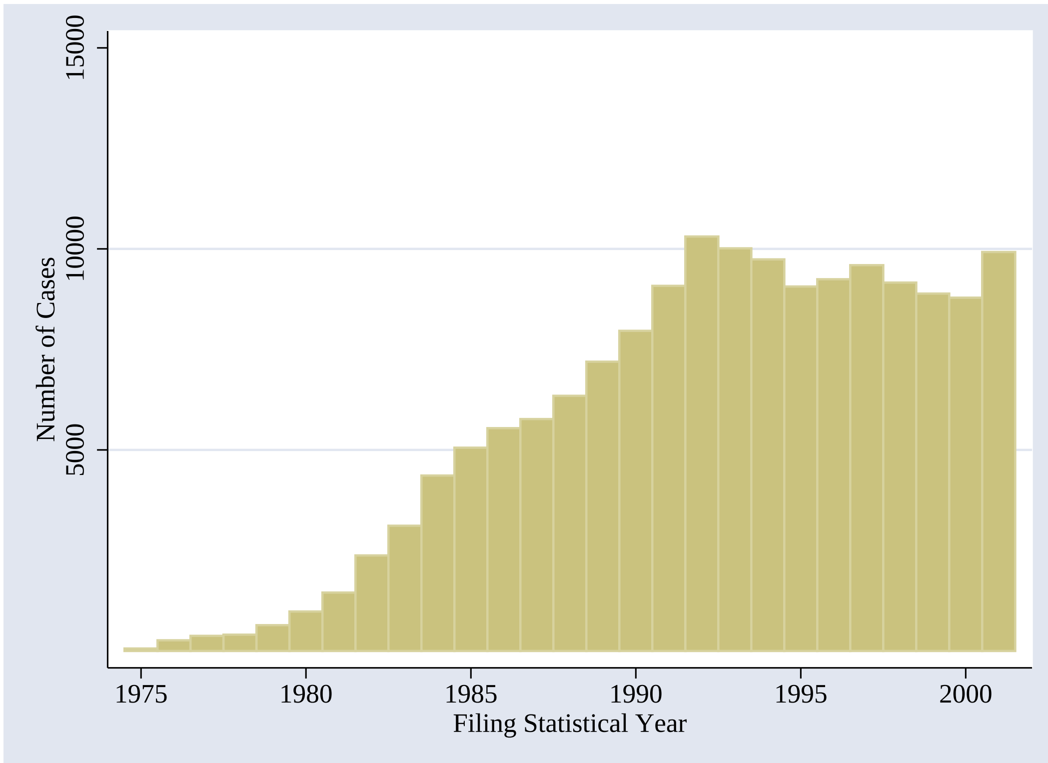


Table 8.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, ERISA Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		% Adjudicated Cases		Plaintiff Win Rate	
Jurisdiction	ERISA	All	ERISA	All	ERISA	All
U.S. Govt. Plaintiff	1.2	13.6	1.7	27.4	89.9	90.4
U.S. Govt. Defendant	0.3	5.3	0.3	5.9	35.4	21.5
Federal Question	98.5	48.1	98.1	42.3	79.5	44.8
Diversity	0.0	33.1	0.0	24.4	0.0	61.6

Figure 8.2: ERISA Cases Filed as a Share of Total Cases Filed, SY 1975-2001

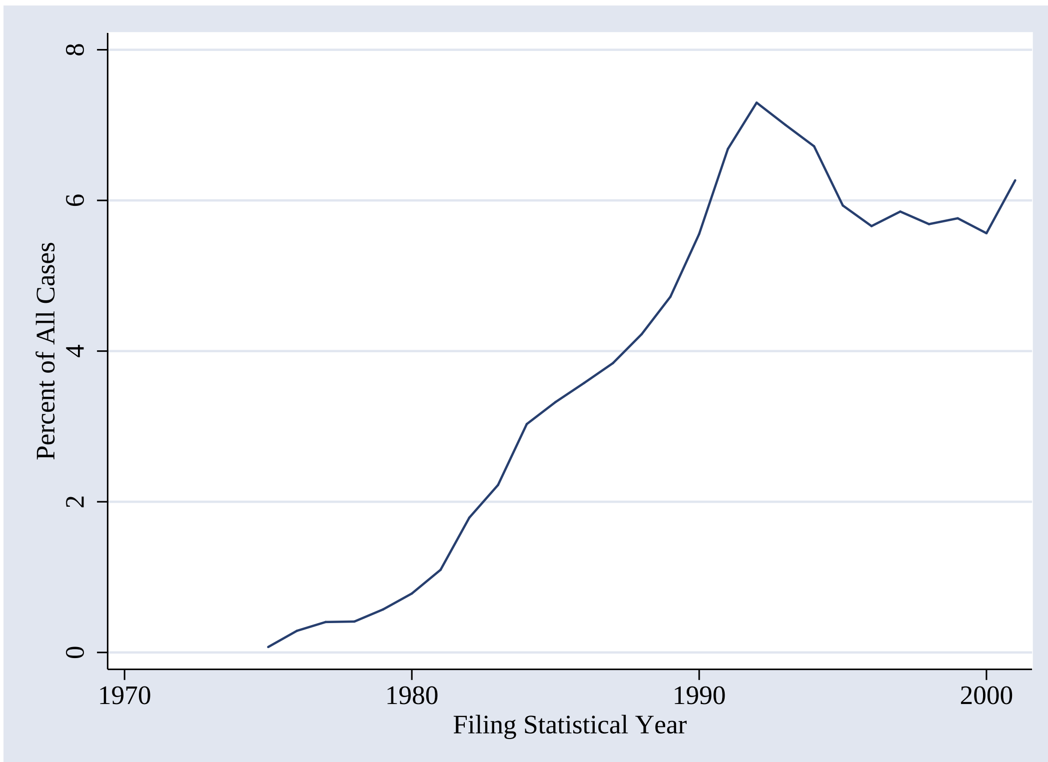


Figure 8.3: Percentage of Adjudicated ERISA Cases Won by the Plaintiff, SY 1979-2001

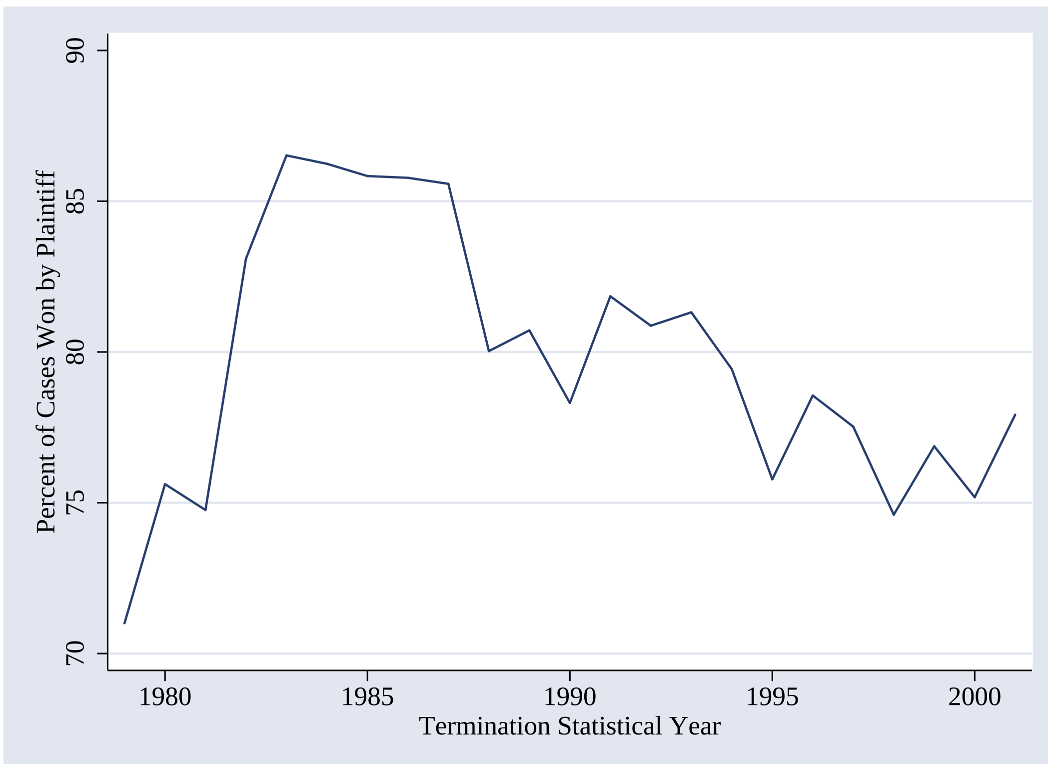


Table 8.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, ERISA Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	ERISA Cases	All Cases	ERISA Cases	All Cases
Default Judgment	98.8	98.2	51.5	25.8
Consent Judgment	95.9	92.4	9.6	10.2
Judgment on Motion Before Trial	43.7	28.0	29.5	42.3
Judgment on Jury Verdict	57.7	46.6	0.4	7.7
Judgment on Directed Verdict	74.0	27.9	0.3	0.7
Judgment on Court Trial	49.7	48.5	3.1	5.1
All Other Dispositions	74.6	47.9	5.5	8.1
All Dispositions Combined	79.1	56.8	100.0	100.0
Consent & Default	98.3	96.6	61.2	36.1
All but Consent & Default	48.9	34.4	38.8	63.9

Table 8.3: Median Amounts Demanded and Median Judgments Received, ERISA Cases and All Cases, 1000s of 2001 Dollars, 1971-2001 Aggregate

	ERISA Cases	All Cases
Sample Size	150971	3894150
Median Amount Demanded	26.7	103.0
Sample Size (Amount Demanded)	39260	1434123
Median Amount Awarded	22.1	40.0
Sample Size (Amount Awarded)	32806	404512

8.3 Examining a Sample of ERISA Case Files

I examined a sample of 50 ERISA case files drawn from the Western District of Wisconsin. This court, based in Madison, covers counties in the western half of the state. The ERISA cases appeared to fall mainly into two distinct categories.

One set of cases typically involved individual plaintiffs and insurance company defendants, and were disputes over pension or health benefits. It appears that such disputes have become particularly common in the age of HMOs and managed health care.

The second group of cases involved union-run funds as plaintiffs and (often small) construction companies as defendants, and appeared to be mainly brought to obtain judgments against the construction companies for non-payment of required payments into the union health, pension, and/or welfare fund. The companies were also typically found to have not accurately reported the number of hours that workers logged which would require the payment of benefits to cover those hours. There is an extremely large number of small construction firms in the country, and many of them may fall into insolvency or financial instability, which may cause them to miss their payments. One would expect that larger, more-established and more solvent firms would not fall prey to this sort of litigation, because satisfy the union claims before they get to court. Of the cases found in my sample, most of these cases resulted in monetary judgments against the defendants. In some cases, there was concern on the part of the funds that the owners of the company in question would liquidate, draining the company of cash before they got paid. Many of the judgments against the small construction companies were default judgments.

An example of the first group of cases was Wilkes v. UNAM Life Insurance (01-C-182-C). In this case, the plaintiff sued because her disability benefits were terminated, and she claimed a violation of ERISA; the court reinstated the benefits (subject to a physician's continued authorization) and awarded attorney's fees and costs to the plaintiff. In many of the other cases involving denial of coverage, the cases were settled, and the outcome is not in the record. It is possible that some of these cases are brought to increase the bargaining power of the plaintiffs. However, it is very difficult to establish HMO liability for denial of benefits under ERISA, However, since such denials are common, some plaintiffs may try to make their HMO liable.

There was one case in the sample in which the Department of Labor sued a company for co-mingling company funds with ERISA plan funds, in violation of the act. A consent order was entered in which the company agreed to terminate the plan and give the employees the option of depositing the funds into another qualified plan or taking them out in cash.

While there was only a single case of this type among the fifty (as opposed to the numerous cases involving disputes over benefits or nonpayment into funds), these types of cases are not uncommon. If fiduciaries steal money from the pension fund or engage in accounting fraud, they can go to jail. The Department of Labor's ERISA enforcement Web site[3] describes its civil and criminal enforcement activities. For instance, in December 2003, the Department sued Meade Communications, Inc. for failure to make contributions to a 401(k) plan, and instead co-mingling the monies with the company's own funds. In February 2004, the department obtained a judgment against E&W Services of Ohio; the court ordered the company to pay about

[3]This site is http://www.dol.gov/ebsa/erisa_enforcement.html; I visited it on Feb. 21, 2004.

$31,000 into the pension fund and barred one trustee from further service.

8.4 Examining ERISA Files Using the Adjacent-Word-Pair Frequency Method

Examination of the party strings in ERISA cases using the adjacent-word-pair method yielded the results in Tables 8.4, 8.5, 8.6, and 8.7. As one can see, the most frequent plaintiffs are union health, pension, and welfare funds, with these being dominated by those in construction; I found a number of such cases in my examination of the case files, described in Section 8.3 above. This leads one to believe that these are mainly non-contribution, non-reporting cases, and that these types of cases are very common in the caseload. Manual examination of the defendant party strings for some of the frequent plaintiffs which are construction unions bears this out, in that many defendants appear to be small construction companies.

The defendant strings reveal something altogether different. These are dominated by insurance companies. This appears to be a mainly distinct group of cases from those that the frequent plaintiffs are involved in. In these cases, the plaintiffs appear to be mainly individuals. I suspect that these cases are mainly denial-of-benefits cases. I found such cases, with individual plaintiffs and insurance company defendants, to be common in my examination of the case files in Section 8.3 above. There are also a few large companies on the list; these may be companies that are so large that they run their own ERISA plans (e.g. Wal-Mart and AT&T).

Table 8.4: Most Frequently Occurring Plaintiff String Pairs in Plaintiff String, ERISA Cases (part 1 of 2)

1	Trustees Of ...
2	Central States (Teamster Health and Pension)
3	Chicago Carpenters (Pension Fund)
4	Brotherhood of Sheet Metal Workers
5	Mason Tenders (Health and Pension Funds)
6	Laborers (Pension Funds)
7	Board Of ...
8	United Food (and Commercial Workers)
9	Southwest Administrators
10	International Association of Machinists (Pension Plan)
11	Central Laborers (Pension, Welfare, and Annuity Funds)
12	Chicago Painters (and Decorators Health and Pension Fund)
13	Greater St (Louis Construction Laborers' Pension and Welfare Funds)
14	Cement Masons (Pension and Health Funds)
15	Iron Workers (Pension and Health Funds)
16	Laborers Health (Fund)
17	National Elevator Industry Benefit Plans
18	National Stabilization Agreement of the Sheet Metal Industry Trust Fund
19	Carpenters Southern California Pension Trust
20	Teamsters Local ...
21	Operating Engineers
22	Teamsters Pension (Fund)
23	Local Number
24	Painters District (Pension)

Table 8.5: Most Frequently Occurring Plaintiff String Pairs in Plaintiff String, ERISA Cases (Part 2 of 2)

25	Carpenters Health (and Welfare Fund)
26	Electrical Workers Local X Pension Fund
27	Masonry Institute (Pension Fund)
28	Metropolitan Life
29	Trustees Plumbers (Health and Pension Funds)
30	Bricklayers District (Council Pension Fund)
31	Metropolitan Life
32	Robert Sasso (Teamsters Local President, Fund Trustee)
33	Building Trades (Pension Fund)
34	ILGWU National Retirement Fund
35	NECA IBEW Fund
36	Michigan Conference of Teamsters Welfare Fund
37	Retail Meat Pension Fund
38	Peter Vario (Laborers' Union Fund Trustee)
39	Detroit Carpenters (Fringe Benefit Fund)
40	Indiana State (Roofers, Plasterers)
41	Trustees For ...
42	NASI (National Automatic Sprinkler Industry) Pension Fund
43	Chester Broman (Fund Trustee)
44	Painters District (Council Fund)
45	Pipe Fitters (Welfare Fund)
46	Missouri Kansas (Teamsters Fund)
47	Howard McDougall (Teamsters Fund Trustee)
48	Hotel and Restaurant Employees (Fund)

Table 8.6: Most Frequently Occurring Plaintiff String Pairs in Defendant String, ERISA Cases (Part 1 of 2)

1	UNUM Life (Insurance)
2	Blue Cross
3	Aetna Life
4	Metropolitan Life
5	Provident Life
6	Hartford Life
7	Prudential Insurance
8	John Alden Life Insurance
9	Central States (Teamster Health & Pension)
10	Travelers Insurance
11	Continental Casualty
12	Paul Revere (Life Insurance)
13	U S (Healthcare, West, Steel, various)
14	Travelers Insurance
15	Wal-Mart
16	Guardian Life
17	Fortis Benefits (Insurance Company)
18	United Healthcare
19	AT&T
20	New England
21	John Hancock Life
22	New York Life
23	Reliance Standard
24	Connecticut General (Life Insurance)
25	Principal Mutual
26	Sun Life
27	Mutual Of Omaha
28	First Unum
29	The Travelers
30	Great West Life
31	Pan American Life
32	Tri State (Various Construction Companies)

Table 8.7: Most Frequently Occurring Plaintiff String Pairs in Defendant String, ERISA Cases (Part 2 of 2)

33	Standard Insurance
34	Equitable Life
35	Jefferson Pilot Life
36	General Motors
37	Northwestern National Life
38	Employers Health
39	Eastman Kodak
40	JC Penney
41	Sheet Metal (various companies)
42	General Electric
43	Pacific Bell
44	Trustees of ..
45	American Chamber
46	United Foods
47	United Food & Comm. Workers Health and Benefit Fund
48	Sears Roebuck
49	CNA Insurance
50	New York
51	Cigna Healthcare
52	General American Life
53	Lincoln National Life
54	Liberty Life
55	Humana Health
56	ITT Hartford Insurance
57	United Mine Workers
58	Building Service
59	Franklin Life
60	US West (Communications, Health Care, Pension)
61	Hoechst Celanese
62	Pacific Mutual Life
63	Bethlehem Steel

Chapter 9

Fair Labor Standards Act Cases

9.1 Legal Background

The Fair Labor Standards Act of 1938 (FLSA) first fixed a federal minimum wage (which has been raised a number of times since then). It also requires time-and-a-half pay for overtime worked over forty hours a week. It outlaws such practices as requiring workers to work "off-the-clock," that is without compensation. It also requires that employers keep accurate records of hours worked and compensation for those hours.

The FLSA has been expanded, notably in 1961, to cover most hourly workers. White-collar, salaried employees are typically exempt; there are various other categories of workers that are exempt. Nevertheless, the FLSA covers over 80 million of the nation's about 137 million workers. It prohibits child labor under most circumstances, although it does allow for such things as after-school jobs by held by teenagers and children that help out in the family business. It prohibits minors from engaging in certain defined hazardous occupations.

The FLSA is enforced by the Wage and Hour Division (WHD) of the Employment Standards Administration of the U.S. Department of Labor. The WHD can sue on the behalf of employees who have illegally been paid a wage below the minimum or who have not been compensated for overtime, and can recover back wages for these employees. Often, there is no need to bring an case to court; the employer will agree to pay the back wages without litigation. The WHD, in recent years, has been focusing its efforts on industries, such as the garment industry, agriculture, and health care, that employ large numbers of low-wage workers (who are often immigrants). The WHD can also access civil penalties against those employers who engage in repeated, willful violations of the FLSA.

9.2 Understanding the FLSA Caseload

Actions under the Fair Labor Standards Act include large numbers of actions against municipalities and other governmental units. Many of these disputes are brought by (often unionized) public employees and involve overtime. Retail stores are also often involved in overtime disputes. Service firms, such as home health firms or nursing homes, and construction firms are also commonly involved in FLSA cases. Surprisingly, we find little evidence of judicial enforcement activity against sweatshops, despite the publicity surrounding such cases; however, enforcement against such entities may take other forms, such as WHD action leading to pre-litigation settlement.

As Figure 9.1 shows, the number of FLSA cases filed fell from high levels in the early 1970s to a lower level in the 1980s, and then began to rise in the 1990s. As a share of total litigation, FLSA cases started at about 3 percent of the total caseload in the early 1970s, fell to below 1 percent in the early 1980s, and had crept back above 1 percent by statistical year 2000. The boom of the 1990s included a large influx of immigrant labor. Employers of immigrant workers are more likely to fall afoul of the FLSA. The Clinton administration also made enforcement of the FLSA a priority. As we will see, the Department of Labor is the most frequent plaintiff in FLSA cases. In fact, as Table 9.1 shows, the federal government is the plaintiff in almost half (47.3 percent) of cases.

As the number of cases has grown, however, the plaintiff win rate has declined. As Figure shows, the win rate was almost 90 percent in 1979, fell below 80 percent in 1986, took a precipitous fall to 50 percent between 1992 and 1997, and subsequently climbed back up a little, to about 55 percent.

Not only is the federal government the most frequent plaintiff, but as plaintiff, the government is much more successful in its cases than are other plaintiffs. As is shown in Table 9.1, it wins 94.9 percent of adjudicated cases; again, as we have seen in both employment discrimination and labor relations cases, the federal government engages in “creaming”; much like a federal prosecutor with a large number of drug offenders to choose among for prosecution (given limited governmental legal resources), it selects both those that it can most easily defeat and are the most significant (since part of the role of FLSA prosecutions is to have a deterrent effect). Table 9.1 shows that non-federal plaintiffs, who file under the jurisdiction code of “federal question,” win 48.4 percent of adjudicated cases.

FLSA cases are unusual in that they result in a high number of consent judgments; 32.2 percent of FLSA cases are resolved through consent judgments, as opposed to only 10.2 percent of all cases. It is likely that most of these consent judgments are agreements with the government to provide redress for past FLSA violations and binding promises to not violate the Act in future (such promises to be enforced with the court in which the consent judgment is entered.) FLSA cases are like copyright cases in this respect: as shown in Section 13.2, copyright cases also have many consent agreements (that is, agreements giving redress for past violations and binding promises not to violate the copyright in future). One difference is that copyrights are almost all enforced by private parties, as opposed to the state.

Like other case types, FLSA plaintiff win rates vary by disposition, as shown in Table 9.2. Plaintiffs win only 33.6 percent of cases terminated by a motion before trial; they win 54.3 percent of jury trials and 60.2 of court trials. They also have, as is usual, a very high win rate for default judgments (96.9 percent), but there are fewer default judgments as a percent of all dispositions (13.7 percent as opposed to 25.8 percent for all cases). This is due to the higher share of consent judgments.

The amounts at stake in FLSA cases are lower than average, as shown in Table 9.3. The median amount demanded is \$30,000, and the median amount received, \$17,200. This is considerably less than the respective amounts for all cases, \$103,000 and \$40,000. The nature of the FLSA makes many cases relatively low stakes, in that issues of unpaid overtime or minimum wage violations usually involve relatively small amounts of money.

Figure 9.1: Fair Labor Standards Act Cases Filed, SY 1971-2001

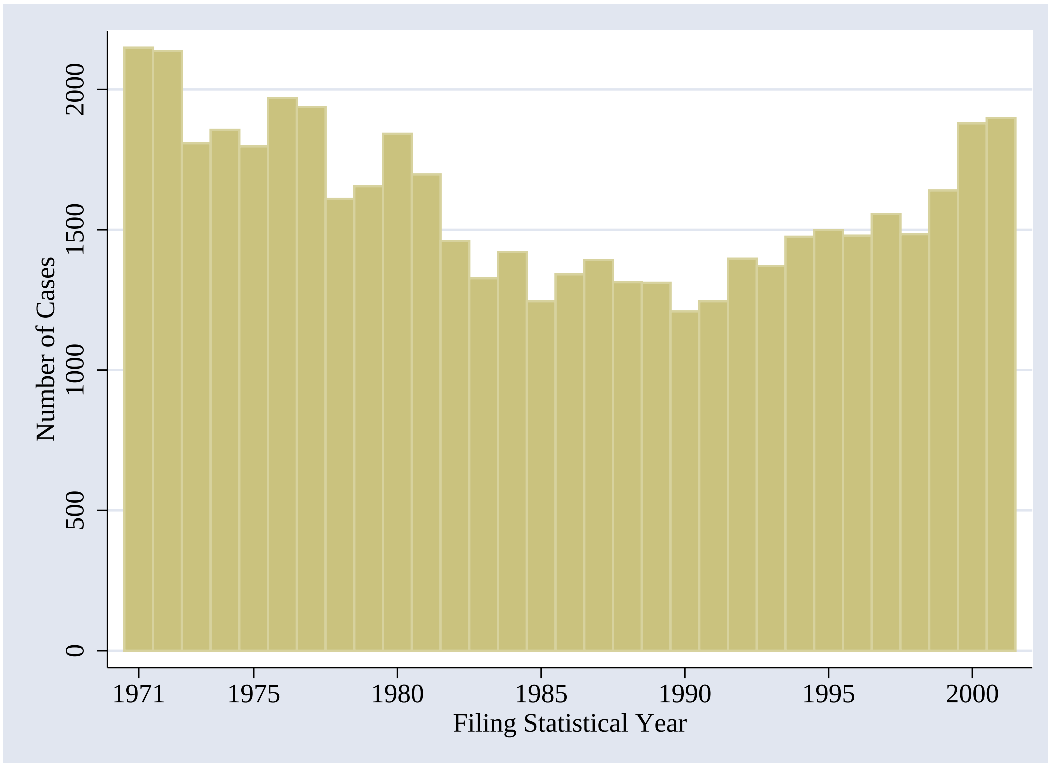


Table 9.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, FLSA Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		% Adjudicated Cases		Plaintiff Win Rate	
Jurisdiction	FLSA	All	FLSA	All	FLSA	All
U.S. Govt Plaintiff	47.3	13.6	64.1	27.4	94.9	90.4
U.S. Govt Defendant	1.2	5.3	1.5	5.9	24.9	21.5
Federal Question	51.6	48.1	34.4	42.3	48.4	44.8
Diversity	0.0	33.1	0.0	24.4	0.0	61.6

Figure 9.2: Fair Labor Standards Act Cases Filed as a Percentage of Total Cases Filed, SY 1971-2001

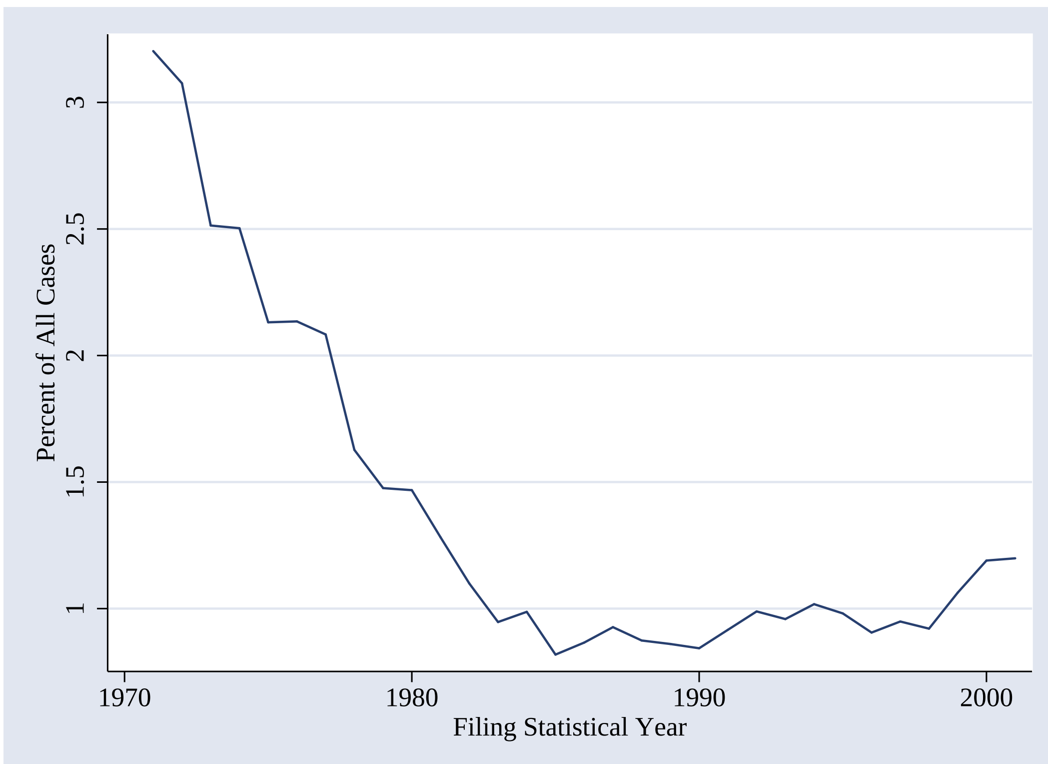


Figure 9.3: Percentage of Adjudicated Fair Labor Standards Act Cases Won by the Plaintiff, SY 1979-2001

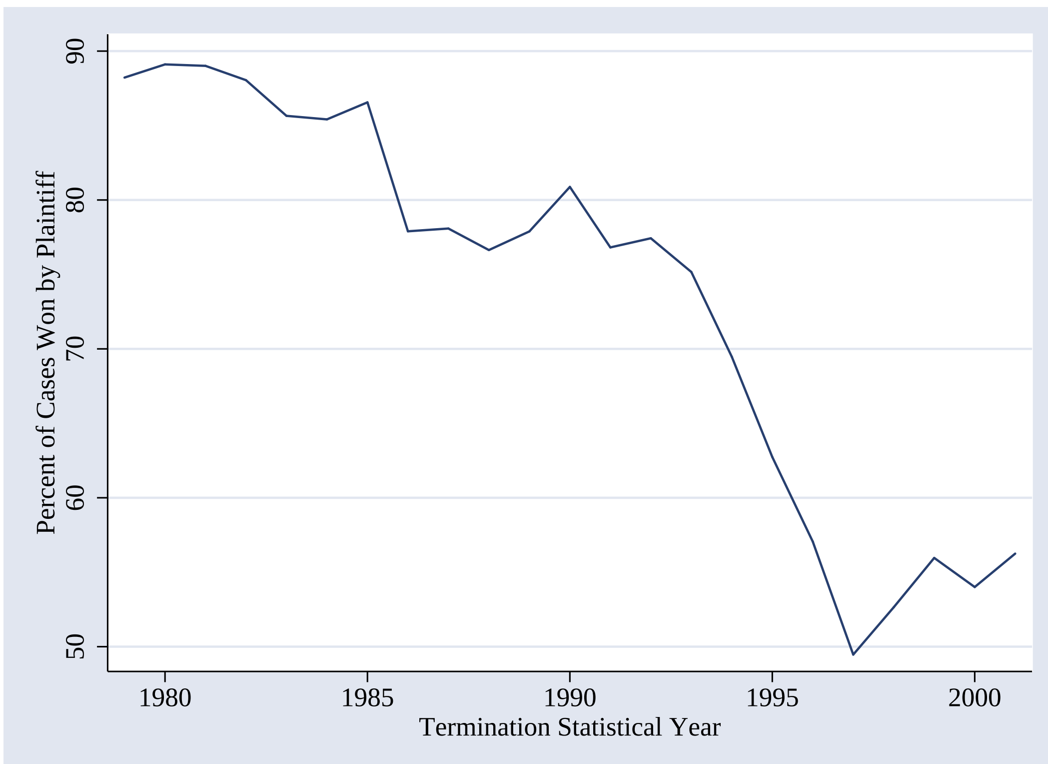


Table 9.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, FLSA Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	FLSA Cases	All Cases	FLSA Cases	All Cases
Default Judgment	96.9	98.2	13.7	25.8
Consent Judgment	96.1	92.4	32.2	10.2
Judgment on Motion Before Trial	33.6	28.0	30.0	42.3
Judgment on Jury Verdict	54.3	46.6	5.6	7.7
Judgment on Directed Verdict	29.7	27.9	0.6	0.7
Judgment on Court Trial	60.2	48.5	9.2	5.1
All Other Dispositions	76.7	47.9	8.7	8.1
All Dispositions Combined	69.8	56.8	100.0	100.0
Consent & Default	96.4	96.6	45.9	36.1
All but Consent & Default	47.2	34.4	54.1	63.9

Table 9.3: Median Amounts Demanded and Median Judgments Received, FLSA Cases and All Cases, 1000s of 2001 Dollars, 1971-2001 Aggregate

	FLSA Cases	All Cases
Sample Size	47933	3894150
Median Amount Demanded	30.0	103.0
Sample Size (Amount Demanded)	7464	1434123
Median Amount Awarded	17.2	40.0
Sample Size (Amount Awarded)	7124	404512

9.3 Examining FLSA Cases Using the Adjacent Word-Pair Frequency Method and the Single Word Frequency Method

Application of the adjacent word-pair frequency method to Fair Labor Standards Act (FLSA) cases led to the following results.

The most prominent plaintiffs were the Secretaries of Labor. This is not surprising, since the Department is charged with enforcement of the FLSA. We have also seen this in the FLSA jurisdiction table, Table 9.1.

Many of the defendants in these cases are governmental units. The first six defendants listed in Table 9.5 were governments of various types, e.g. “City of ...”, “State of ...“. This was surprising because I expected to find low-wage employers as the most prominent FLSA defendants, because I thought they would be the most likely violators of wage-and-hour statutes.

Examination of published FLSA cases in Lexis/Nexis involving a city reveals that many of these cases are likely to be disputes between public employees and a public entity over overtime (which is a subject of the FLSA) or disputes over the classification of employees as salaried managers or professionals, which makes them exempt from some of the requirements (such as overtime) of the FLSA.

Some of the cases concern payment schedules and prompt payment of monies due. In some of these cases, employees claim that they are not salaried/professional because they are subject to ordinary discipline and required to work a fixed schedule. Many of these cases appear to be brought by police, paramedics, public utility workers, airport workers, or firefighters, who work odd schedules with complex work rules and unions and therefore are likely to be drawn into complex disputes over the FLSA. In addition, many of these public employees are represented by unions and therefore are more likely to act collectively in pressing grievances under FLSA. Public employee unions have been one of the few components of the labor movement that have been growing, so they are likely to represent a growing segment of FLSA complaints.

Retail (other than grocery stores and fast food) is represented in the list of top defendants by K-Mart, Wal-Mart, JC Penney, Sears Roebuck, Rent-a-Center, and Rite Aid. The FLSA cases against Wal-Mart have gotten the most press, because Wal-Mart is the largest employer in the United States, and is controversial. Wal-Mart has been accused of such practices as forcing works to work off-the-clock, of locking workers in the store and of not paying overtime. Class-action lawsuits have been brought against the company. Barbara Ehrenreich, in the course of the participant observation for her book on low-wage work, "Nickeled and Dimed," found that similar practices were common among various low-wage employers [56].

Grocery stores are also quite prominent: such stores as Albertson's, Food Lion, and Kroger make the list of top defendants. The situation here is often similar to that of other big retail employers such as K-Mart or Wal-Mart, but there may be a role played by the UFCW, which has many grocery stores organized.

Fast food is represented in the list of top defendants by Pizza Hut. Manual exploration of the party strings reveals quite a few cases against other fast food restaurants, such as Burger King, McDonald's, and Taco Bell. Some of the cases against the fast food companies may be due to increased enforcement of the child labor laws (part of the FLSA) against companies that tend to employ youth, which the fast food companies do. This increased enforcement actually began under President George H.W. Bush and his Labor Secretary, Elizabeth Dole [62].

There appear to be quite a few cases involving farms as defendants, as evidence by the frequent use of the . Many of the plaintiffs in these cases have Hispanic names, indicating that these cases may involve migrant farm workers.

Using the single word frequency method, I found almost four hundred cases containing “health,” “health care”, or “medical” in the defendant string. Examination of published cases indicates that at least some of these cases are similar to the police, fire etc. cases discussed above; they involve disputes over overtime on the part of employees who work irregular hours and/or are disputing rules or classifications. For instance, in Cox v. Acme Health Services., 55 F.3d 1304 (7th Cir. 1995), Cox, who worked as a home health aide, contended that she was entitled for overtime pay for the hours that she spent as a caretaker-companion to an elderly patient. The court found that there was an exemption in the law for "companionship" and denied the overtime.

The words “service”, “drywall, “or “construction” appear frequently in the defendant string. Looking at the names of these companies, they appear to be a variety of service (such as cleaning service) and construction firms, many of whom are small and are evading the FLSA. In one case, Donovan v. Doyon Drywall, Inc., 1982 U.S. Dist. LEXIS 13705 (Dist. FL (Central)), the firm in question was paying its workers on a piece rate for dry-walling, and was indirectly, therefore, evading overtime. The case record indicates that this was a common practice in the industry, which may have led to the other cases that we see in our period.

There is some evidence of the presence of garment-industry sweatshops in the defendant strings. The word "fashion" or "design" appear almost 200 times between them, but these are the only indications of the presence of sweatshops, and not all of these will be in the garment industry (some of the former may be, for instance, hair salons, and the latter, construction companies). It may be that many sweatshops operate under family names or generic names (e.g. Jones Enterprises, etc.) This is likely, given that we know that there was some activity against sweatshops in the Clinton administration. Robert Reich (Clinton's first Secretary of Labor) is the plaintiff in the majority of the "fashion" cases; a few of them have Lynn Martin, his predecessor under Bush, and Alexis Herman, his successor under Clinton.

Table 9.4: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Fair Labor Standards Act Cases

1	Secretary of Labor
2	various secretaries (e.g. Schultz, Dole, Reich, Herman)
3	Equal Employment Opportunities Commission
4	Virginia Alliance of State Employees AFSCME
5	Usa Dept
6	Department Of ...
7	Ray Marshall
8	Robert Reich
9	Labor Union
10	Dist 28 United Mine Workers

Table 9.5: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Fair Labor Standards Act Cases

1	City of ...	12	K Mart	23	Sears Roebuck
2	State of ...	13	Pizza Hut	24	Rent a Center
3	County of ...	14	Wal-Mart	25	Kroger Co
4	U S	15	Los Angeles	26	United Parcel (Service)
5	Board Of ...	16	J C Penney	27	Rite Aid
6	Town Of ...	17	Kimball's Products	28	New England
7	Superior Casing (Crews)	18	Department of ...	29	General Dynamics
8	US Postal (Service)	19	Albertson's	30	American Pro Protective
9	Commonwealth of ...	20	University of ...	31	King County
10	Island Finance	21	Food Lion		
11	Goodyear Tire	22	Firestone Tire		

Chapter 10

Occupational Safety and Health Cases

10.1 Legal Background

All occupational safety and health cases are filed by the U.S Department of Labor on behalf of the Occupational Safety and Health Administration (OSHA), which was established in the Department by the Occupational Safety and Health Act of 1970, which was one of the major regulatory reforms of the era of the late 1960s and early 1970s. The Act requires employers, under what has become known as the "general duty clause", found in section 5(a)(1) of the Act, which requires that each employer "shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees." In addition, section 5(a)(2) continues that the employer "shall comply with occupational safety and health standards promulgated under this Act." OSHA, elsewhere in the act, is empowered to issue such standards in order to enforce the Act.

For enforcement, OSHA employs an inspectorate. Violations found by a the inspectors can result in fines of up to $70,000, although the highest fines are reserved for violations found to be willful. Twenty-six states run their own OSHA programs; the remaining states rely on the federal agency to operate their program. Fines and other remedies imposed by OSHA can be appealed to the Occupational Safety and Health Review Commission (OSHRC), an independent federal agency outside of the Department of Labor. Cases appealed to the OSHRC go first to the OSHRC's internal administrative law judges, and then may be, at the discretion of one commissioner, appealed to the commission itself, and than from there, to one of the U.S. Courts of Appeals. Since we are considering herein only cases being brought in the district courts, we do not see these cases in this study.

The U.S. District Courts do not play a major role in OSH regulation, according to Mark Lerner, a Department of Labor attorney I interviewed. However, there are circumstances where they do play a role. Three basic types of civil cases can be brought to the district courts.

The first kind occurs when the employer refuses OSHA entry into a workplace, and demands that OSHA provide a warrant. Under these circumstances, the Secretary of Labor (represented by the Solicitor of Labor, on behalf of OSHA) goes into U.S. District Court to obtain such a warrant. The Supreme Court, in Marshall v. Barlow's (1978), found that OSHA must go into court to obtain a search warrant, but may obtain an ex parte warrant, which is a warrant obtained with the participation of only one party. According to Lerner, litigation over these warrants was more active in the

1970s and early 1980s while the courts were still defining what constituted probable cause under which such such warrants may be issued. After the law became more established, these cases died down.

In the second type of case, an employee alleges that he has been illegally discriminated against by the employer for bringing a safety concern to OSHA. Employees have found such discrimination cases difficult to prove, because the employer usually can justify his actions on some other basis. (In that, they are similar to other types of discrimination, such as discrimination based on race or gender). According to Lerner, this explains why the number of discrimination cases has fallen to a very low level in recent years.

A third way that a case may make it into district court is to enforce a penalty that OSHA has levied against an employer. As we will see in the next section, these account for the cases in which a monetary judgment is awarded, and most of them are default or consent judgments.

The levels of OSHA cases brought in the district courts will have only a weak relationship, if any, to the underlying OSHA enforcement activity. A strong relationship exists only between enforcement activity and those cases brought to enforce penalties.

10.2 Understanding the OSH Caseload

No OSH cases were recorded in the database prior to 1975. As Figure 10.1 shows, the number of OSH cases brought has declined over the period 1975-2001. The number of cases rose in the 1970s and then declined sharply after 1982. There was a brief increase starting in about 1988, but this fell off again, to the point that very few cases are being brought currently. The decline in OSH cases as a share of all cases has declined even more precipitously, as shown in Figure 10.2.

The district court cases are almost entirely brought by a U.S. government plaintiff, as Table 10.1 shows; the government brings 99.2 percent of these cases, and wins 99.2 percent of those that are adjudicated as well. Thus, almost all of these cases probably involve warrants and penalties (which cases have the Department of Labor as a plaintiff), and not discrimination (which cases have private parties as plaintiffs), as these are the three main possible types of district court OSH cases, as we saw in the previous section. Figure 10.3 shows that the win rate has been very high over time, with a recent fall which is almost certainly due simply to random fluctuations due to the extremely low case volume (10 or less cases in the last four years shown, 1998-2001).

Very few OSH cases reach trial. Table 10.2 shows that most OSH cases are resolved in a default judgment (67.6 percent). The only other dispositions with a significant number of cases are consent judgments (11.5 percent) and judgments on a pre-trial motion (16.2 percent). Plaintiffs win virtually all of the default and consent judgments; the plaintiff win rate for the pretrial motions is still high, 82.7 percent.

As shown in Table 10.3, OSH cases are very low-stakes compared to all cases. This may be a factor in why so few of them reach trial, since going to trial is expensive. The median amount demanded in OSH cases is only $4300, and the median amount received is $4800; the corresponding figures for all cases are $103,000 and $40,000.

Among the few recent occupational safety and health cases, the most frequent case types involve coal mining and construction, two hazardous industries. There were even fewer cases involving F2000 defendants.

Figure 10.1: Occupational Safety and Health Cases Filed, SY 1975-2001

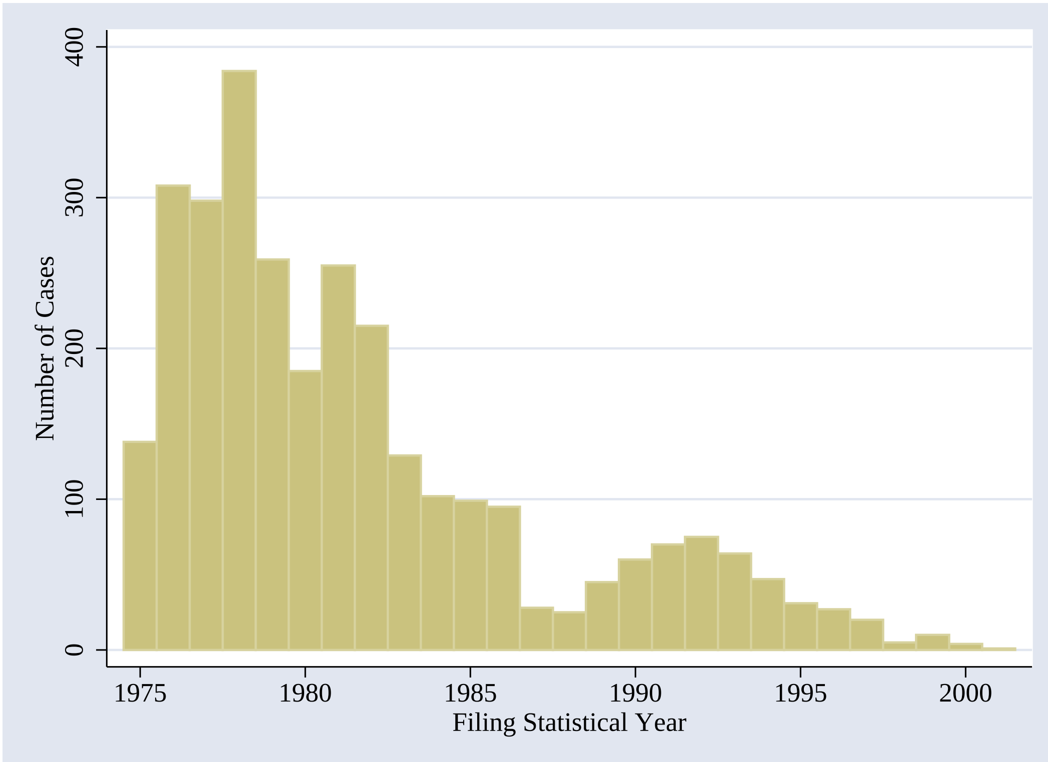


Table 10.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, OSH Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		%Adjudicated Cases		Plaintiff Win Rate	
Jurisdiction	OSH	All	OSH	All	OSH	All
U.S. Govt Plaintiff	99.2	13.6	99.2	27.4	96.1	90.4
U.S. Govt Defendant	0.8	5.3	0.8	5.9	12.5	21.5
Federal Question	0.0	48.1	0.0	42.3	0.0	44.8
Diversity	0.0	33.1	0.0	24.4	0.0	61.6

Figure 10.2: Occupational Safety and Health Cases as a Share of All Cases Filed, SY 1975-2001

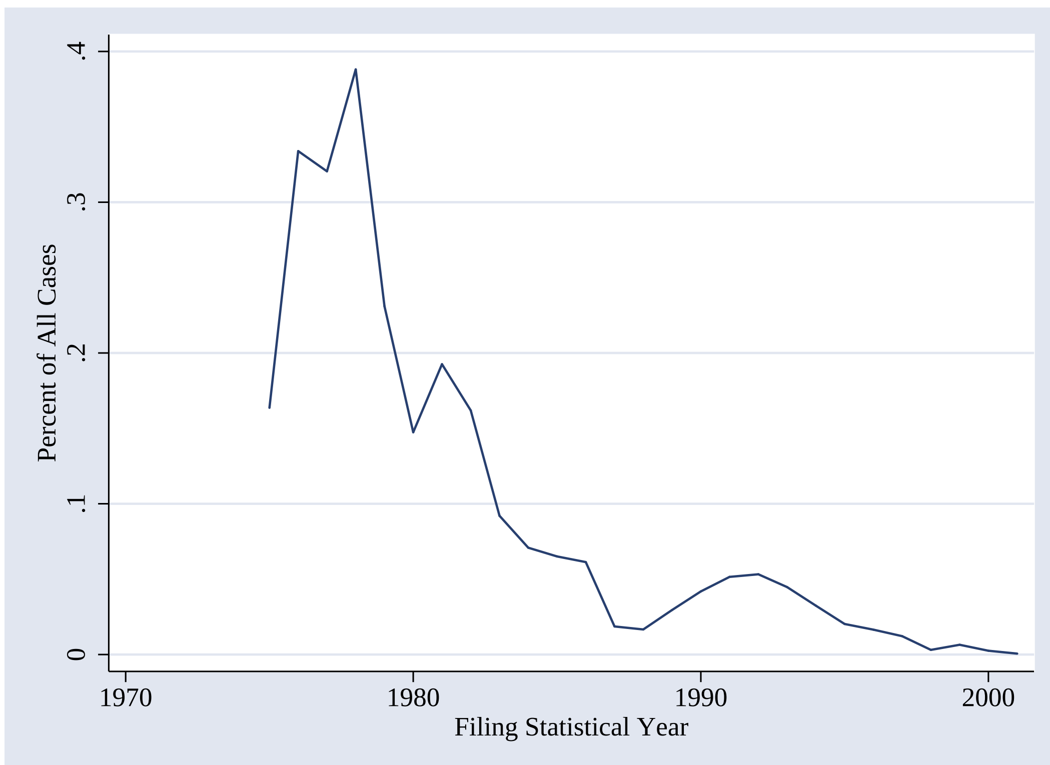


Figure 10.3: Occupational Safety and Health Cases, Plaintiff Win Rate, Terminations 1979-2000

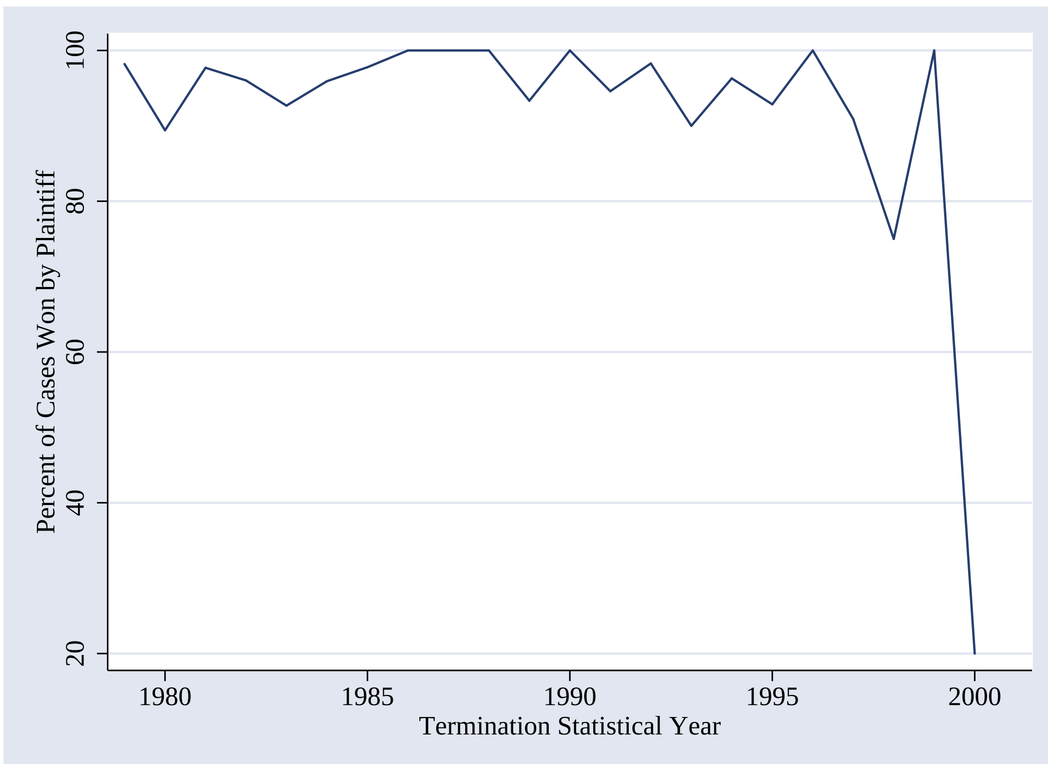


Table 10.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, OSH Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	OSH	All	OSH	All
Default Judgment	99.5	98.2	67.6	25.8
Consent Judgment	94.6	92.4	11.5	10.2
Judgment on Motion Before Trial	82.7	28.0	16.2	42.3
Judgment on Jury Verdict	100.0	46.6	0.3	7.7
Judgment on Directed Verdict	0.0	27.9	0.3	0.7
Judgment on Court Trial	85.7	48.5	2.2	5.1
All Other Dispositions	66.7	47.9	1.9	8.1
All Dispositions Combined	95.0	56.8	100.0	100.0
Consent & Default	98.8	96.6	79.1	36.1
All but Consent & Default	80.6	34.4	20.9	63.9

Table 10.3: Median Amounts Demanded and Median Judgments Received for OSH Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate (OSH Cases Began in 1975)

	OSHA Cases	All Cases
Sample Size	2997	3894150
Median Amount Demanded	4.3	103.0
Sample Size (Amount Demanded)	909	1434123
Median Amount Awarded	4.8	40.0
Sample Size (Amount Awarded)	798	404512

10.3 F2000 OSH Litigation

F2000 companies were defendants in only 66 OSH cases in the period 1971-91, which is not a large enough number of cases to reach many conclusions. However, the top three SICs of defendants were "Fabricated Metal Products," SIC 34, with nine cases, "Oil And Gas Extraction," SIC 13, with six cases, and "Primary Metal Industries," SIC 33, with six cases. These industries are known to be hazardous.

10.4 OSH Cases Viewed with the Adjacent Word-Pair Frequency Method and the Single Word Frequency Method

It appears that some cases involving the old Board of Mine Operations within the Department of the Interior, which regulated mine operations prior to the 1977 enactment of the Mine Safety and Health Act (MSHA), have been classified under the same code in the database as OSH cases. It turns out that these cases, which almost all have the Secretary of the Interior as plaintiff and a mining company as a defendant, are the main cases that we find using the adjacent-word-frequency method; no other OSHA cases involve frequently-occurring defendants. The top defendants are shown in Table 10.4. This is due to a spurt in these cases in the early 1970s; the perception that mines were unsafe led to the passage of MSHA, which largely removed enforcement activity from the district courts.

The single word frequency method finds that many of the defendants in OSH cases have words in their corporate names that are identified with the construction industry. OSHA has been known to focus its much of its energies on the construction industry, because it is known to be particularly hazardous. The steel industry is also represented.

Table 10.4: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Occupational Safety and Health Cases

1	J M Coal Co	4	Owl Creek Mining Co	7	Buffalo Creek Mining
2	Campbell Coal	5	Darnell Mining	8	Lucky Cumberland Mines
3	Sanders Coal	6	H B Coal	9	

Chapter 11

Railroads and the Federal Employers' Liability Act

11.1 Legal Background

The Federal Employers Liability Act of 1908 (FELA) allows railroad employees that have been harmed or killed on the job to sue their employer for damages. FELA was enacted in response to high rates of injury among railroad workers, who were at the time of its enactment a much more prominent force in society than they are today. In order for FELA to apply, the railroads for which workers are employed must be engaged in interstate commerce. The Jones Act gives to sailors the same protection given to railroad employees. Railroad workers and sailors are the only workers who can sue their employers for job-related illnesses, injuries, or death; all other workers rely on the (no-fault) workers' compensation system, which is a compulsory insurance system that came out of a social compromise.

Thus railroad workers and sailors are the only workers who generally can sue their employer when they are injured on the job. Employees can sue if they have not been provided safe tools and a safe working environment, which amounts to employer negligence, and this negligence leads to employee illness, injury, or death. The standard used for recovery of damages is one of comparative negligence. This means that employees can still recover damages even if they contributed to their own accident, provided that the employer contributed to it as well. Damages are reduced by the proportion of the employee's contribution. Employees can recover for medical expenses, loss of wages, and pain and suffering. These cases demonstrate that a significant burden on the courts is created by opting for a legal rather than a administrative mechanism for handling workplace injury, although defenders of FELA argue that it creates strong incentives for safety in the hazardous railroad industry.

The standard of negligence under FELA is generally considered to be rather lenient. All that needs to be shown is that the employer contributed in some way, no matter how small, to the employee's injury, for negligence to be found. This, along with the generally hazardous conditions in an aging railroad system, may contribute to the relatively large number of cases. In addition, the courts have been allowing claims for emotional distress, which may also contribute to the number of claims filed. For instance, in 1995, the Supreme Court found that if the employer places the employee in a "zone of danger" (a common-law test) in which they may reasonably fear physical harm or physical impact, then they may recover for emotional distress. Upon remand, the district court found (and the appeals court affirmed) that the facts in the particular case in question (Gottshall v. Conrail, 988 F.2d 355 (3rd Cir. 1993) did not place the plaintiff (Gottshall) in physical danger, so he lost the case, but in principle, employees may recover for emotional distress. (Gottshall had been urged to continue working while a fellow employee had collapsed; the man died, and Gottshall suffered an emotional breakdown.)

Some critics have argued that FELA is no longer necessary and that railroad workers should be, like almost all other workers, be covered instead by workers compensation. Phillips [170] argues that FELA should be preserved, because the railroad industry is a hazardous one and FELA gives employers an incentive to operate safely, since they have to fear lawsuits. He points out that the railroad industry has opposed FELA almost from its inception (in 1906), and have attempted to replace it with workers compensation. He argues that policy makers have felt that FELA was an effective mechanism for preserving employee safety in railroads, otherwise they would have given in to the pressure from the railroads. (Of course, plaintiffs' attorneys and railroad unions have exerted political pressure in the other direction.) Phillips found that, setting aside claims for occupational illness, claims under FELA have resulted in payments of "\$21,954 per non-litigated claim, \$143,144 per lawsuit claim, and \$43,750 per claim overall."

Murphy [156] points out that one of the strategies taken by the railroads in FELA cases is to file a property damage counterclaim against the employee, in cases when railroad property was damaged at the same time as the injury to the employee and the railroad can make a case that the employee's actions contributed to the damage.

11.2 Understanding the FELA Caseload

The FELA caseload from 1971-2001 is shown in Figure 11.1. The caseload rose fairly steadily from the early 1970s to the early 1990s, and then fell off sharply after about 1992. Figure 11.2 shows that the decline in FELA cases as a share of all cases has also been sharp; through most of the 1970s and 1980s, the share was about 1.5 percent. It fell in the 1990s to a little above 0.5 percent. The share of cases won by the plaintiff, as shown in Figure 11.3, has fluctuated over time, but appears to be exhibiting an overall downward trend, from almost 70 percent in the early 1970s to somewhat over 40 percent in the 1999-2001 period.

Table 11.1 shows that the jurisdiction for FELA cases is always "federal question," which means that the government is never a plaintiff or defendant. Table 11.2 shows that an unusual number of adjudicated FELA cases are taken to a jury trial; 48.8 percent of FELA are so adjudicated, as opposed to only 7.7 percent of all cases. Among adjudicated FELA cases, 29.2 percent are settled on a pre-trial motion, as opposed to 42.3 percent of all cases. FELA plaintiffs only win on pre-trial motions 13.0 percent of the time, as opposed to 28 percent in all cases; however, they win 69.7 percent of their jury verdicts. This appears to be a type of case in which attorneys are motivated to take to a jury. Since they all involve injuries to employees, juries may be sympathetic.

Table 11.3 shows that FELA cases are high-stakes; both demands and awards are substantial. The median amount demanded in a FELA case was $584,000, and the median amount awarded, in those cases in which money was awarded, was $163,200. The respective values for all cases are $103,000 and $40,000. However, the table shows that the number of cases in which money was awarded was less than a tenth of the number in which it was demanded; in many of the others, the cases were likely settled out-of-court for amounts that are not recorded in the database.

While railroad employment has been falling steadily since the 1950s, the industry remains one of the most highly unionized in the country. The railroad workers union, which in 2004 became part of the Teamsters, is active in promoting workers' awareness of their rights under FELA, and they maintain a list of recommended attorneys. Because awards or settlements in FELA cases can be substantial, these firms are eager to work on contingency.

Figure 11.1: FELA Cases Filed, SY 1971-2001

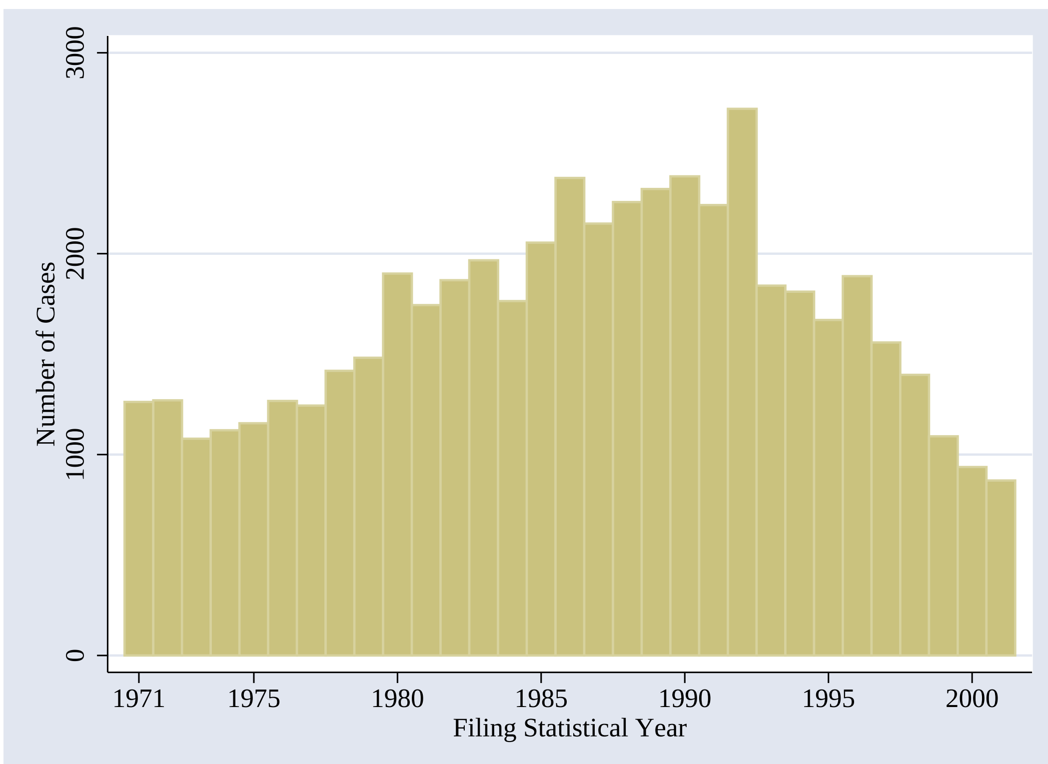


Figure 11.2: FELA Cases Filed as a Percentage of All Cases Filed, SY 1971-2001

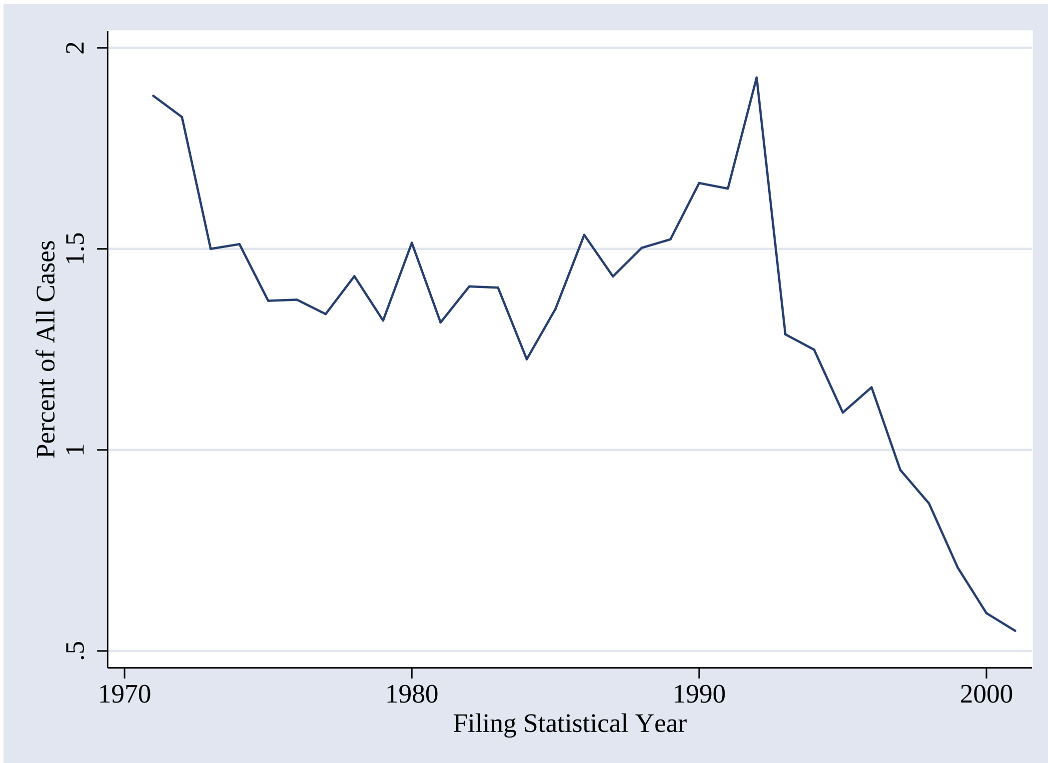


Table 11.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, FELA Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		% Adjudicated Cases		Plaintiff Win Rate	
Jurisdiction	FELA	All	FELA	All	FELA	All
U.S. Govt Plaintiff	0.0	13.6	0.0	27.4	0.0	90.4
U.S. Govt Defendant	0.0	5.3	0.0	5.9	0.0	21.5
Federal Question	100.0	48.1	100.0	42.3	58.1	44.8
Diversity	0.0	33.1	0.0	24.4	0.0	61.6

Figure 11.3: Percent of Adjudicated FELA Cases Won by Plaintiff, SY 1979-2001

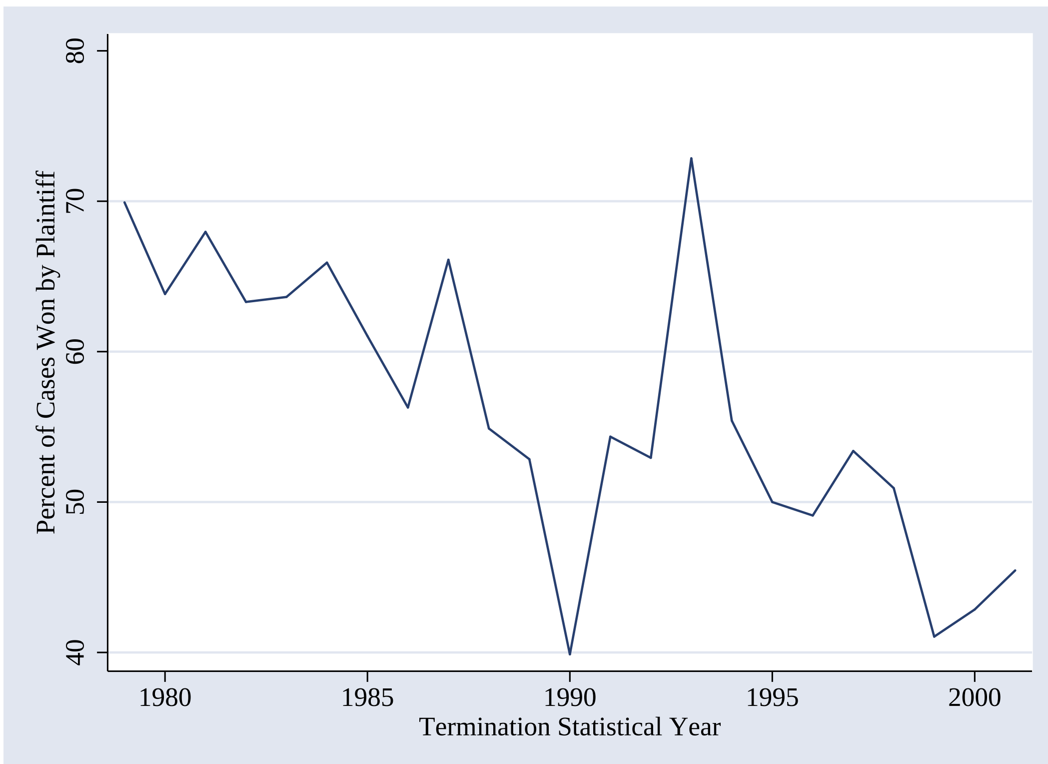


Table 11.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, FELA Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	FELA	All	FELA	All
Default Judgment	75.0	98.2	0.7	25.8
Consent Judgment	91.1	92.4	3.3	10.2
Judgment on Motion Before Trial	13.0	28.0	29.2	42.3
Judgment on Jury Verdict	69.7	46.6	48.8	7.7
Judgment on Directed Verdict	33.9	27.9	2.4	0.7
Judgment on Court Trial	71.4	48.5	2.4	5.1
All Other Dispositions	77.5	47.9	13.3	8.1
All Dispositions Combined	54.1	56.8	100.0	100.0
Consent & Default	88.4	96.6	4.0	36.1
All but Consent & Default	52.7	34.4	96.0	63.9

Table 11.3: Median Amounts Demanded and Median Judgments Received, FELA Cases and All Cases, 1000s of 2001 Dollars, 1971-2001 Aggregate

	FELA Cases	All Cases
Sample Size	51815	3894150
Median Amount Demanded	584.0	103.0
Sample Size (Amount Demanded)	25041	1434123
Median Amount Awarded	163.2	40.0
Sample Size (Amount Awarded)	2124	404512

11.3 FELA Cases Viewed with the Adjacent Word-Pair Frequency Method

Table 11.4 shows that the top FELA defendants are all railroads, either long-haul or commuter. The largest railroads in the country are near the top of the list, as one would expect. Some of these defendants are also F2000 companies and have shown up earlier in the analysis of F2000 cases. Two New York-area commuter railroads, the Long Island Railroad and the Metro North Railroad, appear near the top of the list, probably because they have a lot of employees. Manual examination of the plaintiff strings in FELA cases indicates that the plaintiffs are almost all individuals.

Table 11.4: Most Frequently Occurring Adjacent Word Pairs in Defendant String, FELA Cases

1	Consolidated Rail	22	Kansas City Southern Railway
2	Union Pacific	23	Erie Lackawanna Railway
3	Burlington Northern	24	Boston Maine Railroad
4	CSX Transportation	25	Delaware Hudson Railroad
5	Penn Central	26	Seaboard Systems Railroad
6	Long Island Railroad	27	Chicago & Northwestern Railroad
7	Metro North Railroad	28	Southern Railway
8	Southern Pacific	29	Maine Central Railroad
9	Atchison Topeka & Santa Fe RR	30	NE Illinois Regional Commuter Railroad
10	National Railroad Passenger Co	31	SE Penn. Transportation Authority
11	Norfolk Western Railroad	32	Denver Rio Grande Western Railroad
12	Norfolk Southern Railroad	33	Springfield Terminal Railway Company
13	New Jersey Transit	34	Port Authority of NY and NJ
14	Illinois Central Railroad	35	Reading Company
15	Grand Trunk Western Railroad	36	Elgin Joliet and Eastern Railway
16	Soo Line	37	Union Railroad
17	Baltimore & Ohio (B&O) Railroad	38	Indiana Harbor Belt Railroad
18	Chesapeake Ohio Railroad	39	Chicago Milwaukee and St. Paul Railway
19	Baltimore Ohio Railroad	40	Patapsco and Back Rivers Railroad
20	St Louis Southwestern Railway	41	Western Maryland Railway Company
21	Missouri Pacific Railroad	42	Seaboard Coast Line Railroad

Chapter 12

Patent Cases

12.1 Legal Background

Both patent and copyright law stem from a clause in the U.S. Constitution[1] that authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

Patent law protects inventions. Patent holders are granted a limited-term monopoly in a particular product or process that they have invented. An inventions must be non-obvious, useful, and represent an advance over existing knowledge, which is referred to as "prior art." One of the main dangers to a patent holder when attempting to defend a patent in court is that prior art will be found that invalidates the patent in question.

Before a patent is filed, a search through previously issued patents is done, in an

[1] Found in Article 1, Section 8.

attempt to find such prior art. If none is found, a patent application is filed, which includes a detailed description of the patent or process for which a patent is requested. The standard for granting a patent (beyond those given above) is "novelty," which is a stronger legal standard than originality, which is all that is required for a copyright. Patents are much harder and more expensive to obtain than copyrights. Because they are expensive to obtain, filing for a patent is a business decision; sometimes, a company may decide to keep a new invention a trade secret rather than applying for a patent.

Patents may be sold or licensed. Patents are also subject to compulsory licensing, if a good faith effort has been made to reach a licensing agreement and none has been reached. However, the use of compulsory licensing in the U.S. has been rare [243]. U.S. law does not force a patent holder to manufacture or license their patent (i.e. "use it or lose it"), as is done in many other countries. This has led to, some would argue, a practice of obtaining patents in order to obtain royalties from someone who wants to use a similar idea later.

The term of patents is considerably shorter than that of copyrights; twenty years for utility and plant patents, and fourteen years for design patents (from the date of the application). Utility patents are patents on novel processes or products. A utility patent is what is normally thought of when the term "patent" is applied; plant patents cover plant varieties (e.g. hybrid roses), and design patents cover the appearance of a product. Patent holders can sue for damages and injunctive relief against alleged infringers.

12.2 Understanding the Patent Caseload

As Figure 12.1 shows, the number of patent cases filed annually in the U.S. is only a few thousand, but it has been growing robustly in the last decade or so. Figure 12.2 shows the share of patent cases as a share of all litigation; this share actually declined from the 1970s to the 1980s, to rise again in the 1990s. Much of this rise in the 1990s may have been due to the dominance of "knowledge" industries in that decade. However, patent cases still represent a very small share of total federal civil litigation; in 2001, this share was 1.4 percent. However, this share does not reflect the public interest in these cases, which is much higher than the number of cases would indicate. Intellectual property is highly significant to the economy, and patent rights–especially in certain industries such as high-tech and pharmaceuticals–are central to business strategy.

The plaintiff in a patent case is not necessarily a patent-holding company. My examination of a sample of case files showed that a fair share (although a minority) of patent cases are declaratory judgment cases, in which the plaintiff is trying to get a ruling from a court that proceeding to produce a product would not violate a patent, either because the product is sufficiently different in substance from the subject matter of the patent in question, or because the patent in question is not valid, typically because of the existence of "prior art" that was not brought to the attention of the patent office at the time that it granted the patent. Of course, in many cases, the plaintiff is in fact the patent holder, and is alleging infringement. Such infringement cases are of two main types: cases of deliberate infringement (piracy), which are less likely to be contested in court (since they are often open-and-shut cases), and cases involving two companies, often with the defendant company believing in good faith that their competing product did not violate the patent of the plaintiff company, or at least hoping so.

Figure 12.3 shows the percentage of adjudicated patent cases won by the plaintiff between 1978 and 2001. The figure shows that the win rate climbed from around 60 percent in the early 1980s to over 70 percent around 1990, and then fell again in the 1990s to a level fluctuating between 55 and 60 percent. If, as I suspect, in most of these cases, the plaintiff is the patent holder, this means that patent holders have been, in recent history, moderately successful in defending their rights in court.

Table 12.1 shows that the overwhelming source of jurisdiction in patent cases is "federal question." In the relatively few cases in which the federal government is a party, it is quite successful.

Table 12.2 shows that among adjudicated patent cases between 1986 and 2001, 62.7 of cases were won by the plaintiff. It also shows that consent judgments are the most common dispositions, constituting 38.5 percent of all dispositions in patent cases, as opposed to only 10.2 percent of dispositions in all cases. The plaintiff wins the overwhelming number of these consent judgments: 93.8 percent (such a high rate is normal for consent judgments; 92.4 percent of all consent judgments are won by the plaintiff). Thus the high level of consent judgments is boosting the overall win rate. This is clear when we examine the other common dispositions in patent cases. The next most common disposition is a ruling on a pretrial motion, accounting for 31.5 percent of dispositions; plaintiffs win only 24.9 percent of these, indicating that many of these are successful motions from the defendant. Plaintiffs win 67.7 percent of jury trials, but these are only 9.7 percent of the dispositions. Plaintiffs win 49.9

percent of court trials, but these are only 8.6 percent of dispositions. The result of these varying outcomes by disposition is a slight advantage to the plaintiff overall.

Table 12.3 shows that stakes in patent cases are somewhat higher than average. The median amount demanded of $120,000 in patent cases is only somewhat higher than the $103,000 in all cases, but the median amount awarded of $148,800 is substantially higher than the $40,000 among all cases. This is not surprising, because patent cases typically are business-versus-business cases, and therefore are usually higher stakes than other cases, which often involve individuals.

Figure 12.1: Patent Cases Filed, SY 1971-2001

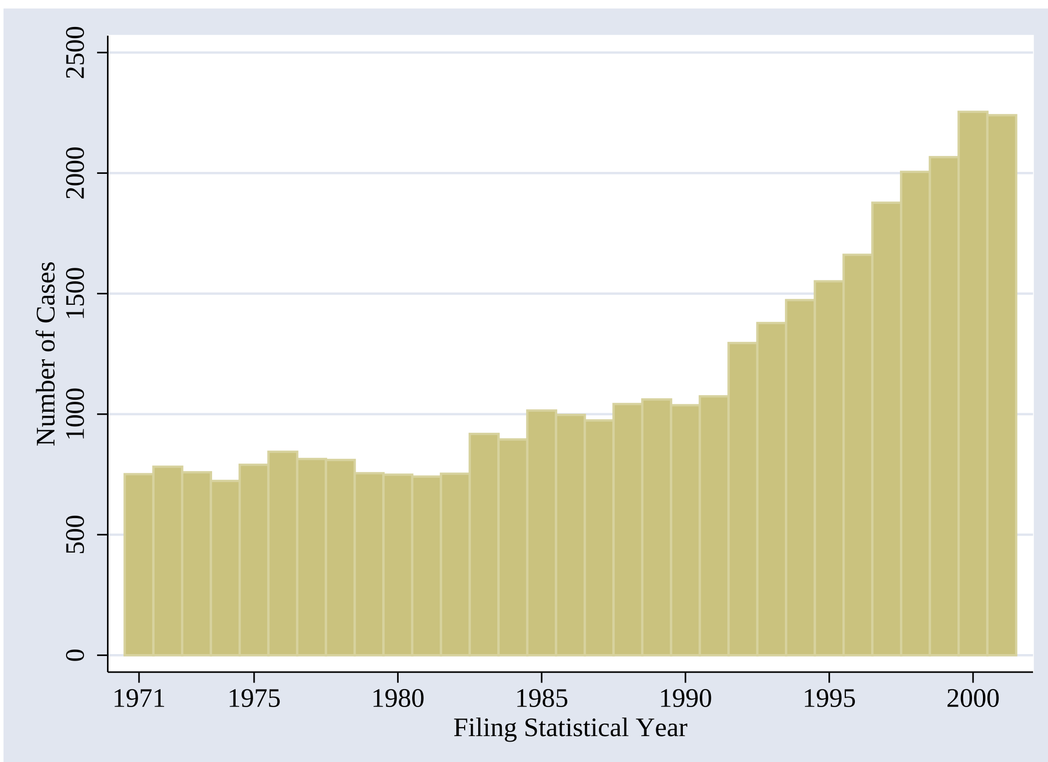


Figure 12.2: Patent Cases Filed as a Percentage of All Cases Filed, SY 1971-2001

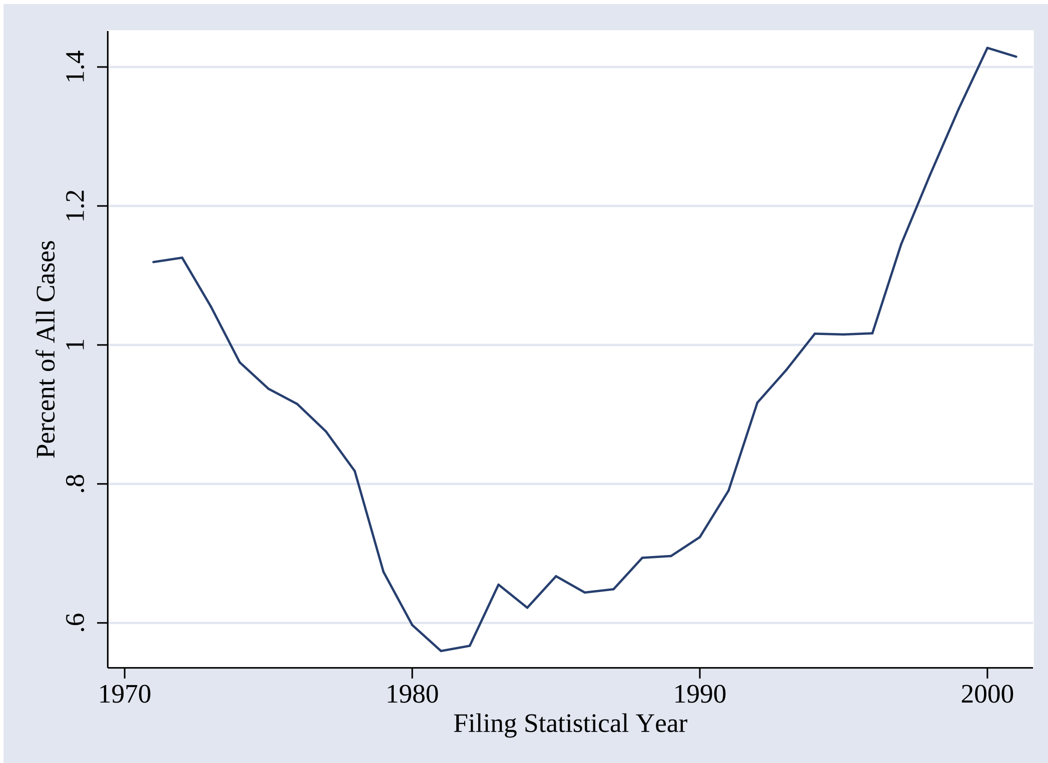


Table 12.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, Patent Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		% Adjudicated Cases		Plaintiff Win Rate	
Jurisdiction	Patent	All	Patent	All	Patent	All
U.S. Govt Plaintiff	0.3	13.6	0.4	27.4	68.2	90.4
U.S. Govt Defendant	1.3	5.3	1.7	5.9	18.8	21.5
Federal Question	98.3	48.1	98.0	42.3	63.3	44.8
Diversity	0.0	33.1	0.0	24.4	0.0	61.6

Figure 12.3: Percentage of Adjudicated Patent Cases Won by the Plaintiff, SY 1978-2001

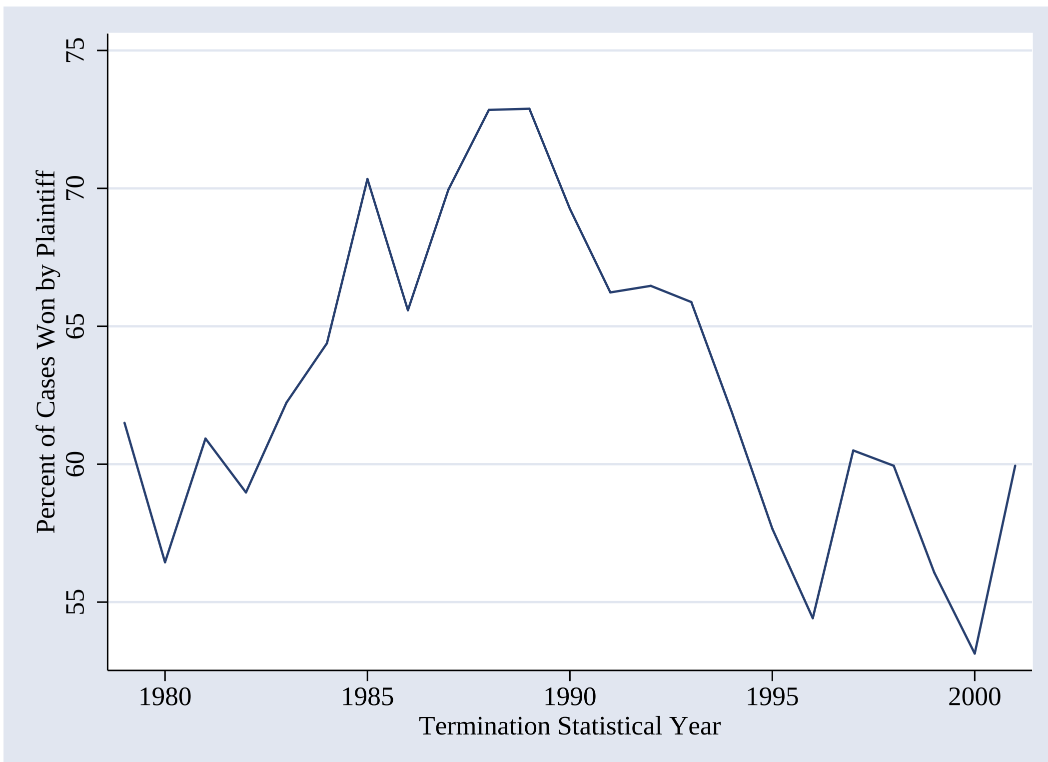


Table 12.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, Patent Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Patent	All	Patent	All
Default Judgment	94.2	98.2	4.6	25.8
Consent Judgment	93.8	92.4	38.5	10.2
Judgment on Motion Before Trial	24.9	28.0	31.5	42.3
Judgment on Jury Verdict	67.6	46.6	9.7	7.7
Judgment on Directed Verdict	48.7	27.9	0.9	0.7
Judgment on Court Trial	49.9	48.5	8.6	5.1
All Other Dispositions	50.7	47.9	6.3	8.1
All Dispositions Combined	62.7	56.8	100.0	100.0
Consent & Default	93.8	96.6	43.1	36.1
All but Consent & Default	39.2	34.4	56.9	63.9

Table 12.3: Median Amounts Demanded and Median Judgments Received for Patent Cases and All Cases, 1000s of 2001 Dollars, 1971-2001 Aggregate

	Patent Cases	All Cases
Sample Size	33832	3894150
Median Amount Demanded	120.0	103.0
Sample Size (Amount Demanded)	2052	1434123
Median Amount Awarded	148.8	40.0
Sample Size (Amount Awarded)	1200	404512

12.3 F2000 Patent Cases

As one might expect, F2000 patent litigation is dominated by firms that rely on advanced technology, such as firms in the chemical, pharmaceutical, and electronics industry. There are 3,219 cases with an F2000 plaintiff, and 3,432 cases with a F2000 defendant. The top twenty F2000 plaintiffs are shown in Table 12.4, and the top twenty F2000 defendants in Table 12.5. We see that the top plaintiffs include the chemical companies as Dow Chemical, FMC, and Union Carbide, the diversified technology companies 3M and BOC, the pharmaceutical companies Upjohn and Lilly, and the electrical/electronics companies General Electric, AMP, RCA, Teledyne and AT&T Technologies (the equipment division of AT&T). The defendants are a somewhat more diverse group: they include two of the largest retailers, Sears and K Mart, two of the big three auto manufacturers, General Motors and Ford, as well as the electronics companies General Electric, Westinghouse, Litton, Tandy, Motorola and Teledyne, the pharmaceutical company Abbott Laboratories, and the chemical companies Union Carbide and Dow Chemical.

12.4 F2000 Patent Plaintiffs

As examples of cases with F2000 plaintiffs, let us consider published cases involving three of the top F2000 plaintiffs, Minnesota Mining and Manufacturing (3M), Dow Chemical, and Lilly. 3M is a diversified, technology-based manufacturing company; Dow is a large chemical company; and Lilly is a large pharmaceutical company. These cases, as we will see, indicate that most patent litigation is between businesses, and that much of it has to do with the production of knock-off products.

Table 12.4: Top F2000 Plaintiffs in Patent Litigation, SY 1971-1991

Company	Cases
Minnesota Mining and Manufacturing	68
Upjohn Co	58
Dow Chemical Co	44
General Electric Co	41
AMP Inc	38
Lilly (Eli) & Co	36
FMC Corp	33
RCA Corp	32
BOC Inc	32
Oak Industries Inc	32
Teledyne Inc	30
AT&T Technologies Inc	28
Union Carbide Corp	26
Kaiser Industries Corp	26
Phillips Petroleum Co	25

Table 12.5: Top F2000 Defendants in Patent Litigation, SY 1971-1991

Company	Cases
Sears Roebuck and Co.	66
General Electric Co.	56
Minnesota Mining and Manufacturing Co (3M)	53
Ford Motor Co	42
General Motors Corp	39
K Mart Corp	37
American Hospital Supply Corp	29
Motorola Inc	29
Westinghouse Electric Corp	27
Dow Chemical Co	25
Tandy Corp	25
Du Pont (E.I.) De Nemours & Co	25
Teledyne Inc	25
Litton Industries Inc	25
Honeywell Inc	24

In 3M v. Fellowes Manufacturing Company, 76 F. Supp. 2d 972 (1999), 3M sued Fellowes over infringement of a patent that it had on a gel-filled wrist rest for computer keyboard users. Fellowes counterclaimed, citing a patent it held for a similar product which was filled with a liquid. The case turned on whether or not a gel "flowed" and therefore could be thought of as a liquid; the court found that it did not, and that neither patent infringed the other. Here either side could have been the plaintiff; 3M was the plaintiff simply because it sued first.

In 3M v. Beautone Specialities et al., 117 F. Supp. 2d 72 (1999), 3M sued some companies (some of which were Chinese) for infringement of the patented adhesive that it uses for its popular "Post-It" notes. The court granted the defendants' summary judgment motion, finding that the defendants product did not infringe 3M's patent under the patent law's doctrine of equivalents;[2] there were differences that were significant enough to preclude infringement. This case illustrates the ability of a popular consumer product to generate litigation, as companies try to knock it off.

In Dow Chemical v. Viskase Corp., 852 F. Supp. 991 (1995), Dow brought a declaratory judgment action, seeking to show that the defendant's patents on certain varieties of ethylene polymers were not valid or were not infringed by its products. The court found that Viskase had already represented to Dow that it was released from any liability or possible suit, and therefore refused to exercise jurisdiction. In Dow Chemical v. Eby Mine Service et al., 813 F. Supp.. 749 (1993), the court found that Eby had infringed Dow's patent on "backfilling underground voids" created during mining. The issue then was whether individual defendants could be found liable for inducing Eby to do so; a separate trial was set to find out the facts of this; the case

[2] This doctrine says that two products can be treated as equivalent even if there are some differences, if they are sufficiently similar.

was then settled.

In Lilly v. Zenith Goldline Pharmaceuticals, 149 F. Supp. 2d 259 (2001), Lilly sued a competitor for infringement of a peptic ulcer drug. The competitor tried to apply to sell the drug as a generic before the patent expired. The defendant maintained that the patent was invalid in that it added no non-obvious advance over prior art. The court disagreed, and found that the infringement was willful, and awarded attorney's fees because of this fact. In Lilly v. A.H. Robins, 1985 U.S. Dist. LEXIS 16640, Lilly sued Robins for infringing a drug that improved ruminant animal efficiency in utilizing feed. Robins alleged obviousness as a defense. The court found infringement, and enjoined against further infringement.

Patent cases often pit large companies against one another, as one company claims that one or more other companies have infringed one of its patents. For instance, in 1997, Unocal won a case against six other oil companies that it claimed were infringing a patent that it held on a formula for gasoline that met the California emission standards. The jury awarded Unocal back royalties, and future royalties will be negotiated between Unocal and the other oil companies. The case was appealed [118].

12.5 F2000 Defendants in Patent Cases

12.5.1 Retailers as Defendants in Patent Cases

Why is it that retailers appear more frequently as defendants in patent cases than they do as plaintiffs? Is it because they are some of the highest visibility firms in the country, and therefore patent holders are likely to be aware of their infringement?

Or is it simply their size? A look at the published cases may give us a clue as to the reason. Let us consider Sears and K Mart as examples of large retailers with significant numbers of cases.

Sears Roebuck was the top defendant in patent cases during the 1971-2001 period. Sears may be the top defendant because it sells so many mechanical devices, such as tools, that are likely to be covered by a patent. In a nation with many inventors and tinkerers, many people have invented various tools and mechanical devices, and Sears may have tried to get away with not compensating some of them. In addition, Sears may sometimes infringe the patents of major technology-based companies. Let us examine some such cases.

In Philips Elecs. North America Corp. v. Sears Roebuck., 55 F.3d 592 (Fed. Cir 1995), the U.S. subsidiary of the large Dutch electrical/electronics company Philips, U.S. Philips, sued Sears Roebuck and Izumi, a Japanese company, over Philips's patent on a rotary electric razor. It had previously sued Izumi in Japan, and Izumi and Windmere Corporation in Florida, in similar suits. Because of the fact that there were two lawsuits in the U.S. that dealt with substantially the same matter, the situation got very complex.

At the time, only two companies in the world manufactured such razors, Philips and Izumi. Izumi sold its razors to Windmere Corporation, which marketed them under the "Ronson" name and under the Sears name at Sears stores. Philips marketed its razors under the "Norelco" name.

Philips alleged that Sears infringed two patents it held (through U.S. Philips), and that Izumi induced the infringement. Izumi responded that these three lawsuits amounted to harassment, designed to drive Izumi out of the market. Izumi maintained that Philips had the market all to itself prior to 1977, when Izumi entered the market. Izumi also counter-sued under the antitrust laws, maintaining that Philips engaged in predatory pricing and price discrimination. This form of counter-suit is common in intellectual property litigation. Since patents and copyrights are effectively government-granted monopolies on a particular product, defendants often use antitrust law to defend themselves, arguing that the plaintiffs are not entitled to their market power (their intellectual property should not have been granted) and that the plaintiffs have abused their market power.

The litigation between Sears and Philips took over 10 years. In 1996, a jury found that Sears had not infringed Philips' patents on the shaver.

This case gives us an idea as to why retailers appear so frequently as defendants; they market products, and have an incentive to market "knockoffs" if they can be sold more cheaply. On the other hand, they do little or no applied product development research, at least not much compared to technology companies such as Philips, and therefore have very few patents to defend by suing others, as plaintiffs.

In 1975, Donald Gronholz demonstrated a power tool accessory, a router guide, to a Sears purchasing agent. The router guide aided the operator of a power tool, a router, in making cuts in wood or plastic. Gronholz obtained a patent on his invention in 1977. In 1978, Sears began to sell a router guide that Gronholz claimed was based on his design. In Gronholz v. Sears, Roebuck & Co., 869 F.2d 390 (8th Cir. 1989), he sued Sears for patent infringement and unfair competition. Gronholz died in 1987, but his widow carried on the suit. The patent infringement claim was dropped, and it is not clear what the fate of the unfair competition claim was.

In 1963, Peter Roberts invented a socket wrench that made it easier to change the sockets, a so-called "quick-release wrench." In 1965, he was granted a patent on it. He was an employee of Sears at the time of the invention. He signed over the rights to the wrench to Sears. Sears marketed it and it was an enormous success.

In Roberts v. Sears, Roebuck & Co., 723 F.2d 1324 (7th Cir. 1983), Roberts sued Sears, alleging that Sears had known that a patent would issue, and he hadn't known so, at the time of signing the rights over to Sears. He alleged that he was fraudulently induced to sign the rights to the invention over to Sears. A jury awarded a million dollars in damages to Roberts. This case illustrates how disputes over patent rights can often arise between a company and one of its employees, and Sears has many employees, many of whom are familiar with the technologies that the store sells.

A similar case, Maxwell v. K Mart Corp., 880 F. Supp. 1323 (Dist. MN 1995), although not involving an employee, was filed against K-Mart in 1992. In the 1980s, Susan Maxwell invented a system for attaching shoes to one another in self-service stores to prevent separation and mismatches, a system that did not damage the shoes themselves. She was granted a patent for this system. She licensed the system to one discount store (Target) but was unable to negotiate a license with the companies that operated the shoe departments within K Mart. The case was very complex, involving whether the plaintiff fully complied with the patent law, and whether there were prior inventions that superseded Maxwell's patent. At this writing, it was not completely resolved.

Discount stores often do business with manufacturers of inexpensive goods around the world. In doing so, they run the risk of patent infringement, because often infringing goods are produced in places like Taiwan which have only spotty enforcement of intellectual property law. Creative Pioneer Prods. Corp. v. K Mart Corp., 1987

U.S. Dist. LEXIS 13474 (Dist. TX (S)), illustrates this. K Mart sold a wire stripper that it had imported from Taiwan in the early 1980s. It did a patent search but found that no U.S. patent had been filed on the design. It turned out, however, that the tool had been patented in Italy by an inventor there and the U.S. patent was in process of being obtained. The Italian inventor sued K Mart and was able to recover royalties but no punitive damages or attorney fees because the court found that the infringement was not willful. This illustrates that retailers can easily run afoul of the intellectual property laws despite no deliberate intention to do so. However, in some cases, there may be such an intention, given the number of manufacturers producing cheap "knock-off" goods in developing countries. The retailers certainly have some incentive to look the other way, and not ask too many questions.

12.5.2 General Electric as Defendant in Patent Cases

Let us consider General Electric as an example of a large F2000 defendant in patent cases. As the manufacturer of a wide variety of high-tech electronic and electrical equipment, as well as the user of a great deal of process technology in manufacturing, GE makes use of a great number of patents. It often finds itself in disputes with inventors who claim that it has infringed their patents.

In Fonar Corp. v. GE, 107 F. 3d 1543 (Fed. Cir. 1997), a small company founded by a former professor sued GE for infringement of two patents involving magnetic resonance imaging (MRI). After a complex trial, which involved the presentation of thousands of pages of documents, a jury found infringement of both patents. Ultimately, the appeals court agreed with the jury, and awarded over $100 million to Fonar.

In Strong et al. v. GE, 305 F. Supp. 1084 (1969) an inventor's widow sued GE for infringement of a patent on a electric meter box. The court found that since the design of the meter in question was published two years before the patent issued and because the patented device was in public use for more than one year before the patent application, the patent was invalid. This case illustrates the strategic errors individual plaintiffs, with less familiarly with the patent law, can make when dealing with large companies like GE.

12.6 Proposed Patent Law Reforms and their Potential Effects on Litigation

Because of the significant costs of patent litigation, many in-house corporate counsel are supporting a bill to convert patent disputes into an administrative process within the U.S. Patent and Trademark Office (PTO). This is consonant with an overall preference of corporations for replacing litigation, wherever possible (and when it is to their advantage), with administrative processes and alternate dispute resolution, such as arbitration. This bill would no doubt lead to a major reduction in litigation. In addition, the bill would allow a company that could show that it has been using a process which was subsequently patented by another company to could continue using the process, without paying a royalty. (Some companies do not patent processes that they use in order to keep them as trade secrets, since obtaining a patent requires revealing the process to the public.)

The bill is being pushed by two industry trade groups, the Software Publishers Association (SPA) and the Intellectual Property Owners (IPO). The general counsels of 3M and Union Carbide, two of the companies most frequently involved in patent litigation, have spoken out in favor of the bill. However, patent lawyers who work on a contingency fee basis oppose the bill, saying that the PTO is biased in favor of large multinational companies and their claims to intellectual property. These lawyers argue that the big companies all cross-license one-another's patents and steal intellectual property from small companies and inventors [187], who are unable to defend their patents, given the magnitude of the resources that large companies can bring to bear in litigation. However, there is also an argument that an administrative process would actually benefit legitimate small inventors, because the costs of access to administrative processes are typically lower than litigation, and plaintiffs would still have access to the courts after exhausting the administrative process (such as occurs, for instance, in employment discrimination law).

12.7 New and Growing Forms of Patents and their Impact on Patent Litigation

The recent mania for high technology has created a focus on two types of patents: software patents and business-method patents. Meurer [150] has characterized this as a "patent flood," which is akin to Galanter's concept of a "case congregation" [79] A software patent is a patent on a particular programming technique; for instance, the controversial patent on the compression method used in by the popular "GIF" format for representing images in a computer. Software patents have existed for as long as computers have, but increasing numbers of them are being filed and granted in the era of the Internet.

Business-method patents are just that; patents on a business process or method, such as a diaper service. Business method patents need not involve computers at all (for instance, a patent on the idea of a diaper service does not), although many of the best-known recent ones do. Traditionally, the patent office and the courts have not allowed business-method patents, but this has changed [150]. The change came out due to the decision of the Court of Appeals for the Federal Circuit in the State Street v. Signature Financial case, which concerned software created by Signature for handling mutual funds. The court upheld Signature's patent in this case, and allowed patents on business methods in general if they were non-obvious and produced useful results [217]. This opened the door for many such patents, and therefore more litigation.

One of the best-known business-method patents which was granted, and upheld in court, was Amazon.com's patent on the idea of "one-click" ordering on the Internet. This involves ordering something by selecting a single button on a Web page. Amazon had sued Barnes and Noble, which had offered a similar service.

Other well-known business methods that have been patented in recent years include the following [217]. Priceline, the online travel Web site, patented its reverse auction method for selling airline tickets, hotel rooms, auto rentals, package vacations, and cruises.[3] Netflix, a company that rents DVDs through the mail, patented the methods that customers use to request movies and the method that it uses to mail the DVDs to them. EBay, the Internet's largest auction site, lost a case in Virginia against a company, MercExchange, that held various patents on methods of holding online auctions, and was ordered to pay a $35 million dollar settlement. Possible

[3] Their system works by allowing the user to "name their own price" for the desired service (airline ticket, etc.). The site then accepts or rejects the price, so that the idea is to bid the lowest price that will be accepted.

injunctive relief is still pending as of this writing.

MercExchange had obtained three patents on Internet auction methods as a result of a single patent filing in April 1995, several months before eBay was started; one of these patents was central to the dispute, which involved the purchasing of items of a fixed price This settlement, while welcome to MercExchange, will have a less significant impact on eBay's bottom line (eBay is worth billions) than any injunctive relief that may be awarded in the future, because it may require eBay to shut down the portion of its business that involves buying items for a fixed price or purchase an expensive license from MercExchange [9].

Some companies are opportunistically filing for very broad patents, and receiving them. For instance, there is a company called Pangia Intellectual Properties (PanIP) which claims to have a patent on electronic commerce [232]. If such a patent were upheld, it would require that each of the thousands of companies that engage in electronic commerce pay a licensing fee to PanIP. PanIP writes letters to companies, requesting the payment of a licensing fee and threaten to sue each company if the fee is not paid.

The companies in question often feel that this is simply a legalized form of extortion. In the case of PanIP, a number of them joined together to fight back against PanIP in court. But, overall, this may be a winning strategy for PanIP, if they can manage to keep its costs of litigation below the revenue from licensing that comes from those who lack the energy or resources to fight a threatened lawsuit. Ethical considerations aside, this poses an interesting pricing problem for PanIP, in that it wants to set licensing fees at an optimal level; not too high, so as to cause too many of the companies to call PanIP's bluff and force PanIP to sue, and not too low, so as to maximize revenue coming in.

PanIP is not the only company which appears to be in the full-time business of holding and enforcing patents. Another such company is Techsearch LLC. This company was started by a lawyer with the explicit goal of finding, in the public files, patents that have not been enforced by their owners, and then buying or licensing them. Techsearch is a small company with a small portfolio of patents (twenty-five as of 2001), but it has managed to obtain licensing fees from a number of large corporations for a patent on a basic file-transfer process. These corporations felt it was worthwhile to pay the fee rather than risk litigation, and Techsearch had a credible threat of following through on litigation because it was run by a lawyer with patent litigation experience. Techsearch and PanIP appear to have somewhat different strategies; PanIP threatens to sue smaller companies, and Techsearch goes after larger ones. There is a trade-off here; larger companies may be less likely to be intimidated, but may also be willing to pay larger license fees.

The activity of PanIP and Techsearch, and other similar "patent boutiques" that have emerged in recent years for the sole purpose of enforcing patents, appears to be another example of legal entrepreneurship generating cases, as we have also seen with respect to employment discrimination litigation and shareholder litigation. Techsearch states that they are defending the rights of small inventors by making it possible for them to litigate their claims. And there is good evidence that this can happen; one of the attorneys, Raymond P. Niro, that works for Techsearch on occasion has also (on his own) gotten large judgments on behalf of small inventors that claimed that their ideas were stolen by larger companies. In two cases involving manufacturing processes, he obtained jury verdicts of $13.2 million and $11 million respectively

[208].

However, according to critics, many software patents are overly broad, and lack the two main pillars of patent validity, novelty and non-obviousness. One such critic of the U.S. patent system, Greg Aharonian, estimates that two out of three of the over 20,000 software patents granted each year are invalid. However, whether a patent is "novel" (e.g. sufficiently different from something that came before) and "non-obvious" are highly subjective judgments; where the courts draw the line on such judgments will determine the share that are valid; there is no bright line one can draw here. Ultimately this is a philosophical and political disagreement between those who believe that intellectual property rights should be expansive to those who think that they should be defined narrowly.

Mark Lemley, a Berkeley intellectual property expert, observes that the patent and trademark office is underfunded and understaffed and lacks the resources to investigate "prior art." It would follow (although Lemley did not explicitly say this), therefore, that many invalid patents are granted, and it is up to the courts to decide their validity. The result of this system is that a patent does not stand on its own as a valid statement of a right, without being further investigated and litigated.

The technique used by the patent office in granting patents–having them examined by government employees– differs from the way that work is generally judged in engineering and science. The best journals in these fields rely on peer review of submissions. Both the federal government and private foundations also rely on peer review in the awarding of research grants. The peer review system is not confined to the U.S.; rather, it is international; most scientific journals are international in their authorship.

Given the success of the peer review system in engineering and science, it might make sense to model the patent system on it. Many scientists have complained that the PTO's standards do not rise to the standards required for publication in a decent journal, of originality and reproducibility. However, it is difficult to see how one would use peer review, since peers are potential commercial competitors of the patent applicant, and as such not only should not be granted access to the patent application, but also may be biased as to whether or not to grant it. However, some of the same problems occur with scientific peer review of publications, because a scientist reviewing an article could be a competitor doing research in the same area. There ought to be some way to reform the patent office so as to apply more widely-accepted standards, if (and this is a big if) such standards can be agreed upon. Critics of the patent system are fond of citing some of the more outrageous and offbeat patents, but of course many, if not most, patents are more run-of-the-mill and reasonable. Their tactics are similar to those of critics of litigation who select the most unusual and apparently baseless cases to critique *all* litigation.

Some would maintain that the less defensible patents are not much of a problem, because a patent is only worth anything if its holder is willing to litigate it, and the weaker patents will be easily swept aside in court. However, the courts have upheld many patents that outside observers have felt were invalid (such as the Amazon.com "one-click-shopping" business method patent), so there is a high level of uncertainty. While the patent office attempts to maintain clarity, in reality all the granted patents represent a mire of overlapping and conflicting claims, some of which don't meet standards of originality and non-obviousness. Since each patent becomes part of the law, since it creates a bundle of private rights, what we have is a situation of a great deal of bad law; that is law that is unclear and may be inequitable. The inequity, some claim, stems from the expansion of monopoly rights caused by the patent office's willingness to grant patents on more and more subject matter, including business methods. The patent office may do this because their mission is to grant patents and they have a tendency to be "captured" by their regulatory clients, the patent applicants. This may have tipped the balance between the public goals of rewarding innovation and of preserving competition [217]. The expansion of rights in the patent area parallels a similar expansion of rights in the copyright area, which we discuss in more detail in Chapter 13. And more rights lead to more litigation as people file cases to assert those rights. Conservative critics frequently complain of this increased assertion of rights; they are usually complaining about on civil rights and tort litigation. But the same thing could be said about a "land grab" in intellectual property, which is largely being undertaken by well-resourced businesses.

The patent mire of bad law leads to litigation, since its lack of clarity causes the uncertainty about the outcome of cases that causes litigants to pursue cases. Judges' lack of familiarity with the technical matters that comprise patent litigation does not help, they often handle this by bringing in outside experts.[4] However, efforts to rationalize and clarify the patent system would be difficult, due to the political difficulties of transforming it into more rational system, such as a peer-review-based system.

Aharonian makes part of his living by attempting to uncover prior art in order to invalidate patent claims. Aharonian himself was sued by Techsearch for using

[4] One example of this is the criticism that the New York district court judge in the DeCSS case received in the technical computing community. The judge made a distinction between the distribution of binary and source code which some experts said was not meaningful. Although this case was from copyright rather than patent law, the point is the same.

one of its patents to run his web site without a license. He had been highly critical of Techsearch. He claimed that Techsearch's lawsuit was a form of harassment in retaliation for that criticism.

The patent in question involved using a computer to compress and decompress data from a remote server. Since most Web sites display images, and most images are compressed, and all web pages are displayed via communication with a remote server, virtually any Web site could be in violation of Techsearch's patent. This patent has been a lucrative producer of royalties for Techsearch, obtaining a total of almost $3 million in licensing royalties from such companies as Walgreen Co., Playboy Enterprises, and Gap Inc. Because Techsearch could have gone after any individual maintaining a Web site, Aharorian claims that he was singled out for prosecution because of his highly critical comments on Techsearch and its patents. Lawrence Lessig, another intellectual property expert, agrees [242]. Aharorian says that he has no problem with the legitimate small inventor enforcing his rights, but objects to the activity of the patent boutiques. However, it seems that the patent boutiques, by buying up patents from inventors willing to accept cash for them, perform an ordinary market function in absorbing and distributing risk by maintaining a portfolio of patents.

Another trend associated with new high-technology patents is the use of patents to create "private law," bypassing public policy. By claiming a patent on a particular technology or process, one can control its use for a limited time, either for profit (the usual motivation) or for political reasons. For instance, one can imagine an anti-abortion group obtaining a patent on a particular abortion technique or drug and then using the patent to prevent access to the technique or drug [213]. Of course, Congress can always pass a specific law overriding such activity in particular cases, but the constitutionality of such a law may be questioned, because patents derive their force from the Constitution. Such activity can generate additional litigation, because the patent holders need to use the courts to enforce their rights.

Stix [213] gives two examples of this phenomenon in action. In the first, the biotechnology activists Jeremy Rifkin and Stewart Newman applied, in 1997, for a patent on chimeras that are part-human, part-animal. They did this not to make use of an actual technology, but because they objected to the concept of such a chimera. No one has produced such a chimera, but presumably if someone did, Rifkin and Newman could sue and obtain an injunction. Such chimeras, at first blush, appear repellent ("slave races" and such). However, one can also imagine arguably legitimate needs for such technology: for instance, in stem cell and tissue culture research, one can use animals, such as pigs, to produce genetically human hearts. Rifkin and Newman are attempting to set themselves up as the regulators of this such processes, answerable to no one.

12.8 Patent Law "Entrepreneurs"

Controversies in patent law are not new–others have tried to push the limits well before the age of the Internet. Given any legal or regulatory regime, there will always be some who try to push its limits. The patent entrepreneur Jerome Lemelson, who died in 1997, held over 500 U.S. patents, more than any other individual other than Thomas Edison and Edwin Land.[5] However, unlike Edison and Land, who both

[5]Land was the founder of Polaroid.

founded large companies to develop and commercialize their inventions, Lemelson was an independent inventor; he spent most of his life developing ideas and inventions and filing for patents.

Lemelson often attempted to license his patents to companies, with mixed results, although he did have more success later in his life. However, he is best known for obtaining patents, and then using them in court to extract royalties from others. This is perfectly legal; obtaining a patent does not require that you actually manufacture and sell a product based on it, or license it to someone to do so. In fact, Lemelson may have had an advantage in that he did *not* run a company, because then that company might have been subject to counterclaims based on patents held by its targets, creating stalemates that would have made it more difficult to extract royalties. This commonly occurs when a small company tries to sue a large one; the large company counterclaims based on a patent or patents in its (larger) patent portfolio.

Lemelson is a hero to some solo inventors and a scourge to the many companies that have been his targets. Web sites set up by groups of solo inventors use Lemelson as a role model; there are many solo inventors in the country who feel like they have been given a raw deal by corporations that, in the inventors' opinion, blatantly steal their ideas. On the other hand, attorneys that represent large companies portray him, and the foundation that now holds his patents, as illegitimate, while vying for the business of defending people threatened or sued by his foundation. Experience in defending against earlier Lemelson cases may be an advantage in getting more Lemelson business. A similar situation exists with respect to shareholder litigation, which I discuss in more detail in Section 18.3; in that case, the law firm Milberg Weiss brings many of the lawsuits (which are typically class-actions). The firms offering their services in order to fight the litigation portray it as illegitimate, and emphasize their experience and effectiveness at fighting off their suits. Such situations are not nearly as dispassionate as a reading of the economics literature on litigation would lead one to believe. In fact, the plaintiff and defendant bars are often quite separate, and have radically different attitudes.

Lemelson's critics say he was a master of the "submarine" patent [212]. He took advantage of provisions in patent law which allowed an inventor to continually amend his patent application, while keeping it secret. Critics say that Lemelson would file a very general patent and then amend the patent over the passage of years as technologies advanced. Lemelson's defenders say that submarine patents do not really exist, because the patent office requires, with an initial patent filing, specific instructions on how it could actually built. Lemelson initially filed a patent on machine vision in the 1950s, for a device—a camera behind a peephole–that critics have characterized as overly simple. He finally received a set of patents on machine vision between 1989 and 1992. He also obtained a set of patents of bar-code scanning technology. Lemelson's attorney, Gerald Hosier (who was listed by Forbes as the patent attorney with the highest income in the country), maintains that the delays in the granting of the patents were not the fault of Lemelson, but of the patent office. After (and perhaps in part because of) Lemelson's alleged "submarine" activity, patent law was changed so as to prohibit such long delays between the filing and issuance of the patent.

Companies that use the technologies he has patented, such as machine vision and the bar code scanner, have been targets of the Lemelson litigation, which continues to be pursued by his foundation, which is represented in court by Hosier. Lemelson brought lawsuits against a group of automobile manufacturers in the early 1990s, which were settled. The Lemelson Foundation now has substantial assets as a result of its ability to extract royalties through litigation, and it uses these assets to fund further collection activity. Its attorneys write letters to companies, demanding royalties that are typically less than the cost of defending a lawsuit. Thus, like PanIP above, Lemelson follows a strategy that makes it worthwhile to the companies in question to pay the royalties. Many companies in fact do so.

One that did so was NCR, which is a major manufacturer of point-of-sale systems that include bar code scanners. The Lemelson Foundation not only sends letters to the bar-code manufacturers; it also approaches retailers directly, asking for direct payments for the use of bar-code technology (given the number of such retailers, a virtually inexhaustible "market" for the Foundation's activity). The fact that the retailers are being approached directly gives the manufacturers an incentive to either fight Lemelson or pay the royalties, because the manufacturers presumably do not want their customers bothered. A notice on NCR's Web site indicates that NCR paid Lemelson for the use of bar code scanning patents and as part of that agreement obtained a license which also covered NCR's customers. According to the site, Lemelson went to court to get the license rescinded, but failed; the court issued an order finding the license valid. The purpose of NCR's notice was to notify its customers that they have protection from Lemelson's claims.[6] In some cases, retailers have been asking the bar code system manufacturers for reimbursement for royalties paid to Lemelson.

More recently, companies that have been targeted by Lemelson have been fighting back. Cognex, a machine vision company, and seven bar code manufacturers have sued the Lemelson Foundation (in Symbol Technologies, Inc. v. Lemelson Med-

[6]As of June 21, 2003, this notice was posted at
http://www.ncr.com/solutions/store_automation/lemelson.htm

ical, Education, and Research Foundation), arguing that the delaying tactics that Lemelson allegedly used in obtaining his patents should render them invalid, since competitors did not have access to the patent during the long period between the patent application and the granting of the patent (patents do not become public until they are granted). Thus, they argue, by waiting so long, Lemelson took unfair advantage of the patent system, which is designed to allow inventors to build on one another's work by obtaining new patents that represent advances over older ones. This argument is referred to as "prosecution laches" in legal terminology.[7] The law.com law dictionary notes that laches is often invoked as a defense, but is seldom accepted by the courts.

The Supreme Court, in a pair of cases in the 1920s, invalidated the patents in question based on this doctrine, and in January 2003, in the Symbol Technologies case, the U.S Court of Appeals for the Federal Circuit ruled that the plaintiffs could use this doctrine. This was viewed as a breakthrough for the plaintiffs, because it had been about eighty years since such a doctrine has been applied in patent cases.

The stakes to Lemelson in any particular case are higher than that potential royalty value of that single case. The willingness to fully litigate particular cases sends a signal to other potential opponents that Lemelson represents a credible threat. The situation was similar to that involving online piracy of music; the Recording Industry Association of America (RIAA), after a period of deciding not to sue individuals, but just companies or institutions like Napster, finally decided to sue some individuals,

[7] Ballentine's Law Dictionary defines laches as "a doctrine, otherwise known as the doctrine of sale demand, by which equitable relief is denied to one who has been guilty of unconscionable delay, as shown by surrounding facts and circumstances, in seeking that relief. More precisely, such neglect or omission to assert a right, taken in conjunction with lapse of time and other circumstances causing prejudice to an adverse party, as will operate as a bar to relief in equity."

in order to make an example of them. The idea here is that these (relatively small in number) lawsuits would have deterrent effects on the millions of people trading music online.

The Lemelson Foundation is involved in educational and charitable activities. For instance, there is a Jerome and Dorothy Lemelson Center for the Study of Invention and Innovation at the American Museum of Natural History, which is part of the Smithsonian, and there are educational initiatives at MIT and at Hampshire College. A cynic might view these activities as an attempt by the Lemelson Foundation to burnish Lemelson's reputation. One wonders what effects these efforts toward good public relations might have on Lemelson's outcomes in litigation. In any case, the trustees of the Foundation must believe that they will not hurt. Courts decide cases based on equity as well as written law, and if Lemelson's reputation and status as "an independent genius bucking large companies" may help the Foundation build a case on equity.

Raising the public visibility of Lemelson through his charitable and educational efforts makes it more likely that a potential adversary will have heard of him, and makes it more likely that he will be viewed as a force to be reckoned with, so that the company in question may be more likely to pay royalties. On the other hand, the educational and charitable activities could be undertaken for altruistic purposes. Most likely, the real situation is somewhere in between.consistent

Human action is usually the result of mixed motives. One motive is pure self-interest, as determined by boundedly rational thought. Another motive, which is almost always present, are the norms governing the situation in question. Of course, the norms in question can always be cast in a manner which is most favorable to one or the other of the litigants. People want to act in a manner that is consonant with their own held moral beliefs; to do otherwise is to create emotional stress and cognitive dissonance. Thus Lemelson must have developed a set of beliefs about what he was doing which was consistent with his personal moral philosophy, a story about who he was, a Lemelson "myth," as it were.[8] Part of the reason for the educational and charitable activity may have been to promulgate that myth.

Lemelson has been emulated by others. One attorney in California, Dennis Fernandez, uses what some have called "offensive blocking patents." Fernandez has a patent on a idea for a system with which two people can video-conference while watching the same television program, each seeing the image of the other in an inset box on the screen. He has taken advantage of the fact that the Patent Office require the inventor to show that the potential patent is for a device or process that could actually be built, by giving detailed schematics or plans, but the Office does not require that the inventor actually build a prototype. Prototyping can be very expensive.

In this case, Fernandez has no intention of building this device, but he holds a patent on it, and if some other company builds an infringing device, he may be able to recover royalties. Fernandez believes such patents can be more valuable than patents on devices or processes that one actually implements. He believes that a good strategy for a company is to try to anticipate any ideas that its competitors might come up, and patent many of them, more than the company in question could actually turn into real innovations [171].

[8]I am using the term "myth" in the anthropological sense of a story that conveys a message, rather than the everyday sense of "fiction."

12.9 Patent Cases Viewed with the Adjacent Word-Pair Frequency Method

Application of the adjacent word-pair frequency method to patent lawsuits indicates that patent disputes are almost always between two companies, rather than between a company and an individual (although, as we have seen, there are some cases of individual inventors suing for patent infringement). The tables of the top plaintiffs and defendants, Tables 12.6 and 12.7, as found by the word-pair method, indicate that particular industries are more frequently involved than others, notably manufacturing industries, the medical and pharmaceutical industries, oil and chemical industries, and technologically-based industries, such as computers, electronics and other high-technology industry. These industries are, of course, some of those that make the most use of patents, and therefore this is not a surprise.

Microsoft appears on the defendant list but not on the plaintiff list. This may be because they use others' technology without compensation (they have something of a reputation in the industry for doing this; Microsoft Windows is, many people believe, largely a knockoff of Apple's Macintosh operating system). Or it may be because they are a highly visible target. Most likely, it is some combination of these. Many people believe that one source of Microsoft's success is their ability *not* to innovate (which is, of course, expensive), but rather their ability to operate most ruthlessly in their marketing and other business practices, while copying technology which was initially developed by others.

One difference between the table of the plaintiffs and that of the defendants is that the latter contains several retailers, such as Sears, K-Mart, JC Penney, Montgomery

Ward, and Toys-R-Us. Many of the suits against these retailers probably involve their sales of illegal knockoff goods. Knockoff goods are also evident in the list of plaintiffs by the presence of Mag Instrument, manufacturers of the popular, and patented, Maglite flashlights, which have been widely copied. According to Mag Instruments' Web site[9], the company has won several large judgments against infringers.

As an example, let us consider one of the companies on the list of top defendants, Johnson and Johnson (number 29 on the list in Table 12.7). Johnson and Johnson is of course a huge, international pharmaceutical and medical supplies firm. Most of the plaintiffs suing Johnson and Johnson appear to be other firms that produce biological or medical products. Examination of published cases involving Johnson and Johnson finds the company as a defendant in a case involving blood vessel graft technology, in one involving artificial knee technology, in one involving synthetic human hormone used to treat anemia, etc. All of these cases are complex and involve advanced technology. Often Johnson and Johnson is only one of several defendants who have licensed processes or products from one another. The proliferation of such cases is an example of the litigation generated by continuing and accelerating new technologies, and Johnson and Johnson is in markets for a variety of these.

Manual examination of the individual party strings indicates a mix of companies, many of which are small (or at least not large enough to be familiar to this writer). Generally, the patent field appears to be dominated by companies that are not well-known, a mix of companies of all sizes. This indicates that patents and technology are actually somewhat broadly held in the economy and are a source of conflict between many companies, large and small.

[9] www.maglite.com, visited on May 6, 2004

Table 12.6: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Patent Cases

1	Lex Tex	31	Shell Oil	61	PPG Industries
2	3M	32	Cambridge Plan	62	Spalding Evenflo
3	Randolph Rand (Co.)	33	Schering Corporation	63	Edwards Ski Products
4	Butterfield	34	Union Carbide	64	Hayes Microcomputer
5	Monsanto Company	35	Elonex IP Holdings	65	Medical Designs
6	Rates Technology	36	Mobil Oil	66	Super Sack Mfg
7	U S (various)	37	Directed Electronics	67	Spectronics Corp.
8	Phonometrics Inc.	38	Gro Master Feed	68	Unicorn Industries
9	Elk Industries	39	Emerson Electric	69	Steven P Shearing
10	Eli Lilly	40	Mead Johnson Co.	70	Skechers USA
11	Directed Electronics	41	Smithkline Beecham	71	Dekalb Genetics
12	Hewlett Packard	42	Merck Co	72	Talk to Me Products
13	Mag Instrument Inc.	43	Armament Systems	73	Harris Corporation
14	Bayer AG	44	Procter and Gamble	74	Ashland Oil
15	Dow Chemical	45	Computime Corporation	75	Baker Hughes Inc.
16	Bristol Myers	46	Sheffield Furniture	76	Illinois Tool Works
17	Black & Decker	47	Kimberly Clark	77	Macrovision Corp.
18	Aspex Eyewear	48	Unicorn Industries	78	Class One Orthodontics
19	Hughes Aircraft	49	Icon Health (& Fitness)	79	John Deere Co
20	Construction Tech.	50	Bausch and Lomb	80	Ag Bag Corp
21	C R Bard Inc.	51	Wang Laboratories	81	Dow Corning
22	Abbott Labs	52	Refac International	82	American Cyanamid
23	Progressive Games	53	Callaway Golf	83	Thomas Betts Corp.
24	RCA Corp	54	Glaxo Wellcome	84	Research Corp
25	The Upjohn Company	55	Precise Exercise	85	Multi Tech Systems
26	FMC Corp	56	Warner Lambert	86	Eastman Kodak
27	Kinnear Weed Corp.	57	Med Pro Industries	87	Leviton Manufacturing
28	Ciba Geigy	58	Lear Siegler	88	Pitney Bowes
29	E I Du Pont	59	W R Grace	89	General Electric
30	Computime Corp.	60	Al Site (Corp.)		

Table 12.7: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Patent Cases

1	U S (various)	29	Johnson and Johnson	57	Leesona Corp.
2	Sears Roebuck	30	Lucent Technologies	58	Bio Rad Labs Inc.
3	Comm. of (Patents)	31	Brunswick Corp.	59	Compaq Computer
4	Hewlett Packard	32	Wilson Sporting Gds	60	Perkin Elmer
5	3M	33	Procter and Gamble	61	Schering Plough
6	K Mart	34	Barr Laboratories	62	Toys-R-Us
7	Ford Motor	35	Teva Pharmaceuticals	63	Allied Signal
8	J C Penney	36	Thomas Betts	64	Zenith Goldline Pharm
9	Bristol Myers Squibb	37	Baxter Healthcare	65	Texas Instruments
10	C R Bard Inc.	38	Tandy Corporation	66	Owens Corning
11	E I Du Pont	39	Montgomery Ward	67	Thomson Cnsmr Elect.
12	Eli Lilly	40	Becton Dickinson	68	Control Data Corp.
13	Microsoft Corp.	41	Scimed Life (Sys)	69	Lex Tex Ltd Inc.
14	Eastman Kodak	42	Baker Hughes Inc.	70	AMD
15	Rates Technology	43	NEC Corporation	71	Mylan Pharmaceutical
16	Union Carbide	44	Sony Corporation	72	Pioneer Hi Bred
17	General Electric	45	Abbott Laboratories	73	Applied Materials Inc.
18	City of ...	46	Boston Scientific	74	Intel Corporation
19	Warner Lambert	47	Sharper Image	75	Lear Siegler
20	Bausch and Lomb	48	Monsanto Company	76	Pitney Bowes
21	Black and Decker	49	Brenner Commercial	77	Ingersoll Rand
22	AT&T	50	Amer Hospital Corp	78	Raytheon Co.
23	Shell Oil	51	Gillette Co	79	Singer Co.
24	General Motors	52	Dow Corning	80	Xerox Corp.
25	Wal-Mart	53	Dow Chemical	81	Ashland Oil
26	Kimberly Clark	54	Mobil Oil	82	Hyundai Electronics
27	FMC Corp	55	Goodyear Tire	83	Sonoco Products
28	W R Grace	56	F Von Langsdorf		

12.10 Examining a Sample of Patent Case Files

I examined 50 case files from the Eastern District of Wisconsin in Milwaukee. This court covers all the counties in the Eastern half of the state, including the Milwaukee-Racine-Kenosha metropolitan area in the Southeastern corner of the state. This metropolitan area is known for such industries as machinery manufacturing, electrical equipment manufacturing, and medical equipment manufacturing.

I found two main types of patent infringement cases in these files. The first type is deliberate piracy; the defendant knows that he is infringing a patent, and is just hoping that he will be able to get away with it, since it is difficult for patent owners to monitor and enforce their patents. The second type of case typically involves legitimate businesses on both sides. The defendant in such a case may have in good faith believed that she was not infringing the patent(s) in question. Of course, good faith makes little difference in terms of finding infringement, but such cases tend to be a good deal more uncertain, and therefore are more likely to be more fully litigated. Also, these two types of cases are only ideal types; cases can range from "deliberate infringement" to "should have known better," to "probably should have known better," to "investigated the situation, was told it was OK," to "fully investigated the situation, was certain that there was no infringement," and all points along the continuum.

There are two commonly-held beliefs about patent litigation that appear not to be upheld by my examination of the case files, at least those I examined in Milwaukee.[10]

The first belief is that patent cases tend to be long, complex, and drawn-out, with testimony from experts on both sides. This may be true for those small percentage

[10]This Milwaukee-area sample is, of course, not a representative sample of the national files. However, I believe it should offer some insight into patterns of patent litigation.

of patent cases that go to trial. One attorney has estimated that cases that are fully-litigated cost an average of one million dollars [232]. However, most patent cases, like most civil cases in general, are settled before trial.

So this first belief appears to be invalid: most of the case files that I examined tend to be rather slim, with the initial complaint sometimes followed by a response. Further pleadings are less frequently included. The complaint tends to follow quite a narrow, conventional format, indicating the businesses of the companies involved, nature of the patent, the nature of the infringement, and the demand for damages and injunctive relief. The response also tends to follow a narrow format: typically it alleges that there has been no infringement, either because the allegedly infringing product is sufficiently different or (apparently more often) because the patent itself is invalid, often because of the existence of so-called "prior art;" that is, technology that did the same thing that existed before the patent was filed. This illustrates the major risk of bringing patent litigation; the result may be that the plaintiff's patent is invalidated. Since both the complaint and the response tend to follow a fixed format, the costs of preparation of these cannot be too great.[11] There is a much greater cost involved in preparing a patent itself, because of its required technical format and because of the amount of research that needs to go into determining whether or not

[11] The pro-forma nature of many of the complaints and responses suggests a principle that probably holds for a great deal of litigation, not just in the patent area. Because so many legal disputes fall into one or another category that has been seen many times before, this means that the preparation of the papers can be done largely on a "fill-in-the-blanks" basis. For instance, as we have seen elsewhere in the employment area, there are many cases in which former employees have gone off to form their own firms and have allegedly stolen customer lists and violated "non-compete" agreements. Complaints against such employees tend to follow a rather fixed format. Of course, the complaints are seldom purely "fill-in-the-form"; they almost always need to be customized to at least a small extent to the case at hand, but often, this customization is not very great. In some routine types of cases, such as bankruptcy and divorce cases done for relatively low-income people, lawyers have faced challenges from paralegals who have set themselves to help pro se litigants fill out the forms, as it were. This has led to lawsuits between these lawyers and these paralegals.

there is prior art, and in distinguishing the new patent from related ones.

Patent cases appear often to involve disputes over which federal district should hear the case. The plaintiff and the allegedly infringing defendant are seldom residents of the same state, because infringement often involves offshore production. Sometimes the defendant is not even in the United States. Usually each party wants to have the case heard in the district that covers his or her respective location, to minimize on travel costs. One way to establish jurisdiction of a district is to establish that the allegedly infringing product was sold in the district in question; this is often the strategy used by the plaintiff. Internet sales and mail order sales may be ways to establish sales in the district in question. As we have seen with other case types, such battles over jurisdiction and/or venue are highly prevalent and consume a significant share of the workloads of the courts. Such disputes are more likely in the case types (such as patents and copyrights) in which the parties are very likely to be residents of different areas, and less likely in case types (such as employment cases) in which they are likely to be residents of the same state or neighboring states. However, clearly the simplification of the rules governing this would cut down on the amount of ink spilled on this topic.

It appears that in at least one case in this group, the case was drawn out by hostility between the litigants. This is not particular to the patent area, of course. The case in question was Quantum Technologies v. Bay Industries (00-C-1254), and concerned two patents on building insulation systems and one trademark. This hostility expressed itself in discovery disputes, as I have seen in other case files when emotion appears to be running high. In this particular case, the plaintiff attempting to get the customer list of the defendant in order to determine to whom the defendant had sold the allegedly infringing product. The defendant did not want to reveal this customer list, saying that the plaintiff would use it to steal the defendant's customers. On my reading of the the case record, these two firms had a very hostile relationship that predated the lawsuit; the lawsuit may have been the result of perceived unfair competition and the anger that arises from it.

Also, most of the companies that I saw in these case files were small or medium-sized companies. It was rare that I saw a case involving a very large, well-known company. This may be because large companies tend to cross-license their technologies (although this would only reduce litigation between large companies). One exception was a case involving Johnson Controls, which is one of the largest companies in Wisconsin, and manufactures electronics, as well as other products. This was quite a drawn-out case, judging from the size of the file. The case was Johnson Controls Technology Co. v. Tridium Inc. It involved patents on "software components for a building automation system based on a standard object superclass" and "Internet access to a facility management system." These were both software patents, and as such are highly controversial (many people feel that many of these patents fail to meet the patent law's criterion of non-obviousness). For instance, Johnson Controls builds and sells, as part of its core business, facility management systems that combine environmental and security controls for buildings. These systems, like those of its competitors, are of course computer-controlled.

After the advent of the Internet, it would not take a genius to see that one could control such a system over the Internet/Web (one can control *any* computer over the Internet/Web), and any company in the business of computer-controlled facilities management is bound to recognize this. However, this remains a relatively new and uncertain area, unlike many of the more routine patents on machines or mechanical processes that I saw in the other case files. Rapid technological change creates more uncertainty as to what can and cannot be patented, as this case illustrates. This may be the reason why it was more fully litigated than almost all of the others. Johnson Controls may have felt that in an environment in which the courts were allowing many software patents to go forward, it would have been lax in its duty to its stockholders to not aggressively pursue such patents itself; thus this case. The case was ultimately settled, under terms not found in the file.

The second commonly-held belief about patent litigation is that patent litigation tends to be about high technology. This may be the case in certain districts, like the district that covers high-technology areas like Silicon Valley or Austin, Texas, but at least in Milwaukee (and the eastern counties of Wisconsin covered by the Milwaukee district), which tends to be more manufacturing-oriented than the rest of the country, the majority of patents are for devices that would not be considered high technology (the above Johnson Controls case represents a relatively rare type in the Milwaukee files). For instance, one of the disputes was over a machine that was used to extrude semisolid foods, such as cheese to put on hot dogs. Another one was over some design patents for gun cases, bow cases (for use in bow-hunting), and firearm cases.[12] Some of the other products included: a building insulation system, a manhole sealing device, a lithographic printing method, a paper shredder, a lawn motor control device, a shower system with a diverter valve, a system for cable management in modular tables, a rotating shaft coupling guard, a toe web gland cutting tool, a roll-up door,

[12] In fact, oddly enough, there appears to be a widely disproportionate number of cases involving the gun and hunting industry; five of these fifty cases involved this industry; I am not sure whether this is a glitch caused by the small sample of cases.

various woodworking jigs and tools, fishing line release mechanisms, and a food patty molding machine. Beyond the aforementioned Johnson Controls case, there were very few cases that did seem to involve high-technology; one that did involved an x-ray imaging system. Of course, it is difficult to define "high technology;" there were some patents in my sample which involved chemical processes which may have been quite sophisticated, and the aforementioned printing patent appeared sophisticated as well.

These are the sort of more everyday products that may form the bulk of patent litigation, if what I found in Milwaukee can be extended, at least to some extent, to the rest of the country. It may be that the Milwaukees and Silicon Valleys balance each other out, so that high-technology products and more ordinary products are both highly-represented in the overall litigation; the nature of the balance between the two would require a more exhaustive, national, examination of the case files.

One of the frequent litigants in these files was a company named Armament Systems and Procedures (ASP). This Wisconsin company makes a variety of equipment for use by the police, such as batons and restraints. They also make flashlights, and hold a patent on an LED-based flashlight, which they market under the trademark Sapphire. They also own design patents on this flashlight. These flashlights are commonly knocked-off in China. In Armament Systems and Procedures v. Loo Loo Enterprises and Shelly Zhao, ASP charged infringement of both the patent on the Sapphire. The parties reached a consent agreement in which the defendant admitted the validity of the ASP patents and was permanently enjoined from infringing them. In Armament Systems and Procedures v. C. Crane Co., the defendant–a catalog and Web sales company–was charged with selling infringing flashlights. The defendant's insurance company intervened, trying to get out of any possible liability, but the case was closed because the process server was unable to serve Crane. The case was refiled, and was still in process at the time I examined the file.

I interviewed the attorney for ASP on these cases, Michael Hanrahan. He told me that ASP is aggressive in enforcing patents, and that companies vary in their aggressiveness. The aggressive companies therefore account for more than their share of the caseload. He said that when a new product is patented and sold in the U.S., an illegal replica is made in China in about six months; Chinese engineers are very good at reverse engineering. In one case, an ASP flashlight had an (unintentional) manufacturing defect, caused by a small dent in the mold; this defect was reproduced exactly in the knockoff!

Many of the operations that are set up to sell the knockoffs in the U.S. and elsewhere are fly-by-night. So, ironically, it is sometimes counterproductive to send a cease-and-desist letter to such a fly-by-night operation. All this does, in many cases, is to alert them that they have been discovered, so that they can dump their inventory on someone else. In cases like this, it makes more sense to just immediately file a lawsuit; that way, if they dump their inventory, at least one can depose them and find out who they sold it to, and then turn around and sue this second party .This is interesting because it causes a movement up the dispute pyramid and leads to the filing of more lawsuits, whereas with other case types, the dispute might have ended before reaching court. The enforcement is similar to that used for illicit drugs; one prosecutes one part of the distribution system in order to get to other parts of the system.

According to Hanrahan, it is not similar, however, to copyright enforcement (such as knock-off videos or CDs), because much copyright infringement is carried out on a small scale by a single entity (such as a video store renting illegally copied videos) rather than by a larger group of people. Hanrahan would only send cease and desist letters to companies that are firmly established in the U.S.; that is, ones that own real estate and are known in their communities.

Hanrahan also noted that companies that simply send cease-and-desist letters and don't follow these letters up with lawsuits are viewed as wimpy by the infringers. The infringers know that what they are doing is illegal in the U.S.; a cease-and-desist letter alone is seldom enough to stop them. A cease-and-desist letter alone, unlike a court order, has no force of law, but just represents the opinion of the attorney writing it; the recipient is free to toss it in the trash, and often does. Hanrahan feels that doing nothing at all is better than sending a cease-and-desist letter without follow-up. Doing the latter is equivalent to letting the infringer know that he is free to knock-off one's products with impunity. At least, if one does nothing, the infringer may be afraid that you simply haven't found out about his or her activity yet; after all, policing intellectual property is notoriously difficult. Serving papers may itself be difficult, as violators of intellectual property may tend to keep a low profile and avoid permanent addresses. However, sometimes infringing products may find their way into mainstream stores, either because buyers are unaware or because they look the other way because of the low price. I found one case in the files against Target Stores, but it was not fully prosecuted.

Armament Systems and Procedures is not only a frequent litigant in these files because it is aggressive in enforcing patents; it is also one of the top patent holders in Wisconsin, as measured by the number of patents received in the 1995-1998. It received 24 patents in this period, placing it 29th on a list of Wisconsin entities in this respect [174]. The top patent holder, Wisconsin Alumni Research Foundation (WARF), an entity closely allied to the University of Wisconsin, did not appear at all in these files, and it received 228 patents in this period, almost ten times as many as ASP. This is almost certainly because WARF is based in Madison, and therefore would likely file cases there instead of Milwaukee. Other than ASP, almost none of the top fifty patent holders–which are mainly large companies–on this list appeared in my sample. This may be because large companies tend to cross-license technology instead of litigating it. It may also be the case that simpler technologies are easier to appropriate and therefore can be appropriated by smaller companies, which are more numerous. This may be why I did not see, in this sample, many cases that involve high-technology, which tends to be more capital-intensive, both in terms of human and physical capital. The fact that these smaller companies are more numerous may allow them to operate in more obscurity as well, increasing the incentives to misappropriate technologies.

Some observers believe that small companies and solo inventors are less likely to rely on patents than on trade secrets. The reason for this is when that a patent is published, it is only as valuable as one's ability to defend it in court. Large companies have more resources for such litigation; large companies with a technology focus may even have in-house counsel with patent. Not only that, but large companies typically have a large portfolio of their own patents. If a large company is approached by a small company with a claim, the large company, after investigating the activities of the small company, can counterclaim, creating a standoff.

A study done for the European Commission of small and medium-sized companies in the European Union found that these companies make little use of the patent system, because they are afraid of the costs of enforcing their patents. The study found that two out of five of the over 600 companies surveyed had experience with alleged infringement of their patents, but only half of these actually pursued their patents in court. They found that large companies in the U.S. were especially energetic in using their resources for litigation defense. Of course, the costs of going to court in Europe differ from those in the U.S., and vary across substantially across Europe as well. The authors consider the following proposal to help smaller companies: these companies would set up a cooperative organization to assist them with obtaining and enforcing patents. Such an organization would level the playing field when it took on a large company on behalf of one of its members, in that it would have substantial resources for litigation and a portfolio of patents. It would duplicate the economies of scale that a large company obtains with respect to patents. However, if such an organization was set up and acquired substantial market power, it might fall afoul of the antitrust laws.

The European Commission study found that the 600 companies it included were on average less likely to invest resources in inventions due to the patent system and the perception that it did not work for them. A related problem may stem from what Heller and Eisenberg [104] refer to as the tragedy of the "anti-commons." In the classic tragedy of the commons, many people have a similar right over a shared resource and each has no control over the actions of the others. Thus, if the people are fishermen, they may over-fish the fishing ground to extinction. In the "anti-commons," many owners are each given the right to exclude others. Significant coordination problems then ensue, because it becomes necessary to obtain licenses from all relevant owners in order to make an advance in a particular area. If transactions are costless, this is not a problem, because rights are traded by their owners. But transactions are far from costless, especially in the patent area, when it is not clear what each person owns until each patent is fully litigated against the background of the others. This creates a full employment program for lawyers, and a boom in lawsuits, but takes one far from a efficient economy.

If it is true that smaller companies are less active in obtaining and enforcing patents, this was not immediately apparent from my examination of a sample of the case files. Most of the companies in the case files appear to be relatively small (as evidenced by the fact that only one of the top patent-holding companies in Wisconsin was found in the files). However, since the vast majority of companies overall are small, this does not mean that small companies are in fact represented in the case files to a degree proportionate to their role in the economy. It may be that the following situation holds: there are not a large number of cases involving large companies, because large companies tend to cross-license technologies with one another and intimidate smaller potential competitors, discouraging them from engaging in any potentially infringing activity. Thus what you see in the files are mainly relatively small companies suing each other.

Another thing that one might expect to see in the files is lawsuits started by independent inventors who hold a patent portfolio but are not actively engaged in using that portfolio or licensing it. The Lemelson and the PanIP patents that we have seen elsewhere are examples of this. But I did not find any case in my (admittedly small) sample that was of this character; in all cases, both sides were actively pursuing product strategies. Thus Lemelson/PanIP-style activity, although it may get a lot of attention because it is controversial, does not a appear to be a significant factor in the case volumes, at least as reflected by my sample.

China has sought and recently received membership in the World Trade Organization (WTO) [167]. This has benefits for China, in that it more fully opens markets for its products. However, as a condition of membership, China is required to police intellectual property rights. This may move some of these disputes away from the U.S.-based agents set up to sell the knockoffs and back to the Chinese company producing the knockoffs. This, of course, is largely governed by political forces, both international and within China itself.

Patent cases tend to extend over long distances. Almost all of the cases that I examined involved a Wisconsin firm and a firm from another state or another country. In the case of the manufacturing patent disputes, the other state was often in the Midwest; of course, the Midwest is more manufacturing-intensive than other regions of the country. Out of the fifty cases, there were international parties from Israel, Belgium, Finland, and Taiwan.

One case illustrated the fact that improperly-issued patents can be costly to the economy, because firms need to expend resources to fight them. In Scag Engineering LLC v. Ransomes Inc. (case number 01-C-152) the plaintiff sought declaratory judgment that the defendants' patent on a "lawn mover control device" was invalid due to prior art. However, the judge dismissed the case because he found that the plaintiff was not at the point of "immediate production" required by law and therefore there was no subject matter jurisdiction. The plaintiff had been sued before by the defendant and presumably wanted to get advance approval by the court before producing a possibly infringing product. Here the law strikes a balance. If the law did not require that the potential infringer be at "immediate production," then presumably many more cases would be generated to test patents, at the expense to the economy of the additional legal services and costs of running the courts. On the other hand, it might be a good thing if were easier to test patents so that the invalid ones could be more easily winnowed out. The plaintiff appears to have gotten poor legal advice in this case.

Chapter 13

Copyright Cases

13.1 Legal Background

Both copyright law and patent law stem from a clause in the U.S. Constitution[1] that authorizes Congress "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." In the case of copyright law, Congress has codified the rights of authors (broadly construed, so as to include such creative people as writers, architects, musicians, photographers, etc.), breaking each copyright into separate rights of reproduction, distribution, performance, adaptation ("derivative work"), display, sound recording and audio broadcast, and translation. Each of these are independent rights that can be individually transferred by contract.

So, for instance, the author of a novel can assign to different individuals the rights to adapt it for the state and for the screen. Each assignee can then sue to defend their

[1] Found in Article 1, Section 8.

right. Copyrights extend for fixed terms, after which the copyright enters the public domain. Copyright law has been amended many times over the years: each time the period over which copyrights are enforced has been extended, mainly as the result of organized lobbying on the part of copyright holders and the corporate interests that represent them, such as the publishers and the motion picture studios. Also, copyrights no longer need to registered to be obtained; copyrights are automatically created as soon as a work is recorded in "tangible form," which includes electronic forms.

The ease at which copyrights are obtained, the long length of their terms (a work written today will keep its copyright 70 years after the death of its author, or, if it was created for hire, 95 years after publication or 120 years after creation), and the increased emphasis on intellectual property (due in part to the increased variety of media in which copyrighted works may created) in the economy all contribute to an increase in the number of copyrights and therefore, potentially, to the number of lawsuits filed.

Disney, because of its prominence in holding copyrights and in defending them, in court if necessary, has been prominent in the legislative battles over copyright law, which have been numerous in recent years due to the increasing importance of computers and telecommunications, and the advent of new technologies for the storage and distribution of information. Disney has been especially prominent in this area for another reason which is mainly its concern: the fact that many of its characters were conceived by Walt Disney in the 1920s and were about to run up against the (former) 75 year limit on copyright. If the major Disney copyrights expired, it would obviously be a major financial loss for the company, and obviously the litigation around its copyrights would dry up. However, Disney was able to successfully lobby Congress for a 20-year extension on the 75 year limit to copyright, making it 95 years (for existing copyrights).

Clearly, the public was too disorganized or uninterested to oppose this successfully, although fifty law professors signed a petition opposing the extension, and one plaintiff is challenged the law's constitutionality in federal court, arguing that Congress keeps inequitably extending the period of copyrights (due, presumably, to well-organized copyright holders). In this case, Eldred v. Ashcroft, a web-site owner/operator, Eldred, wanted to post a Robert Frost poem written in 1923 to his site, thinking that the copyright would expire in 1998. Due to the extension, though, it didn't expire, and Eldred argued that the extension violates the concept of a "limited term" monopoly that the Constitution allows Congress to grant to authors, since if the term keeps increasing, it is not limited. The Supreme Court, however, upheld the extension.

The doctrine of "fair use," codified in Section 107 of the Copyright Act, can be used to defend against claims of copyright infringement. This allows for the use of copyrighted material without permission, in limited amounts, for such purposes as education, criticism, journalism, research, and satire. In determining whether or not a particular unauthorized use of copyrighted material qualifies for fair use and is thus allowed, courts consider several factors: the "purpose or character" of the use (for example, educational, for-profit, and/or satirical), what the particular nature of the copyright is, the amount of the copyrighted material that has been used, and the effects of the use on the potential market for the copyrighted work.

13.2 Understanding the Copyright Caseload

As Figure 13.1 shows, the number of copyright cases filed has not risen sharply in recent years. The number of cases did go up steadily over the period from 1971 to 1984, rising from about 600 to about 2,200 in 1984. The latter part of this period did coincide with the introduction of "shrink-wrapped" mass-market software into the marketplace, creating the opportunity for a new type of piracy. Since 1984, however, the level has not risen or fallen substantially, although there have been short-term fluctuations, as Figure 13.1 shows. The share of total civil litigation that is represented by copyright cases also has also not risen since 1984, as we can see by examining Figure 13.2; it has fluctuated around 1.4 percent. Thus, measured by the raw case count alone, this has not been an increasingly significant area of litigation after 1984. This contrasts with the two other types of intellectual property cases, patent and trademark cases, which have been increasing more steadily in recent years both in terms of raw case count and in terms of their proportion of total litigation (see Sections 12.2 and 14.2 for specific details). The situation with respect to copyright cases apparently contradicts the widely-held belief that intellectual property is a field that is uniformly increasing in importance; it appears that, at least for the time being, such an increase in importance is only reflected in the patent and trademark caseload.

Plaintiffs win a high percentage of copyright cases, although this has been declining in recent years. Table 13.3 shows that the plaintiff win rate was around 90 percent during the 1980s, and then fell to around 75 percent by the end of the 1990s. This may be due to a decrease in the share of cases that are adjudicated, as the "easier" cases are weeded out for settlement, the "harder" cases remain, and they may be more competitive between the parties.

The Administrative Office data show that all copyright cases have a jurisdiction of "federal question." This means that the U.S. government is never involved as one of the parties. This is not surprising; disputes over the validity of copyrights are not made with the U.S. Copyright Office (since copyrights are granted automatically), although they sometimes arise between rival copyright holders (for instance, an individual screenwriter who feels that a movie studio has stolen her script).

As was the case with patent cases, one of the sources of a high win rate for the plaintiff in copyright cases is the high rate of consent judgments, which are almost always won by the plaintiff; these judgments usually involve admissions by the defendant of wrongdoing and a promise not to infringe again. As shown in Table 13.1, among copyright cases, 34.5 percent are consent judgments, and 96.6 percent of these are won by the plaintiff. Only 10.2 percent of all cases are consent judgments.

A significant number of copyright cases–23.7 percent–are default judgments (slightly less than the respective 25.8 percent among all cases), and these cases also have a very high plaintiff win rate, 98.5 percent. The third disposition that takes up a high share of all dispositions is a judgment on a pretrial motion; 26.3 percent of dispositions are such judgments, and 63.6 percent of these are won by the plaintiff; I suspect that many of these are motions for summary judgment. Thus we see that these three dispositions account for over three-quarters of adjudicated cases, and this is a reason why the overall plaintiff win rates are so high.

Many copyright cases are relatively low-stakes piracy cases of various kinds. Such small-time piracy is likely to have damages running into the low thousands, not the millions. An Apple v. Microsoft case is a rarity. As Table 13.2 shows, the median demands of plaintiffs in copyright cases are $109,000, slightly more than the $103,000 demanded in all cases. This demand may be inflated for dramatic effect in many cases, though, because the median amount awarded in copyright cases of $14,300 is substantially lower than the $40,000 median award among all cases. The share of cases getting an award is substantially higher among copyright cases than among all cases.

Figure 13.1: Copyright Cases Filed, SY 1971-2001

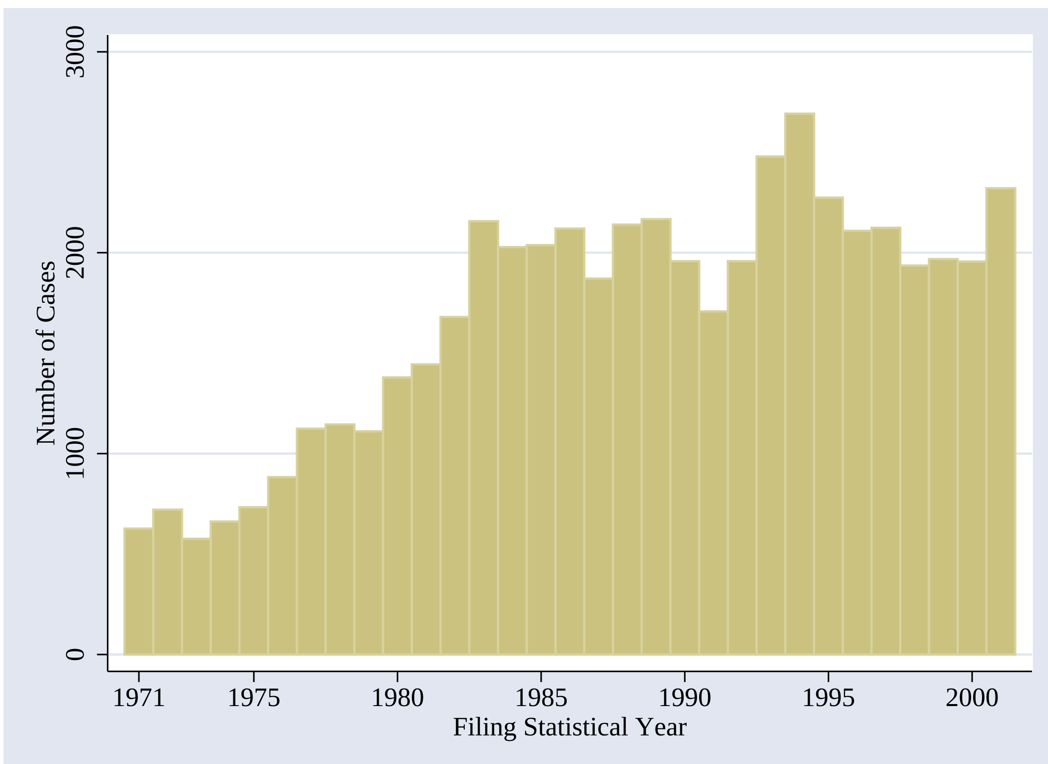


Figure 13.2: Copyright Cases Filed as a Share of All Cases Filed, SY 1971-2001

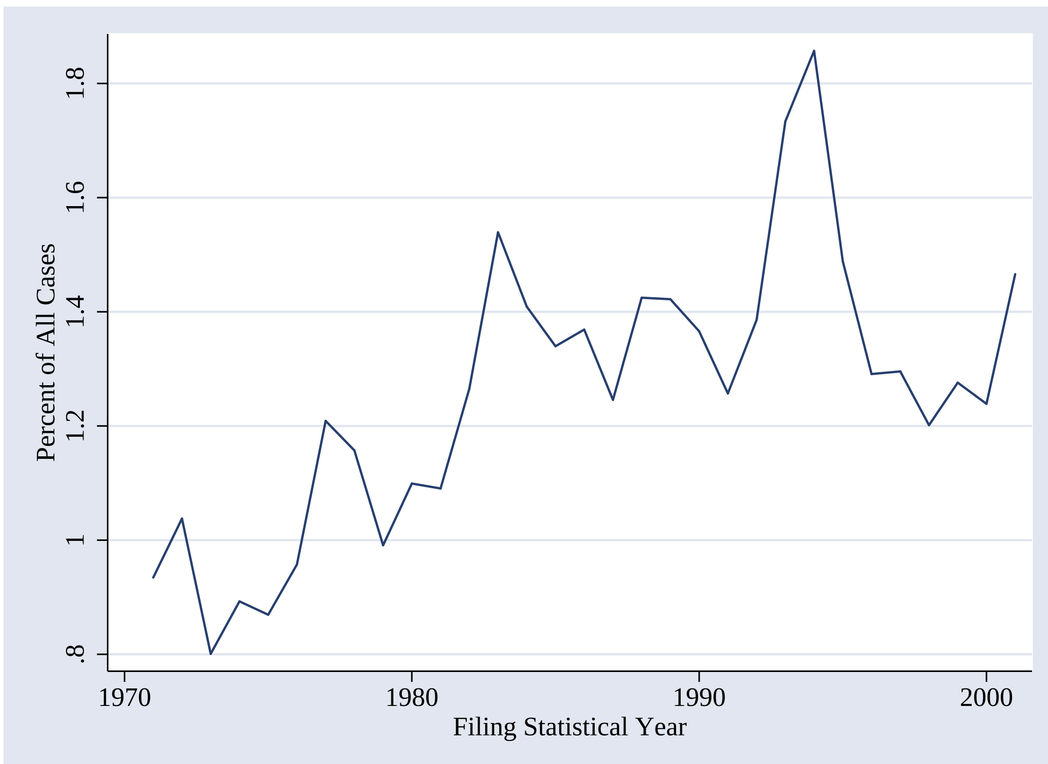


Figure 13.3: Percentage of Adjudicated Copyright Cases Won by the Plaintiff, SY 1979-2001

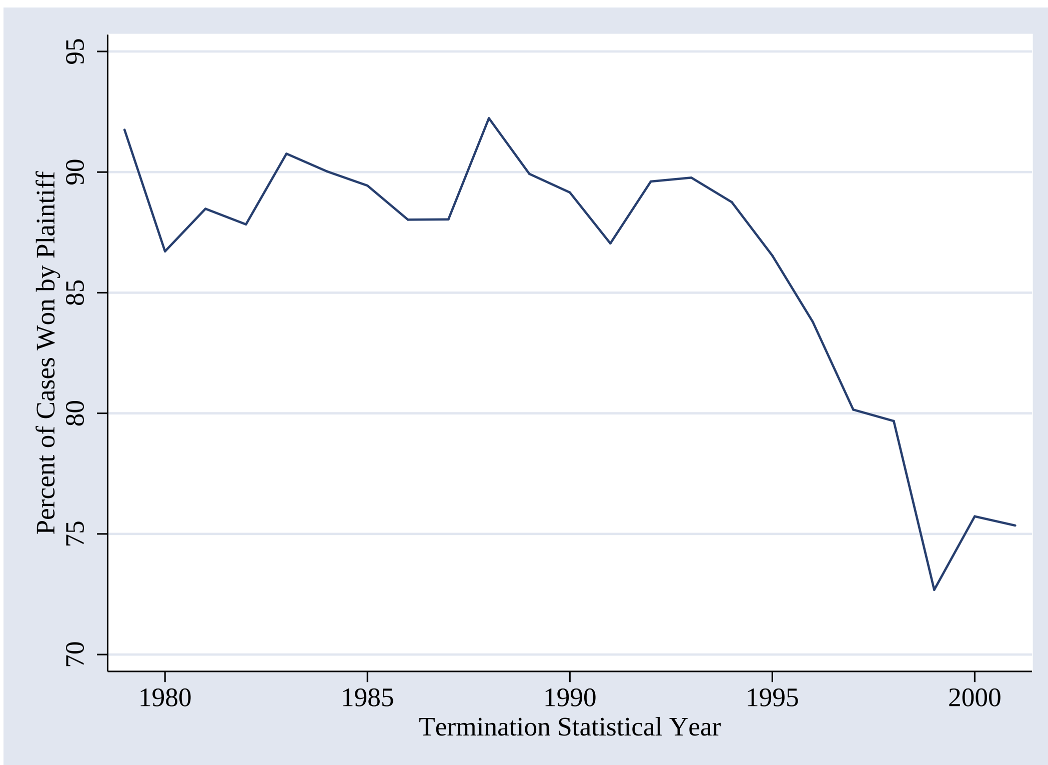


Table 13.1: Plaintiff Win Rates and Adjudicated Cases by Disposition, Copyright Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Copyright	All	Copyright	All
Default Judgment	98.5	98.2	23.7	25.8
Consent Judgment	96.6	92.4	34.5	10.2
Judgment on Motion Before Trial	63.6	28.0	26.3	42.3
Judgment on Jury Verdict	75.3	46.6	1.7	7.7
Judgment on Directed Verdict	52.2	27.9	0.2	0.7
Judgment on Court Trial	76.6	48.5	4.1	5.1
All Other Dispositions	83.6	47.9	9.5	8.1
All Dispositions Combined	85.9	56.8	100.0	100.0
Consent & Default	97.4	96.6	58.2	36.1
All but Consent & Default	69.8	34.4	41.8	63.9

Table 13.2: Median Amounts Demanded and Median Judgments Received for Copyright Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate

	Copyright Cases	All Cases
Sample Size	50338	3894150
Median Amount Demanded	109.0	103.0
Sample Size (Amount Demanded)	11271	1434123
Median Amount Awarded	14.3	40.0
Sample Size (Amount Awarded)	8202	404512

13.3 Copyright Cases with F2000 Plaintiffs

As one might expect, the firms that dominate F2000 plaintiff copyright cases are firms in the entertainment and publishing industries. It is interesting that the top plaintiffs are the film companies rather than the television or publishing companies, although the line between these different kinds of companies is not clear, since many of them have interests in all three of these industries. The top five copyright plaintiffs, as shown in Table 13.3, Warner, Columbia Pictures, MCA, Disney, and Fox, are mainly identified with motion pictures. (Time and Warner later merged, but were separate companies when these data were analyzed.) For instance, the top plaintiff is Warner Communications, which is one of the largest integrated media firms, with interests in publishing, television, radio, and motion pictures.

Table 13.3: Top F2000 Plaintiffs in Copyright Litigation, 1971-91

Company	Cases
Warner Communications	466
Columbia Pictures Entertainment	196
MCA Inc	194
Walt Disney Co	156
Twentieth Century Fox Film Corp	98
RCA Corp	71
Time Inc	48
MGM UA Communications Co	48
CBS Inc	45
American Broadcasting Cos Inc	42
American Greetings Corp	26
Bally Manufacturing Corp	25
Atari Corp	22
Anheuser-Busch Inc	20
U.S. Home Corp	19

In fact, Warner was involved in over twice as many cases as the next-listed plaintiff, Columbia Pictures Entertainment. Examination of published cases reveals that some of Warner's cases were undertaken with other companies, when a common interest was found. Wholesale piracy is often the source of such collective legal action. For instance, in A & M Records, Inc. v. A.L.W., Ltd., 855 F.2d 368 (7th Cir. 1988), a number of record companies, including Warner, sued a company that was renting records in violation of a congressional prohibition against doing so. They won a decision in district court, which was upheld. In A&M Records, Inc. v. General Audio Video Cassettes, Inc., 948 F. Supp. 1449 (Dist. CA (Central) 1996), the defendant (GAVC) was a company that sold blank audio tape to counterfeiters. The plaintiffs (who included Warner) demonstrated, to the court's satisfaction, that GAVC sold tapes of a specific length to the counterfeiters with the knowledge that the tapes would be used for piracy. So GAVC was found liable as a contributory infringer.

Disney is number five in our list of top plaintiffs. Walt Disney Productions v. American Broadcasting-Paramount Theatres, Inc., 180 F. Supp. 113 (Dist. NY (S) 1960), illustrates how copyright and contract can interact in a complex business relationship. Among other business relations, Disney provided programming to ABC, and ABC helped finance the development of Disneyland. Disney licensed some of its programs to ABC exclusively, and was using arguments from copyright law in an attempt to void parts of the exclusive licensing agreement. This case illustrates how Disney, a firm built on copyrighted works, has for a long time been aggressive in making use of its copyrights.

The following case is also evidence of this aggressiveness. In Walt Disney Productions v. Souvaine Selective Pictures, Inc., 192 F.2d 856 (2nd Cir. 1951), both Disney and the defendant had made a movie based on "Alice in Wonderland." Both movies were slated to be released around the same time. Disney sued to prevent Souvaine from releasing its film at the same time, arguing that the public would be confused and Souvaine would benefit from Disney's substantial advertising, which exceeded that of the defendants. Disney argued that it had acquired a secondary property right in the term "Alice in Wonderland" due to its substantial advertising, even if the primary meaning of the term is in the public domain. The judge rejected this argument, which seems to me to smack of arrogance.

A similar case was Walt Disney Productions v. Filmation Assocs., 628 F. Supp. 871 (Dist. CA (Central) 1986), Disney alleged that Filmation's plans to create new films on the same themes as some of its best known films, such as Pinocchio, Alice in Wonderland, and the Jungle Book would constitute infringement. Of course, all of these films were based on classic literature that had passed into the public domain.

Some of the cases with Disney as plaintiff are cases in which Disney is defending its own copyrights, often to its own well-known characters. It does this in part to avoid injury to the Disney brand. For instance, in Walt Disney Co. v. DeFabiis, 168 F.R.D. 281 (Dist. CA (Central) 1996), the defendants ran a school where the purported to teach "Disney cartooning," said (according to Disney, falsely) that they had been employed by Disney, and led students to believe that they could be employed by Disney upon completion of the course.

In that Disney defends copyrights to characters as well as to videos and other movie reproductions, Disney is different from most of the other movie studios (except for Warner Brothers, which also has copyrights on well-known characters). For instance, in Walt Disney Co. v. A & S Discount, 1990 U.S. Dist. LEXIS 13488 (Dist. IL

(N)), Disney hired investigators to look for pirated apparel. One of the defendants was selling unlicensed merchandise with Mickey and Minnie Mouse on it. Cases like this create employment for investigators, and are similar to trademark infringement cases. In Walt Disney Co. v. Best, 1990 U.S. Dist. LEXIS 12604 (Dist. IL (S)), the defendants had been selling counterfeited toys.

At least one copyright case concerns a former Disney employee. In Walt Disney Productions v. Basmajian, 600 F. Supp. 439 (Dist. NY (S) 1984), Disney said that Basmajian had taken some animation cels from its studios without permission and was planning to auction them. Disney claimed that such an auction would be a violation of Disney's copyrights. Basmajian claimed that he had taken the cels with authorization and that they were now his property. Disney said it needed to maintain its policy of not allowing employees to remove cels and that it received substantial revenue from the sale of the cels.

13.4 Copyright Cases with F2000 Defendants

An interesting fact about copyright cases involving the F2000 is the following: F2000 firms appear more often as plaintiffs (in 1,944 cases) than they do as defendants (in 1,160 cases). This is despite the fact that there are more F2000 defendants overall (391,352 appearances) than there are F2000 plaintiffs (136,630 appearances). This may be because F2000 companies own many copyrights and are aggressively defending them with corporate legal departments, whereas smaller companies (and individuals) may own relatively fewer or do not defend them as aggressively.

Many of the same companies that are the top F2000 plaintiffs in copyright cases (shown in Table 13.3) are also the top F2000 defendants. The top defendants are listed in Table 13.4. The main difference between the two tables is that the plaintiff table is composed almost entirely of companies that are the direct owners of many copyrights. The defendant table also includes companies, notably, retailers such as Sears, J.C. Penney, Woolworth, and Montgomery Ward, which may infringe copyrights by selling gray market goods or illegal copies of goods. This is similar to what we found in the chapter on patent cases, where retailers were selling illegal knockoffs of patented goods.

Let us consider the published cases against Disney to get an idea of what has been generating F2000 defendant cases. Several cases involve individuals suing Disney for copyright infringement because of similarity between a work used by Disney and the work of the plaintiff individual (e.g. Rapp v. Walt Disney Co., 1998 U.S. Dist. LEXIS 13793 (Dist. PA (E)). In McCormick v. Ferguson, 1995 U.S. Dist. LEXIS 14506 (Dist. PA (E)), the plaintiff maintained that she had authored a work of substantial similarity to Disney's "The Lion King" and that Disney had stolen the story. The plaintiff appeared pro se. The judge did not find substantial similarities between the two stories, and found for Disney. Again, the plaintiff may have been unfamiliar with the details of copyright law, and unaware of the standard that the stories be "substantially similar"; the stories had some thematic elements in common, such as animal characters and a king, but the story lines were quite different, the judge found.

Risdon v. Walt Disney Productions, 1984 U.S. Dist. LEXIS 22250 (Dist. NY (S)) is a similar case. Risdon had authored a story which he maintained was substantially similar to the story of the movie "Tron". Again, the plaintiff appears to have confused a case of similarity of some concepts and thematic elements with copyright infringement, which is a more tightly-focused concept, and requires detailed correspondence of form, in terms of both characters and plot sequences.

These cases are similar in nature to the many patent cases against large retailers like Sears for allegedly stealing an invention of an independent individual inventor. Some of these cases involve the assignment of a license to Disney and a dispute over the use of those rights (e.g. Boosey & Hawkes Music Publishers., Ltd. v. Walt Disney Co., 145 F.3d 481 (2nd Cir. 1998)). Some of these cases may be litigated despite the fact that the plaintiff has only a small chance of prevailing, because the potential payoff is great. For instance, in Boosey the dispute was over the rights to reproduce Stravinsky's "Rite of Spring" in video copies of the movie Fantasia. The trouble was that the "Rite of Spring" is in the public domain in the U.S., and the dispute was only over royalties for those copies sold in foreign countries where the copyright is still in force. As might be expected, a U.S. judge was unwilling to enforce claims under foreign laws, and dismissed the action, while implying that the plaintiff should have brought action, if he so chose, in each foreign country where he claimed royalties were due. Still, it may have been worthwhile bringing suit, on the small chance of prevailing, given the enormous numbers of copies of "Fantasia" that have been sold. The plaintiffs and their lawyers thought so.

The Boosey case was related to Muller v. Walt Disney Productions, 871 F. Supp. 678 (Dist. NY (S) 1994) and Philadelphia Orchestra Assn. v. Walt Disney Co., 821 F. Supp. 341 (Dist. PA (E) 1993). In these cases the estate of Leopold Stokowski, the former conductor of the Philadelphia Orchestra, and the members of the orchestra, sued to recover royalties for their performances in "Fantasia." These cases dealt with the fact that there was no ability, in 1937 when the contracts were made, to anticipate the profits that would be made off the film due to videocassette recording technology. According to the briefs in these cases, Fantasia is the best-selling videocassette of all time.

These cases illustrate the relationship between copyright and contract law (licensing) and how technological change can affect the fairness of contracts and lead to litigation. These cases are similar to cases generated by rapid technological change in computer software and consequent uncertainty about the terms of licenses that do not take full account of this rapid change.

In Bourne v. Walt Disney Co., 68 F.3d 621 (2nd Cir. 1995). Bourne was the assignee of the rights to some Irving Berlin songs and the dispute was over the terms of licenses granted to Disney to use these songs. Bourne won this case. It may have won because it was an experienced player in copyright litigation, as opposed to the individuals that lost some of the cases mentioned above, who lacked knowledge and experience with copyrights.

13.4.1 The "Gray" Market

Many retailers sell goods that are intended for markets in other countries, taking advantage of price discrimination practiced by the manufacturers of these goods. The goods are re-imported into the U.S. There have been a number of cases in which manufacturers have attempted to use their copyright to enjoin the further sale of such goods. In Quality King Distributors, Inc v. L'Anza Research Int'l, Inc., 118 S. Ct. 1125 (1988), the Supreme Court overturned a decision of the 9th Circuit which found that the respondent (L'Anza), a shampoo manufacturer, had been not paid

Table 13.4: Top F2000 Defendants in Copyright Litigation, 1971-91

Company	Cases
CBS Inc	74
Warner Communications	41
MCA Inc	41
American Broadcasting Cos Inc	37
MGM UA Communications Co	25
K Mart Corp	23
Columbia Pictures Entertainment Inc	22
Time Inc	19
Twentieth Century Fox Film Corp	16
Walt Disney Co	16
Sears Roebuck & Co	15
Penney (J.C.) Co Inc	13
RCA Corp	12
Woolworth (F.W.) Co	12
Ford Motor Co	11

enough by the petitioner (Quality King), a distributor, since goods intended for the overseas market ended up in the U.S. [186]. The respondent had attempted to use its copyright on the shampoo's label to maintain exclusive rights to the shampoo's distribution in the United States under the Copyright Act of 1976. Several large retailers, including Costco, Target, and Wal-Mart, submitted amicus briefs on behalf of the petitioner (the distributor). The Supreme Court found that L'Anza no longer controlled the copyrighted copies once it had sold them once (to the distributor) and could not control where they ended up. This decision has undoubtedly affected the number of copyright cases that are brought against retailers who sell gray market goods and the distributors that sell them the goods. Litigants who want to bring such cases will need a new legal theory. Quite a few of the lawsuits against retailers under the copyright statute fall into this category. For instance, Costco was sued four times by manufacturers between 1994 and 1998.

13.5 Copyright and the Individual Screenwriter

Because of the massive sums of money that are made in successful films, sums that have increased sharply in recent years, there is a major incentive for authors who think that their scripts and ideas have been infringed upon to sue the major motion picture studios. As the amount of money that can be potentially recovered increases, plaintiffs have more of an incentive to bring suits, if the cost of bringing a suit remains relatively constant and the probability of success remains the same. Studios may be willing to settle with plaintiffs to avoid adverse publicity and avoid encouraging others to sue (although, on the other hand, if it becomes known that studios are willing to settle, this may in itself encourage further suits, in which plaintiffs sue in order to extract a settlement).

Plaintiffs may be relatively unaware of the narrowness of the copyright law, and the relatively slim chances that they will prevail. Studios can often offer the defense that a particular script drew upon "scenes à faire," which is a legal term for scenes that follow as a given when a particular topic is treated. For instance, a movie about a family's relationship with their dog might contain a scene in which the dog misbehaves and is punished; it is difficult for a writer to claim that such an idea is original to her script. Thus, in order to show that a script infringes another one, it is necessary to show not only similarity in many plot elements, but that many of these plot elements are not either scenes à faire or scenes that appeared in other, similar scripts in the past.

Many plaintiffs, unfamiliar with copyright law, may not be aware of this, and may bring suits despite this [74]. In addition, plaintiffs may bring suits in order to get recognition, since there are so many writers laboring away in obscurity. In addition, since many of these writers are working on similar plots, and Hollywood films often are shown throughout the country, effectively the films serve as advertisements to any writers that may be working on a similar project. In addition, writers often submit screenplays to the studios, which reject the vast majority of them, so this can often be a basis for a writer arguing that the studio saw his idea and stole it.

For instance, in Towler v. Sayles, 76 F.3d 579 (4th Cir. 1995), Virginia Towler, a writer, argued that a screenplay that she had copyrighted in 1990 had been infringed by John Sayles's film "Passion Fish," which was released in 1992. The appeals court upheld a ruling for Sayles. The appeals court reviewed the logic as follows. Although Towler maintained that someone said that they would show her screenplay to Sayles, Sayles denied having seen it, and the court felt that Towler had not proven such contact. The court also felt that Towler did not demonstrate that there was substantial similarity between the screenplays. For instance, both "Passion Fish" and Towler's screenplay include a black female character and a white female character who are friends; but the court, citing authorities such as "Nimmer on Copyright," notes that copyright does not protect such a general idea. The summaries of the plots of the two stories were quite dissimilar, noted the court, in finding for Sayles.

There may be an emotional component to this case and to cases like it. Towler originally sent her screenplay to someone she believed to be affiliated with Sayles because she admired Sayles's work. As a black woman, she wanted a director capable of treating her screenplay sensitively, and she felt that Sayles would do this.

I interviewed James Chandler, the attorney on the appeal for Towler [33]. Chandler took the appeal because he was interested in establishing the principle that access to the allegedly copied material need not be proven if the similarity is substantial enough.[2] Unfortunately for Towler, and for Chandler, the court did not find either access or similarity, and therefore never reached the plaintiffs argument that even though access wasn't proved, similarity was so strong that access could be presumed.

Chandler said that he had seen many of these types of cases, and found the Towler case exceptional in that he felt that there was strong similarity and difficulty of proving access. The appeals court's summaries of the plots of the two works were quite dissimilar, but Chandler said that the two screenplays were quite similar when read as a whole. However, Chandler may have an interest in saying this, because it justifies his action in pressing forward to the appeal.

Chandler agreed that it was often difficult to prove infringement, but he felt that infringement is common, and in many cases the victim goes without being made aware of the infringement or being able to recover for it. Thus, the difficulty of proving copying may, along with the number of meritless suits, account for the high win rate of the film companies in copyright cases. Chandler says that he advises clients of the difficulty of winning cases. He also says that he bases his decision on how to charge– either by the hour or on a contingency basis–on the character of the case. In "David vs. Goliath" cases, in which he is representing David, who is, say, an individual screenwriter like Towler, he will take the case on contingency; in a case

[2]The legal principle that is currently applied is that access of the alleged copier needs to be proven, and then, and only then, is the similarity of the works is considered. Access and similarity both have to be proven, in that order.

involving two businesses, both with some resources and it is an ordinary business dispute, he takes the case on a fee basis. For some cases, where he has particular interest in pursuing equity for a plaintiff, he may take the case on a pro bono basis.

13.6 Private Policing of Film Piracy

A classic example of how technological change–in this case, the development of the video-cassette recorder–can lead to litigation is the following case. In Sony Corp. Of America v. Universal City Studios, Inc., 464 U.S. 417 (1984), a group of movie studios had sued a group which included the manufacturer of a videocassette recorder (Sony), some stores selling that recorder, and one individual who made a copy of a program copyrighted by one of the plaintiffs by taping it off the air. The plaintiffs claimed that the manufacturer and stores were contributing to copyright infringement by selling the recorder. Effectively, the plaintiffs were attempting to get rid of the new technology. Ultimately, the Supreme Court found, however, that Congress did not intend to ban home recording for home use, and found for the defendants.

Of course, unauthorized reproduction of videotapes for commercial purposes remains illegal. The Motion Picture Association of America (MPAA) acts as the investigator in these cases, often acting on a tip, but the studios themselves bring suit. The tapes are tested to determine whether they are genuine, which is often easy, since the bootlegs are often of poor quality. Due to the large number of video stores, and the obvious incentive to rent or sell illegal copies, the movie studios have to engage in a constant private policing activity, and these lawsuits are the ultimate result of that activity. Sometimes they go so far as to get a court order to have U.S. Marshals seize the pirated media. The activity here is similar to that undertaken by McDonald's and Coke in protecting their trademarks, and by BMI and ASCAP in enforcing the collection of royalties for public performance of music. Note that this activity existed in other forms before the advent of the videocassette; in Warner Bros. v. Kalish, 1978 U.S. Dist. LEXIS 16145 (Dist. W. 1978), the plaintiffs sued to stop the defendant from selling unauthorized prints of films through the mail.

While video store cases are common, not all the cases involving the illegal copying of videos involve video stores. In Paramount Pictures Corp. v. Labus, 1990 U.S. Dist. LEXIS 11754 (Dist. WI (W)), the defendant, the owner of a small resort, had made available videocassettes that he had copied along with a rental of a VCR to resort guests. He was required to pay for the those instances of infringement that could be substantiated.

At least one case, and probably more, involve the studios versus the cable channels or systems. In Columbia Pictures v. Liberty Cable, Inc., 919 F. Supp. 685 (Dist. NY (S) 1996), the plaintiffs alleged that the defendant did not keep proper accounts for filing with the Copyright Office and making payments to the Office, as required by law. There is also at least one case involving hotel pay-per-view systems, On Command Video Corp. v. Columbia Pictures, 777 F. Supp. 787 (Dist. CA (N) 1991). In this case, the plaintiff argued that pay-per-view movie orders in hotel rooms did not constitute "public performances" and it therefore did not have to pay royalties on such orders. The district court found for the defendants (the motion picture studios) in this case, saying that the orders were public performances. Again, it is hard to see what the plaintiffs were thinking here.

13.7 The Chinese Factor

China's recent accession to membership in the World Trade Organization (WTO) may provide some ammunition for intellectual property holders. China, like all WTO members, has agreed to enforce intellectual property rights. This has opened the door to the possibility of lawsuits filed in China against Chinese companies illegally manufacturing copies of CDs or DVDs (or Video CDs (VCD)–in Asia, DVDs or videotapes are often copied onto CDs–VCDs–which can show video instead of audio). One such lawsuit, the first ever filed in Shanghai, was filed in July 2003 by the movie studios Disney, Fox, and Universal against three Chinese companies allegedly engaged in the manufacture of pirated VCDs and DVDs. Unfortunately for the studios, Chinese law only allows for the recovery of 500,000 yuan ($61,000) per title if the plaintiffs are unable to document the extent of the piracy, hardly a significant sum for these companies. In this case, the defendants were each ordered to pay 170,000 yuan to the three plaintiffs, and to issue a public apology (the latter an Asian cultural phenomenon that would rarely be demanded by a Western court). It is also the case that the courts may not be independent of politics in China, and in China party and military officials are themselves heavily involved in business, so bringing such a case in China is very different, for instance, than bringing it in Europe or the U.S. [1][2].[3] In an authoritarian society such as this, the state has a lot of control over what business activities are undertaken, and if party or military officials are themselves engaged in such piracy or indirectly profiting from it, it will be harder to stop it. On the other hand, these officials may be more directly susceptible to international political

[3] This is not to say that the courts are completely independent of business and politics in the West; but it is hard to argue that they are not more independent than in a one-party dictatorship like China.

pressure that may be brought by the U.S. on behalf of the media companies.

This points out an interesting interaction between international diplomacy, law, and politics. The United States may have only a certain amount of diplomatic "capital" that it can bring to bear on another country. So, for instance, consider Indonesia, a poor country in which, like many others, piracy of intellectual property is common. Indonesia, which is politically unstable, is also home to Islamic radical terrorist groups and produces large quantities of illegal drugs. The United States has the problem of balancing these competing demands on Indonesia's government. As a result, intellectual property enforcement may not get the attention that the media companies desire.

13.8 Copyright Lawsuits Viewed with the Adjacent Word-Pair Method

The adjacent word-pair method showed that the entertainment industry accounts for a significant fraction of copyright cases. At least as measured by this method, the entertainment industry is much more significant than any other industry. Although Microsoft is the third most prevalent plaintiff listed in the tables of top plaintiffs, Tables 13.5 and 13.6, there are no other software companies among the top plaintiffs, which are almost all entertainment companies.

The list of top defendants, given in Tables 13.7 and 13.8, is similar to the list of top plaintiffs. One notable difference, however, is that large retailers, such as Wal-Mart and JC Penney, appear in this list, much as they do in the patent area. They appear because they are alleged to be selling illegal copies of a particular copyrighted work.

Most of the cases against the retailers appear to involve clothing, fabric, or product designs, judging by the names of the (smaller) companies which are plaintiffs.

Many of the cases where motion picture studios or record companies (such as Universal, Warner, or Disney) are defendants involve what appear to be individual plaintiffs, perhaps screenwriters, songwriters, or composers. There are also some cases involving two large studios, and some where the plaintiff is a smaller company.

Richard Wolfe, a successful songwriter, won a David-and-Goliath suit against music giant EMI, after more than a decade of struggle. The settlement was sealed, but Wolfe said it was substantial. As part of the settlement, EMI signed a consent agreement, admitting no wrongdoing but agreeing not to do wrong in the future [211]. The defendants in such settlements want sealed agreements because they fear the publicity that disclosure of the settlement might bring, encouraging other potential plaintiffs. This must be the reason why there are so many sealed cases ("under seal" is the top "defendant" in Table 13.7). It also gives us an example of why a consent judgment is the most common disposition in copyright cases, as shown in Table 13.1.

Many of the cases where motion picture studios are plaintiffs are brought against small video stores, individual pirates, other small stores, or cable companies. Presumably, in the latter type of case, they are suing because a cable company broadcast one of their films without paying a royalty, or as the result of a more complex dispute over licensing.

Many music cases are brought by Broadcast Music, Inc. (BMI), one of the two organizations (the other is the American Society of Composers, Authors, and Publishers (ASCAP)) that each are in charge of collecting royalties for about 45 percent of recorded compositions. A third organization (SESAC) covers most of the remainder.

Thus, organizations that want to freely play music to the public must obtain licenses from all three organizations. Effectively, these organizations act as private police in collecting such royalties from entities that play music to the public, such as radio stations, restaurants and hotels, and nightclubs. BMI brings lawsuits with itself as the plaintiff, while ASCAP tends to bring suits using the name of the actual copyright holder, which is often a publishing company with “Music” in its name; numerous such companies appear in Tables 13.5 and 13.6.

A search for Broadcast Music in the U.S. District Court file of Lexis/Nexis found numerous cases. Some of these cases are cases brought by artist plaintiffs against other artists, claiming copyright infringement (of music or lyrics or both), and BMI is named as one of the defendants, because royalties are alleged to have been paid to the wrong person. Some deal with more complex issues. For instance, in one case, Broadcast Music, Inc. v. 84-88 Broadway, Inc., 942 F. Supp. 225 (Dist. NJ 1996), a restaurant/bar that had paid a service to have music piped in was taping this music and using a disk jockey to selectively replay selections. BMI brought suit, and the court found that such activity was not covered by the license agreement with the service that piped the music in, and found infringement damages against the defendant. Since the license agreement explicitly prohibited such recording and replaying, it is unclear why the defendants litigated this case.

In another case, Broadcast Music, Inc. v. Calvin’s Furniture & Appliances, 1996 U.S. Dist. LEXIS 7566, BMI sued a furniture store that had been playing a radio station to its customers. Again, the law was clear, and it is unclear why the case wasn’t settled. Perhaps the defendant felt it could get a "home-style" exemption, which is sometimes allowed under the law.

Table 13.5: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Copyright Cases (Part 1 of 2)

1	Broadcast Music Inc. (BMI)	32	Metro Goldwyn (Mayer)
2	Bridgeport Music	33	Prophet Music
3	Microsoft Corp	34	Hulex Music
4	Columbia Pictures	35	Sweet City (Records)
5	Jobete Music	36	Bourne Co
6	Universal City Studios	37	Kieselstein Cord
7	Warner Brothers	38	Fourth Floor (Music)
8	Walt Disney	39	Impulsive Music
9	United Features	40	Jazz Bird (Music)
10	Blue Seas (Music)	41	Hamstein Music
11	Under Seal	42	Badco Music
12	Brockman Music	43	Cayman Music
13	Cherry Lane (Music)	44	Twentieth Century Fox
14	Almo Music	45	U2 Home Ent.
15	Famous Music	46	Antisia Music
16	Sailor Music	47	Home Box (Office)
17	BDC Music	48	Controversy Music
18	Cass County Music	49	Vernon Music
19	WB Music	50	Kingvision PPV
20	Milene Music	51	Paramount Pictures
21	Chappell Co	52	That's Entertainment
22	Flyte Tyme (Tunes)	53	Center City (Music)
23	Blendingwell Music	54	Morley Music
24	DC Comics	55	Swallow Turn (Music)
25	Top Rank Inc.	56	Dwarf Music
26	Gladys Music	57	RCA Records
27	Boz Scaggs Music	58	Tallyrand Music
28	Mills Music	59	Cross Keys (Publishing)
29	Doors Music	60	Stygian Songs
30	Somerset Songs	61	Joe Hand (Promotions)
31	Adobe Systems	62	Granite Music

Table 13.6: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Copyright Cases (Part 2 of 2)

63	Hong Kong TV
64	Stonebridge Music
65	Stone City
66	Canopy Music
67	Arthur Rutenberg (Homes)
68	Sweet Summer (Night Music)
69	Next Plateau (Music)
70	Raydiola Music
71	April Music
72	Van Halen (Music)
73	Robbins Music
74	Red Cloud (Music)
75	Pop N (Roll Music)
76	Moose Music
77	Music City (Music)
78	Colgems Music
79	Marisa Christina
80	Asia Entertainment
81	T B (Harms Co.)
82	Frank Music
83	Hideout Records
84	Major Bob (Music)
85	Jasperilla Music
86	Rare Blue (Music)
87	Scholz Design
88	Howlin Hits (Music)
89	Russell Cason (Music)
90	In Design
91	Stonebridge Music
92	Nintendo of America

Table 13.7: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Copyright Cases (Part 1 of 2)

1	Under Seal	20	Random House
2	Walt Disney	21	MCA Records
3	Warner Bros	22	New World (Pictures)
4	Sony Music	23	F W Woolworth
5	U S	24	Etna Products (Co.)
6	Wal Mart	25	New Line (Cinema)
7	JC Penney	26	MP3.Com
8	Desert Empire (Television Corp.)	27	Columbia Pictures
9	John Does	28	Arista Records
10	K Mart	29	Spencer Gifts
11	Sears Roebuck	30	Simon and Schuster
12	Paramount Pictures	31	Oriental Trading Co.
13	City of ...	32	Montgomery Ward
14	Metro Goldwyn (Mayer)	33	United Artists (Corp.)
15	Time Warner	34	Priority Records
16	Polygram Records	35	Recording Industry (Association)
17	Universal City (Studios)	36	Home Box (Office)
18	WB Music	37	Target Stores
19	Russ Berrie (Co.)	38	Rhino Records

Table 13.8: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Copyright Cases (Part 2 of 2)

39	Hearst Corp
40	Capitol Records
41	Atlantic Recording
42	Arc Music
43	McGraw Hill
44	Pickwick International
45	Albert E Price, Inc.
46	Anheuser Busch
47	Fox Broadcasting (Co.)
48	Capital Cities (ABC)
49	Red Lion (Broadcasting)
50	Atlantic Recording
51	Radio Station (various)
52	Kohl's
53	Ichiban Records
54	Ford Motor (Company)
55	Home Shopping (Network)

Occasionally, a business that is approached for royalties refuses to comply and does not defend itself in court; in that case, BMI may go to court to get a default judgment (e.g. in the case Broadcast Music, Inc. v. R Bar Of Manhattan, Inc., 919 F. Supp. 656 (Dist. NY (S) 1996)) The costs of doing so may be minimal (to BMI), since the Copyright Act allows for payment of attorney's fees, if BMI is able to collect a judgment. BMI also sometimes becomes involved in a case (as a defendant) if there is a dispute over who holds a copyright; the plaintiff may be suing to collect royalties from BMI.

BMI may also be involved in private antitrust lawsuits against it and ASCAP, such as International Show Car Association. v. American Society of Composers, 806 F. Supp. 1308 (Dist. MI (E) 1992), in which the societies were accused of monopolizing the market for performance rights. Some of the other antitrust litigation involves cable television companies. Companies sued for royalties by BMI may use the antitrust statutes in their defense, as a counterclaim. The cable television companies have done so, such as in Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Services, 746 F. Supp. 320 (Dist. NY (S) 1990). There appears to be little litigation involving radio stations and BMI; radio stations are "repeat players" that have become accustomed to paying royalties to BMI and ASCAP.

Antitrust litigation against the performing rights societies dates back to a 1934 lawsuit that the U.S. brought against ASCAP; private antitrust litigation continues to the present day. The existence of only two major public performance rights organizations creates an opportunity to fix (presumably artificially high) prices. Later (in 1940), the U.S. brought suit against BMI. Both organizations operate under a consent decree which resolved such litigation. The societies agreed to a system of non-exclusive licensing, and agreed not to require blanket licenses from their users. The Southern District of New York acts as a "rate court" to set a "reasonable fee" when users and the performance rights organizations cannot agree. BMI only set its rate court up in 1994; ASCAP's court had been operating for a long time prior to that.

Clearly, in order to enforce the law against the large number of businesses that are potential infringers (every retail establishment in the country, and many other businesses and non-profit entities as well), BMI must employ a large number of private police, and its enforcement must be imperfect at best. When it suspects an establishment of playing music without a license, it sends an undercover investigator to take notes on what compositions are played.

It appears that the subjects of BMI and ASCAP investigations have organized themselves sufficiently to get legislation enacted to fight BMI and ASCAP, by state legislators. In 1995, the New York State Cultural Affairs law was amended to require the performing rights societies to give establishments notice within 72 hours of visiting their establishments. Other states have enacted legislation controlling the activities of the organizations. (This is an example of how state legislatures sometimes are more responsive to the needs of small business (here, restaurants) than large organizations (here, the performing rights organizations). The enactment of regulations around franchising, such as the Iowa Franchise Act, which we discuss in Section 16.8, is another example.)

BMI and ASCAP sued New York State and, in 1996, won an injunction against enforcement of the law, based on the argument that this would make the enforcement of copyright law more difficult, since it would make follow-up visits to gather more documentation useless (since the establishments would likely temporarily cease infringing activity), and therefore should be preempted and invalidated. However, this was not the end of the fight. Some restaurants, bars, and other retail establishments formed an organization called the "Music Licensing Fairness Coalition" to pressure Congress to modify the law so that they were exempt from playing performance royalties when playing radio stations in their establishments. There is already on the books a "home-style" exemption which exempts smaller establishments from royalties. This exemption, which is vague in wording, has not been uniformly applied by the courts, which may in itself generate some uncertainty and thus fuel litigation.

Another goal of the coalition was to impose mandatory arbitration on the license fees charged by the three licensing organizations [228]. One of the arguments for such arbitration is that the consent decree is still under the jurisdiction of the Southern District of New York, and therefore imposes high travel and legal costs on parties outside the New York City area.

This dispute lies at the intersection between copyright and antitrust law, because the retail establishments contend that BMI and ASCAP operate like an unregulated monopoly, and charge unfairly high fees, despite the consent degree under which they operate.

Such business-against-business conflicts often find individual members of the party most associated with business–the Republicans–on different sides of the fence. For instance, one of the proponents of legislation to regulate the performing rights societies was James Sensenbrenner, a Republican congressman from Wisconsin, a state with a large tourist industry and many bars and restaurants. On the other side was Sonny Bono, a Republican congressman from California, and perhaps the only professional songwriter in Congress, and definitely the best-known. (Of course, Bono's objection to the proposed regulation was likely have been at least in part particularistic and highly personal.) We found a similar situation with respect to the politics of the Iowa Franchising Act.

My manual examination of the published cases indicates that BMI wins a large proportion of its cases. Richard Sweeney [218], a BMI employee that I interviewed, indicated that many of the attorneys representing the clients sued by BMI are not very well informed on copyright law, and allow litigation to proceed even though the defendants may not have a case. He said that he often speaks with attorneys who lack even an elementary knowledge of the law, for instance the distinction between mechanical royalties and performance royalties. (The former are what you pay as part of the cost of purchasing a recording, and the latter is what you pay for playing a recording in public.) This accounts for why so many of these cases (although probably not a high proportion of cases) proceed as far as they do. Some of the small business owners probably feel they should not have to pay royalties simply for playing royalties in their establishments, given that they can listen to the radio for free in their home or car. They may feel that they have already "paid" for the CD they are playing.

Also, Sweeney indicated that there may be a principal-agent problem here, in that attorneys may be willing to proceed with a case as long as a client is paying their hourly fee, even if the client does not have much of a case. The situation with the BMI cases seems to more closely approximate Galanter's theory of repeat-players vs. one-shotters [76] than it does Priest and Klein's theory [178] that the cases that are litigated are the ones in which each side has a roughly equal chance of winning. In copyright law, BMI is the ultimate repeat-player. On the other hand, the stakes in these cases are asymmetric, since BMI wants to demonstrate, by winning cases, that it is entitled to royalties so it can collect them from the vast number of parties that it does not actually take to court.

The numerous BMI and ASCAP cases are an example of a group of cases found in the federal courts that could no doubt be handled more efficiently by an administrative agency. This agency, however, would be in danger of being "captured" by the media and computer industries it deals with, and the administrative law judges who would be the first (and in most cases, the only) arbiters to hear the cases would not have the independence that federal judges (with their life tenure) have, and there would be no use of juries at this level. On the other hand, access to an administrative mechanism would lower costs for aggrieved parties, and this would help less-resourced parties.

13.9 Online Copying of Copyrighted Works

The governance problem presented by radio and other public performance of copyrighted music is similar to the relatively new situation involving the illegal copying of popular songs, TV shows, and movies using computer networks. As we will see, such activity has led to the emergence of new forms of litigation, although not yet in the volumes that has been generated by illegal movie distribution using videotape.

13.9.1 The Online Music Wars

The fact that users can easily exchange music online is the result of a tactical error that the record industry made, but it was a mistake that only a visionary could have avoided. This resulted from the invention of the compact disc, which transformed the transmission of recorded music from analog to digital form. As a result of the CD's adoption, virtually the entire catalog of recorded music was released to the public in a digital form that did not have any copy-protection scheme. But the release of the CD antedated the ability of ordinary users to store and transmit the data stored on CDs by about 10 years.

Generally, copy-protection schemes have been foiled by users who find them frustrating. This is an ongoing struggle, because the software and media industries want to control copying by technical as well as legal means, since legal means are limited in their effectiveness.

The record labels have been unwilling to distribute music electronically in a format that can be freely copied. Instead, they have favored formats that track what computer they are being used on and how many times they have been copied. These formats are typically based on encryption. Unless a particular method is carefully designed, however, it will be cracked and rendered no more than an irritant to those who want to copy something. In an early attempt at copy-protecting music, the music industry unveiled its "Secure Digital Music Initiative" (SDMI) and issued a challenge to the public to crack it. Prof. Edward Felton and his students at Princeton did so. When Felton planned to publish his results, the record industry threatened to sue, but did not follow through on the threat. Felton published his results anyway, after backing down for some time. When he finally ended up publishing, it was with the approval of the record industry; thus the threat of legal action in this case had a temporarily-chilling effect on academic free speech.

After the advent of the high-speed (broadband) Internet and of high-speed, high-capacity personal computers, users digitally compressed the files containing songs into a format called MP3 so they took up a relatively small amount of disk space and could be transmitted in a reasonable amount of time. Users were able to store the contents of the CDs that they owned on to their hard drives in MP3 ; this was a process referred to as "ripping."

Copy-protected music downloads are available on the Internet, such as the AAD format used in Apple's Itunes system, and Microsoft's Windows Media files. These have not achieved the popularity of the MP3 format, which allows for unlimited copying.

The initial popularity of MP3s led to the popularity of a Web site called MP3.com, which was founded in 1997. MP3.com had made it possible for Internet users to upload CDs to the MP3.com Web site and then listen to them anywhere by "streaming" them downward back to a computer being used for listening. Audio streaming means downloading the data in real time as it is played through the computer's speakers. As a result of this, 45,000 CDs[4] had been "ripped" onto MP3's servers. MP3.com charged users a fee for this service, referred to as my.mp3.com, and as result had made millions of dollars and was a public company. MP3.com defended itself by saying that it was just allowing users to make copies of CDs that they had legally acquired, and that their service would actually stimulate CD sales. MP3.com claimed that they had a technology that verified that users of my.mp3.com had a physical copy of the CD. However, the law only allows consumers to make their own copies, not to make copies with the assistance of a a third party. Also, MP3.com had ripped thousands of CDs onto its servers, so that it could stream the CDs back down to their owners.

Since neither MP3.com nor its users were paying royalties on these recordings,

[4]Possibly up to 80,000 CDs, according to one account.

the RIAA, along with five major record labels, sued MP3.com in federal court in New York, and won a judgment for copyright infringement. Injunctive relief was also sought; the RIAA sought to shut down the service.[5] Because of the number of recordings that were involved, the damages were potentially huge; the RIAA initially sought damages that would have exceeded $6 billion. Universal, one of the plaintiffs, received a settlement of $53 million at trial, and as a result ultimately gained control of the site and company. The other plaintiffs settled for undisclosed amounts, reported to be $20 million each. The site was very valuable as a brand and Internet destination; Vivendi Universal (the parent of Universal) continues to operate it, but it operates under license from the relevant record labels and music publishers. A related lawsuit was also filed by several songwriters against MP3.com.

At the same time, users had been trading music over the Internet, illegally. Initially, the best-known software program that allowed users to exchange songs was Napster, a service whereby individual users were able to store in a central database (run by Napster) a list of the songs that they were sharing. This allowed each user to search this database to find a particular song and contact the machine of the user that was sharing it for download. Users built up large music collections, and only one legitimate copy needed to be purchased for this copy to be propagated all over the Internet, often in hours in the case of a new "hit" song. The record industry's traditional orientation toward trying to find and promote hits made this situation worse, as people could just download the one hit song they wanted to hear, rather than the entire album.

[5] Since the MP3.com decision, which was relatively early in the history of all this, several services have emerged with the blessing of the record industry, such as Apple's Itunes and the Rhapsody service. These services collect fees from users and distribute them to the copyright holders, record companies, and other parties, such as song publishing companies.

The record industry, through their trade association, the Recording Industry Association of America (RIAA),[6] successfully sued and shut down Napster, but this did not stop file sharing. Instead, Napster was supplanted by a number of other peer-to-peer programs, including Morpheus, Aimster, Grokster, Kazaa, and Limewire. In peer-to-peer networking, there is no central server; instead, each machine in the network passes queries along to its neighbors, until a machine is found that has the song (file) in question. Napster was only partially peer-to-peer, the actual files were stored on peer machines, but the database of their locations was centralized on Napster's servers, making for a target for the RIAA. With these newer systems, the centralized server is totally eliminated.

As network bandwidth has increased, the popularity of music sharing continued to increase, and users began to share files containing television shows and movies, as well as pornography, both still pictures and video. Thus, file sharing became a concern for these industries as well. The record industry had a bad reputation for mistreating artists with exploitative contracts and overcharging consumers (for instance, when the CD first became available, the price of a recording skyrocketed, from typically around \$8 or \$9 to \$15 or \$16); thus peer-to-peer file sharers showed little remorse, and many openly gloated about the opportunity for "payback." There was also little sympathy for Hollywood, which is populated by millionaires.

A 2002 survey found that two-thirds of people engaged in file-sharing did not care that the works being shared were copyrighted; a 2001 survey found that 61 percent didn't care. But another survey found that people would stop illegal file sharing if threatened with jail or fines.

[6] www.riaa.com

Fully peer-to-peer networking provides a more difficult opportunity for enforcement than a centralized system such as Napster. Nevertheless, after a period of waiting and frustration, the RIAA began to sue individual users for sharing files, winning settlements in the thousands of dollars each. These lawsuits served mainly as a disincentive to engage in such file sharing. It may have had at least a temporary effect; usage on Kazaa and Morpheus both dipped in the weeks immediately after the RIAA threatened lawsuits against individual users, by about 15 percent. However, a spokesman for the company that runs Kazaa said that there are many fluctuations in usage and this was just one of them [233]. There is some anecdotal evidence that the subpoenas have decreased the level of file-sharing. On the other hand, this may be a temporary effect if the RIAA does not keep up its subpoena activity, which will be quite costly in the long term and may generate quite a bit of litigation on a continuous basis. The RIAA cannot hope to stop file-sharing entirely; the situation is like speeding on the highway. While the police issue a lot of speeding tickets, many people still speed and don't get caught. Like the police, the RIAA does not have the resources to monitor and catch all violators. Eventually, if the issuance of these subpoenas becomes the stable governance method, the system will settle down into a stable level of piracy; the RIAA hopes that this will be lower than otherwise expected (and has good reasons to believe so; after all, speeding tickets do discourage speeding).

The unpredictable factor in all this, for the RIAA and the users, is the technology. There is no guarantee that people won't invent technologies to make it harder for the RIAA to track down users. For instance, technologies are already available that help users mask their identities. And there is no guarantee that file-sharers won't resort to other means, like simply borrowing CDs from friends and copying them on their computer, which is easy to do.

In July 2003 alone, the music industry obtained at least 871 federal subpoenas that were served on various Internet service providers (some of them, like Verizon, very large) and universities for file sharing alone, and 75 new subpoenas were being sought daily. The subpoenas demanded the names and addresses of computer users that were allegedly sharing files. (Users are typically identified in file-sharing programs by "screen names" and not their actual names; however, the Internet provider can usually identify the person that is paying for or is responsible the Internet connection). Some of the universities and Internet service providers that received the subpoenas have been challenging their validity in federal court. The RIAA (presumably for its own convenience) obtained all the subpoenas from a federal district court clerk in Washington, DC; MIT and Boston College argued that this court did not have jurisdiction over their (Boston-area) campuses; the RIAA argued that the DMCA granted this court jurisdiction. A Boston federal district court judge ruled in favor of the schools and threw out the subpoenas [179]; if this decision is upheld on appeal, it would raise the costs of enforcement of the RIAA, since they would have to get subpoenas from district courts all around the court. The Electronic Frontier Foundation (at eff.org) has also been fighting the subpoenas, arguing that the disclosure of user names violates the privacy of users without affording them proper due process of law. It is possible, however, that Congress may clarify the law in order to make it easier on the RIAA.

After the individual users are identified, they can each be sued. Damages sought could range from $750 to $150,000 per song illegally shared. The subpoenas, under the

DMCA, could be obtained from a U.S. district court clerk's office without requiring the signature of a judge.

However, with literally millions of users online, the prospect of suing even a small fraction of them would tax the litigation resources of even a well-financed organization like the RIAA. I logged on to Kazaa, one of the services, on July 10, 2003, and the program informed me that there were 3,783,178 people logged on (worldwide) and a total of 813,699,408 files were being shared, for an average of 215 files per user (of course, the files are not evenly distributed across users, and the RIAA or MPAA are most likely to go after those users sharing the most files, which may be difficult to determine.)

The peer-to-peer systems have also been the target of litigation. The developer of Morpheus has been sued twice by groups of record companies, first in the Los Angeles, and then in Nashville. In the federal district court decision in Los Angeles, the judge found that developers of the peer-to-peer software (in this case Morpheus and Grokster) could not be held responsible for actions of the software's users that infringe copyrights; the second case against was filed in Nashville in what one attorney described as "forum-shopping," speculating that Nashville, a music industry town, might be a better place to get a favorable decision [102].[7] The second case was not over a file-sharing system, but a system that the developers of Morpheus had also developed called Streamcast, a music-streaming service that was never launched. For Streamcast, the defendants had loaded many thousands of CDs onto hard drives with the idea of web-casting their contents to Internet users. Streamcast had attempted

[7] Practicing attorneys often take the social environment of the courtroom into account in their decision-making, which is one reason why there is so much forum shopping and demographically-based jury selection; economic and black-letter law theories seldom take this into account, although there is no reason in principle why economic theories could not.

to negotiate licenses with the record companies to operate this service legally under the DMCA (which requires web-casters, like broadcasters, to pay royalties), but was rebuffed.

What the RIAA and the MPAA need is a legal mechanism that does not exist, which might be called a "reverse class-action," that is, unlike an ordinary class action, where a (usually large) class of people sues a (usually small) group of individuals or organizations, in a reverse class action, a small number of plaintiffs would sue a large number of people. However, it is difficult to see how this could be implemented without the help of a police state; even if they had a judgment entered against them, the defendants would not come forward to identify themselves and pay it. So, instead, companies are forced to file many individual cases. Alternately, the penalties for sharing files could be increased considerably, but the content industries have already seen a large expansion of their rights with the passage of the Digital Millennium Copyright Act of 1998 (the DMCA; see below) so they may not be able to persuade Congress to expand their rights further.

Thus, being sued by the RIAA is likely to remain an improbable event for the average user, and is unlikely to deter him or her, unless adverse publicity leads the risk-averse computer user to over-estimate his chances of actually getting sued, or if the record industry manages to persuade the public that file sharing is actually stealing; despite the harsh rhetoric of the industry, most people don't seem to take this as a serious moral problem, probably because many people had been in the habit of exchanging cassette tapes with friends and saw this as a simply a natural extension of that.

Suing individual users does not seem to be an adequate solution to this governance problem. The situation differs from that with respect to the radio stations, which was largely solved with the creation of ASCAP and BMI and a royalty system. Individuals are far more numerous, and far less accountable, than radio stations, or even small businesses that play music in public, such as bars and restaurants. Some have suggested that all computer users be accessed a per-machine fee, similar to the per-television fee accessed in Europe to finance public production agencies like the BBC, and the proceeds from this fee be distributed to the artists on the basis of listenership, as accessed by some independent Nielsen-like agency. This would have the advantage in that everyone could freely listen to whatever music they wanted. Others have decried this as no better than "legalized theft," and it is difficult to see how the fee should be set, since setting it too low may result in under-production of music (which fails to meet the demand that would exist in a normal market). Setting it too high would result in over-production.

This would be distasteful to many Americans in that it would be basically a socialist mechanism to solve an (alleged) market failure, and there is a resistance to socialism of any kind in the U.S. However, the U.S. uses socialist schemes occasionally; social security, unemployment insurance, and worker's compensation are all basically socialist schemes. Worker's compensation was designed as a compromise to replace what could have been a costly system of tort litigation to recover for worker injury or death.

After an initial reluctance to accept the inevitability of the electronic distribution of music, and the loss of the profits associated with the sale of $16 compact discs, the record industry has been experimenting with licensed online distribution. Many of the services that have emerged allow the downloading of a certain number of songs for a fixed monthly fee. There was also a hope that consumers would take to a a cable-television style licensing method, in which users could "stream" unlimited numbers of songs for a fixed monthly fee (that is, listen to them without permanently downloading them); the Rhapsody service allows this. A recent service, the Itunes service from Apple Computer, allows downloading of songs for 99 cents each with no additional fees; there are several competing services. All of these systems involve copy-protection schemes, which have been adopted because of the record industry's reluctance to further assist unauthorized copying (although this is mainly futile, since CDs continue to be distributed mainly without copy protection, since attempts to introduce copy protection on CDs have met with consumer resistance).

It appears clear that this situation is in flux, and eventually some more stable governance form will be found. In the meantime, we can expect some litigation, since we are in a "Wild West"-like, ungoverned, situation. That is, laws exist to govern the situation, but they are difficult to enforce and widely flouted. Even in a governed situation, there is a certain rate of litigation based on people trying to slip past the rules, but in a relatively ungoverned situation such as presently exists, there are more violations, and therefore there is more of a tendency or need to resort to litigation as part of private policing. Also, often a law like the DMCA has provisions whose limits–for instance, the definition of what constitutes circumvention (see below)–have not been fully tested by the courts, so a certain volume of litigation as people attempt activities that run up against these limits. This is in the very nature of law–laws are written in human language, and human language needs to be interpreted by someone. Judges turn the law into reality by giving these words their meaning in terms of social action. Much the same could be said about a legal term such as "affirmative action" which is rather vague.

13.9.2 DVD Wars and the Emergence of the Digital Millennium Copyright Act

With respect to motion pictures, the Hollywood studios learned from the experience of the music industry with the CD, which was unencrypted, and built encryption into the DVD, despite the historical failure of almost all copy-protection schemes. The encryption method used was called "CSS," for content-scrambling system. Only licensed computers and DVD players were allowed to decrypt CSS for viewing, and only on the motion picture studios' terms. Normal, licensed DVD players play DVDs only by following instructions encoded on the DVD. For instance, most DVDs have a section at the beginning, which shows copyright notices, which cannot be skipped or fast-forwarded through. It is technically possible to build a DVD player that allows the user more control over the DVD, but such players will not be licensed to use CSS. DVDs are also region-encoded, allowing them to only be shown on players sold in particular regions of the world, so that the studios can control when they release films on DVD in different regions.

Of course, CSS was viewed by many as a challenge to be surmounted. Surprisingly, considering its economic importance,[8] it was easily analyzed and the code was broken.

[8] The technology to create strong ciphers is readily available and is used widely in such applications such as the transmission of credit-card numbers across the Internet, so it is a bit puzzling why the movie industry did not do a better job in getting a well-designed encryption system. It is possible that because of the trade-off between the strength of a cipher and the compute-time required to decrypt it, they chose a relatively weak cipher. It is also possible that they were relying on "security through obscurity," which is based on keeping a cipher method secret (rather than just the key(s)). This is generally not a workable principle, because all it does is create a challenge for cryptographers, which they love.

leading to the creation of the program "DeCSS", which was an openly available, free program that was widely disseminated. DeCSS was programmed by a Norwegian, Jon Lech Johansen, who was only 15 years old when he wrote it.

Congress had obliged the motion picture industry with provisions of the Digital Millennium Copyright Act (DMCA) of 1998 that prohibit bypassing so-called "Technological Protection Measures (TPM)." DeCSS fell into this category; it was considered a "circumvention device." Defenders of DeCSS argued that prohibiting its use prevented DVDs from being played under open source operating systems such as Linux which operated under free licensing schemes, that DeCSS was a free expression of its programmer, and therefore squelching it would violate free speech. In addition, they argued that if someone successfully analyzed an algorithm and published your results in a well-specified manner, that it would be a trivial manner to translate the published result into a computer program. It is hard to see a way that the MPAA could negotiate with Linux's distributors to license software for playing DVDs that had copy-protection, because Linux has no sole distributor, and users always prefer software without restrictions, like DeCSS, to licensed software with restrictions. In any case, the MPAA would probably have little interest in negotiating such a license, since it was not interested in the use of DeCSS on Linux, only its use as a step in pirating movies, by transforming them from the CSS encrypted format into an unencrypted format

While DeCSS remained illegal to distribute in the U.S., in 2003 a court in Oslo acquitted Johansen of the charge of digital piracy. Despite injunctions against its U.S. distribution, it remains relatively easy to obtain a copy of DeCSS, because the MPAA cannot shut down the whole Internet, and when it shuts down a site that holds

DeCSS, another one pops up. One computer scientist, David Touretsky of Carnegie-Mellon University (CMU), has taken up the fight to distribute DeCSS on free speech grounds. Touretsky distributes DeCSS on his Web site at CMU, and the program appears to remain available there despite a cease-and-desist letter sent by the MPAA. Some people have even printed up t-shirts with the source code of DeCSS on them.

The courts, so far, have not agreed with Touretsky's view that programs are a form of protected speech. In a lawsuit brought by eight major motion picture studios, the Second Circuit Court of Appeals in New York ruled against the publisher of a magazine for hackers called 2600 that had published the source code for DeCSS, upholding the decision of a New York District Court; the court found that since DeCSS could be used as a circumvention device as defined under the DMCA, it could not legally be published by 2600. The defendants decided not to appeal to the Supreme Court.

Newer computers are routinely being shipped with drives that can play DVDs as well as CDs, and some are being shipped with drives that can write DVDs. These are marketed by the computer manufacturers for the purposes of file backup and for creating one's own DVDs of home videos and the like, but they can also, in principle, be used to copy commercial DVDs containing Hollywood films. This has created a market for software that does such duplication. The manufacturer of one such software program, DVD Copy (available in several variants), 321 Studios, was sued by the MPAA in 2003; the company lost the suit and was ordered to stop selling the program.

Other provisions of the DMCA included the following. Internet service providers could not be held liable for the transmission of copyrighted material over the Internet, but they were obliged to remove material from their servers if it appeared to be infringing. “Webcasters,” that is, people or organizations that stream audio, video or music so that Internet users can view or listen to it in real time were obligated to pay royalties to the copyright holders. (In this, the model of broadcasting established in the 1930s was followed.) The manufacture or sale of devices or software devised to defeat copy-protection schemes was outlawed, and it became a crime to actually defeat such mechanisms. (The case of CSS is a special case of this rule.)

One interesting thing about the DMCA was that it was passed in order to comply with the treaties agreed to at the World Intellectual Property Conference in Geneva in 1996. In typical American fashion, the media companies lobbied for a new law to enforce their rights in the new situation in which media is distributed electronically. Alternatively, they could have asked for the creation of a new bureaucracy with the ability to write intellectual property “traffic tickets,” which would be enforced at first through an administrative system contained within the bureaucracy, and only appealed to the courts in unusual cases, but this is not the way that Americans typically choose to enforce their rights. They choose law, and the courts, rather than the state, and an administrative bureaucracy.

Jessica Litman, in her book *Digital Copyright*, argues that the DMCA represented a major shift of rights away from the public (and “fair use” of copyrighted material) and toward the copyright holders [136]. After reviewing the history of copyright law in this century, she concludes that the development of the law has been dominated by the copyright holders, as represented by large corporate entities such as the record companies, movie studios, and print publishers. The public interest was only weakly represented, by institutions such as libraries and universities, and indirectly by the manufacturers of consumer electronics and the Internet service providers.[9]

In recent years, some organizations have emerged to directly represent the public interest in this arena, given its overall importance; the Electronic Frontier Foundation (eff.org) does some work in this area, as does digitalconsumer.org (see below). But of course these latter institutions have much less money or influence than do the corporate interests, whose interests are much less diffuse than the public's. The corporate interests, because their interests are well-defined and not diffuse, and because the corporations are much smaller in number and therefore easier to organize, are very well-organized, and therefore more able to pursue their interests with the state. This is a familiar situation in many arenas of politics; Mancur Olson, among others, discusses such situations in his writing [164].

According to Litman, the DMCA is only the latest move in the expansion of rights toward the copyright holders. This hasn't ended; a bill proposed in 2003 by two prominent House Democrats, Howard Berman (who represents a Southern California district near Hollywood) and John Conyers, further strengthens the hand of the copyright holders by, among other things, making it a felony to upload a copyrighted file to a publicly-accessible network. The result of the politics behind the law is a copyright system that is biased in favor of the copyright holders, and erodes the rights of the user to do what the user might consider reasonable with copyrighted material legally acquired, like loaning a copy of a purchased videotape to a friend (legitimate under the well-known "doctrine of first sale") and extracting a reasonable portion for reproduction for scholarly, teaching, or journalistic purposes (under "fair

[9]Some of the consumer electronics manufacturers, like Sony, have conflicted interests, because they also own media companies. And some media companies own Internet service provides. AOL Time Warner owns two: the huge America Online (AOL) service and the cable modem subscribers of its Time Warner cable television business.

use"). She argues that we are moving to a situation in which the Internet becomes dominated by commercial, copyrighted material, and the copyright holders control how it can be transmitted and viewed, moving toward a system in which payment for a copyrighted work is required each time that it is used.

Specifically, DMCA gives the copyright holders strong controls over when and how copyrighted media are used. It makes it illegal, for a user to "rip" tracks off of a legally-acquired CD to MP3 files to listen to on their computer or on a portable (solid-state) MP3 player, or copy a DVD at all to any other medium (since this would involve circumventing CSS). This is what the consumer advocacy site digitalconsumer.org refers to as "space shifting," that is, moving the copyrighted material to other devices. It also makes it illegal for the consumer to circumvent how digital context is presented; under DMCA, it is illegal to sell a DVD player that allows the user to fast-forward through material, such as copyright notices or advertisements that the DVD has been programmed to show without interruption. This capability, of course, was readily available with audio and video tape. Such control of how media are presented in time is what digitalconsumer.org refers to as "time shifting." Of course, the media companies would say that if people weren't illegally exchanging files, then they would not have had to lobby for such stringent controls in the DMCA.The media companies, presumably, would like to charge a fee for each space shift and would like to prohibit time shifting altogether. One can envisage a situation where libraries would have to charge each patron a fee for use of each (electronic) item, unlike the present situation with a book that can be checked out by many patrons after the library buys one copy.

The digital video recorder (DVR) has been a popular innovation of recent years. A DVR is like a VCR in that it records video, but unlike a VCR, it records it onto an internal hard disk instead of videotape. A DVR is basically a computer that has specialized hardware and software for recording video. The DVR downloads a program schedule daily from the Internet and allows users to record programs by selecting them from an on-screen menu. They are then recorded to a hard drive and can be watched at any time in the future, without having to bother with videotape. DVRs also allow the user to pause live TV and to fast-forward through commercials.

The two best known brands of DVR are Tivo and ReplayTV, made by a company called SonicBlue. Microsoft also makes a competing product called UltimateTV, and has a version of its Windows XP operating system that allows a computer on which it is installed to act as a DVR. In addition, some satellite dish manufacturers sell DVRs built into their equipment, notably DirectTV and Dish Network. The ReplayTV allows users to share video files across a home network and across the Internet, and it allows the recording of DVDs onto its hard drive. At one point, SonicBlue threatened to sue Tivo for patent infringement, but the two companies agreed to not fight each other and instead work to expand the market for DVRs. At this writing, DVRs are only present in a small fraction of American homes, but the stakes are enormous; the $50 billion in advertising revenue that television takes in annually is threatened if viewers can skip commercials [70].

ReplayTV has a patented feature, "Commercial Advance," that detects commercials and skips over them. Thus these devices allow for both "time shifting" and "space shifting." As one might imagine, the media companies were not very pleased with the wide distribution of DVRs, and they almost immediately generated litigation. The television producers Viacom, Disney (parent of ABC), and NBC filed a suit against SonicBlue alleging that the commercial advance feature infringed their copyrights.

Shortly later, Time Warner and Columbia Pictures each also filed similar suits. Tivo was left alone in this litigation, perhaps because it had not so blatantly promoted the feature, although Tivo units can be used in much the same way; there is a way to get the unit to skip forward in a recorded show 30 seconds at a time, and commercials to last one or more 30-second units. It is also possible that Tivo was left alone because it was in part owned by AOL Time Warner, Sony, and NBC, which of course are all major content providers. Microsoft, of course, has enormous resources with which to fight litigation [70].

The chief executive of SonicBlue said that his firm spent $3 million per quarter in fighting lawsuits; SonicBlue, a relatively small company compared to the titans of the media business, was driven into bankruptcy (no doubt in part by this litigation) but the ReplayTV product line was purchased by a Japanese company and will continue. However, the new company will no longer sell units that feature "Commercial Advance." However, this is probably only a temporary victory for the media companies, because independent programmers no doubt will in time duplicate this feature and allow "hacking" of DVRs to perform a similar function.

13.9.3 Sex and the Net

Many Web sites are sex-related. In Playboy Enterprises v. Sanfilippo, 1998 U.S. Dist. LEXIS 5125 (Dist. CA (S)), the judge awarded $3.74 million plus attorney fees to Playboy, who had sued a web site provider that had used many pictures from the magazine. Playboy has a legal department which continuously searches for such sites, which are numerous. Often, the defendants are small companies with little resources, so Playboy is not able to recover much in the way of damages, but occasionally the infringing images are part of a larger web site which can remain up (without the infringing images) and generate revenue to pay off the damages to Playboy [188]. Playboy attempts to get large damage awards, because they act as a disincentive to other potential infringers. Although less wholesome, Playboy's actions to protect its "Playmates" are similar to Disney's activity in protecting Mickey Mouse.

13.10 Software Copyright Cases

While the motion picture studios have been the archetypal firms that have aggressively enforced their intellectual property, the software companies are emerging as equally aggressive defenders of their property. Microsoft has an even more powerful market position in software than Disney has in entertainment. There have been, as we have seen, significant numbers of cases involving Microsoft as plaintiff in recent years; continuation and expansion of litigation in this arena is dependent on the continued significance and increasing importance of the software industry (about which there is little doubt), and equally importantly, the continued viability of the current system of copyright enforcement, which is focused around tracking and enforcing royalties around the duplication of copies of works and their public distribution and performance. There are obviously severe difficulties in doing this even now, because of the sheer number of agents in the marketplace; witness the enforcement problems of the movie studios and of the performance rights societies.

This is clearly going to become even more problematic in the future, as the cost of copying plummets to merely the time of the person doing the copying (which may be minuscule if a person can start copying a file over the Internet and then do something else until the copying completes), and copying becomes continually easier, from a technical standpoint. This situation, and the possible market failures consequent on it, have led some scholars and commentators to suggest alternate mechanisms for the provision of payments to authors of works. One such mechanism releases a work to the public at the (near-zero) mechanical reproduction cost. The state collects taxes on computer hardware and and uses the revenues to pay royalties to authors based on consumption of each work, estimated by sampling techniques (for one scheme, see [202]). If a mechanism like this is adopted, as opposed to the current system, then litigation would largely disappear. But this is not likely to happen in the short or medium term, given how wedded the “content” industries are to the current regime, and because such a system would be “un-American” (e.g. not fully capitalist), so we can anticipate an increase in the number of copyright cases in the software industry for the foreseeable future.

Examination of some of Microsoft’s published copyright cases gives us an idea of the activity in which it and other software companies are involved. Some of the cases involve illegal copying of Microsoft products, and a smaller number of disputes are copyright disputes with other companies over similar software. Apple Computer, Inc. v. Microsoft Corp., 35 F.3d 1435 (9th Cir. 1994), over the WIMP (Windows-Mouse-Pointer) interface, is one of the best known cases of the latter type.

Some of the former type of cases involve companies in Asia, or run by businessmen who are Asian or have Asian connections, that are illegally copying and distributing Microsoft software; Microsoft Corp. v. Yokohama Telecom Corp., 993 F. Supp. 782 (Dist. CA (Central) 1998) was such a case. In another case, Microsoft Corp v. Taiwan Trade Ctr., 989 F. Supp. 80, Microsoft and some other companies, including Lotus, Novell, and Symantec, members of the Business Software Alliance, sued a number of defendants located in Puerto Rico for distributing illegal copies of software. In both cases, the defendants were very concerned about adverse publicity associated with the lawsuits. In Microsoft Corp. v. Grey Computer, 910 F. Supp. 1077 (Dist. MD (S) 1995), the defendants had copied large numbers of Microsoft products, and Microsoft was awarded a substantial judgment. Some of these cases may be fully adjudicated because Microsoft wants to generate publicity to deter others

13.11 Examining a Sample of Copyright Case Files

I examined a sample of recent (closed in 2001 or 2002) copyright case files from the Northern District of Illinois, Eastern Division, in Chicago. The Eastern Division covers eight counties in Northeastern Illinois, including Cook County and most of the Chicago area. Thus these case files represented mainly urban and suburban activity in and around Chicago.

The pattern of cases, as usual, was very uneven; that is, certain types of cases kept popping up over and over again. These types of cases were: music performance royalties cases, video piracy cases, software piracy cases, disputes over architectural designs (primarily between home builders), and knockoff-design cases, primarily involving China. In addition, there were a few cases brought by small copyright holders for infringement of properties that they owned, such as journalists and writers, against bigger entities (e.g. television stations, newspapers). However, most of the disputes were between companies or between large copyright holders, such as the performance rights societies or the large computer companies, and small-time, often fly-by-night infringers. We again see here the phenomenon of large rights-holders employing private policing in order to safeguard their property.

Among the disputes *between* companies, we see a common pattern. Often, the litigants had formerly worked together in the same company, and then had a personality conflict or some other event that caused them to go their separate ways. This is common, it appears, in the home design cases and in the cases in which someone is hired to develop software for someone else. In the home design cases, the typical pattern is for the plaintiff to charge a former partner or employee with going off on his own and using copyrighted home designs to build houses. Here, the relevant documents are the blueprints for the original design and the alleged "knock-off" design. In at least several of these cases, the designs appeared to my admittedly untrained eye to be close to identical, certainly close enough to violate copyright. One can only assume that the defendant hoped to slip under the radar of the plaintiff, or that the defendant figured that the plaintiff wouldn't exert the effort to sue.

This is a bit odd, because it is hard to hide a house once it is constructed, especially when you construct it in the same metropolitan area, and one would think that home builders would know in which areas their former associates are operating. In some cases, ignorance of the law, or a dispute over who actually owns the designs in question may play a role. For instance, if someone plays a role in creating a design while in the employ of a firm, there may be an agreement that the firm owns all rights to intellectual property produced. There may be a dispute over whether or not such an agreement exists, and the employee or former partner may leave the firm with the impression or "moral sense" that she owns the rights to the property in question. One interesting thing about this group of cases is that all the cases of design infringement I came across involved residential home design, as opposed to commercial design. This may be because the residential designers are more numerous, or because commercial designers, being often higher-stakes, may be more sophisticated in their knowledge and use of copyright law, and more proactive in avoiding litigation. Possibly both of these factors are at work.

In the cases in which one person or company hires another to write software for it, it appears that it is typically a dispute over whether or not the software development was done under a "work for hire" arrangement in which the hiring party owns the rights to the software, or whether it is a "limited license" in which the software developer retains rights to the software, but grants certain rights to the person or company that has hired the developer. These types of cases appear numerous because there is a large software industry consisting of people developing software for specific custom applications and for so-called "vertical markets," that is, specialized markets. For instance, one of the cases in these fifty in Chicago involved some software that was marketed to people who run home health care businesses. In these cases it appears typical that a team is formed of people who understand the business in question and people who know how to develop software, often because the former do not know how to develop software, and the latter do not understand the business in question. Here, however, the incentives to the developers to take the software developed under hire and go out and compete with the company that hired them are strong, even if there is a contract assigning rights and prohibiting this.

This is especially true since it is relatively easy to take some of the software that one has developed, modify and enhance it slightly or significantly, and put a different user interface on it. This makes it difficult to tell that the original software has been reused. This contrasts with the home design cases, in which the results of a purloined design are difficult to hide, since a house sits outside in plain view. Of course, in vertical markets, the competitors may be well-known to one another, and suspicions may be raised if a given company's former developer is now out on her own in the same market. The presumption may actually be that she has stolen some of the earlier work produced as a work-for-hire, given the strong incentives to do so. However, given the fact that it is easy to hide this fact in the source code for the software, since the source code is typically not distributed to customers and therefore is difficult for outsiders to examine, it may actually be necessary to sue in order to use discovery to find out the extent, if any, of software reuse. Even after litigation commences, it may be difficult to pursue discovery, in that the defendant may hide evidence or appeal to the judge to avoid revealing trade secrets to the plaintiff. Many of these cases confirm the commonly-known fact that it is disputes over discovery or other litigation processes that tend to prolong litigation and make it more costly.

Sometimes the litigation regarding software contracting involves the contractor suing the customer. For instance, one of the cases I looked at was Pixel Witch Inc v. Manic Mascots (N. Dist IL, 01-C-8826). In this case, the plaintiff was a contractor that developed software that the defendant licensed under a limited license, according to the plaintiff. The dispute was over control of the copyrights and over non-payment of licensing fees. The case was settled. In a similar case, IXL v. Adoutlet.com (N. Dist IL, 01-C-763), the plaintiff was a contractor providing software development services to Web sites; the defendant was one of its Web site customers. Again, the rights to the software (as well as, in this case, content) developed by the plaintiff were retained by the plaintiff. Here, it is was alleged that the defendant had not paid in full for services rendered. The case was settled. The financial collapse of the Internet may have led to many such cases around the country, in a similar manner to the way that it led to a large number of shareholder suits (as we explore in Section 18.3).

In such software contracting cases, the nature of the contract–whether the rights to the software are retained by the developer or not– is the determining factor as to whether or not the developer or the hiring party is the plaintiff. Since this is a growing industry, we are likely to continue to see a fair number of such cases.

While software contracting and software piracy cases rest on similar bodies of law (copyright and contract), in their social nature–that is, in terms of the kinds of social relationships between the parties–software piracy cases are more akin to video piracy, music piracy, and product knockoff cases than they are to the software contracting cases. This is because in the case of the software contracting cases, they are typically the result of prior business relationship gone awry, and the parties are much more likely to be comparable in size. In the piracy cases, we typically have a very large plaintiff going against small, often fly-by-night pirates, often employing a small army of investigators.

Piracy cases appear to be quite common. For software piracy cases, in our small sample of fifty, there were three with Microsoft as the plaintiff, and one with Adobe Systems and Macromedia (two other large software companies). In these cases, the defendants were often selling illegal copies of software by advertising using bulk unsolicited commercial electronic mail ("spam"). Investigators working for the software copies would pose as customers and buy pirate copies of the copies. The software companies would then verify that the media that they were sold was not genuine, and initiate an action. Typically, a temporary restraining order was sought, followed by a permanent injunction; the plaintiff never had difficulty in obtaining these. In some cases, monetary damages are sought and/or obtained, if it could be determined how many pirated copies were sold, and the defendant has any reachable financial resources. If this sample is any indication, Microsoft and other software companies bring a large number of these lawsuits, but clearly they can have nothing more than a deterrent action by raising the costs of entry into the pirate software market.

There were also three cases involving Ty Inc. and its trademarked "Beanie Babies," which are small beanbag stuffed animals which have been an enormously popular fad. This illustrates how fads and trends can generate cases, since any copyrighted fad product generates pirates. Ty has been defending its design for these from various pirates, mainly with China connections. For instance, in the case Ty Inc. v. Jenkins (IL N. Dist. 01-C-191), the defendants agreed that they had bought some knockoff beanie babies from China. The case was settled with a consent decree, where the defendants paid a cash settlement and agreed to help Ty pursue the Chinese manufacturers and middlemen. This is a similar situation to what we saw among patent cases; plaintiffs try to follow the "food chain" of the distribution of the pirated goods, much as in a drug prosecution.

There were only two video piracy cases in this sample, and both involved illegal copying of Chinese-language videos. This contrasts with what was found with the adjacent word-pair frequency method, in which the major movie studios were the main plaintiffs involved in this area, but this is almost certainly a function of the small size of this sample of cases. Still, it indicates the extent to which the China connection pervades piracy. In these two cases, both plaintiffs and defendants were Chinese. In one of the cases, Asia View Entertainment v. Kwak Mak (IL N.Dist. 01-C-5341), the defendant, who was operating a video rental business under a license that had expired. The defendant was elderly and did not speak English. He did not respond to the lawsuit despite being served with the complaint, and a large default judgment was entered against him, and his bank account garnished. However, after the default judgment was entered, he managed to obtain an attorney from a community-based firm, and he placed a handwritten statement into the record in Chinese. This attorney managed to reduce the amount of the judgment against him substantially, down to $7500, through a successful motion to vacate the default judgment.

In the other Chinese video piracy case, the defendants were a well organized group. The plaintiffs were the legitimate licensees of the Chinese language videos, and the defendants were distributing them on video compact disc (VCD). Since legitimate copies of these videos had never been made on VCD, the plaintiffs had an obvious case of piracy to present. The case was settled through a consent decree.

BMI and ASCAP performance rights cases were found, much as they were found with the adjacent word-pair method. BMI and ASCAP themselves do not typically serve as the plaintiff; instead, they use one of the companies formed by artists to hold the performance and publishing rights to their songs. They employ private investigators to find establishments that are playing music without a performance license; once these establishments are located, they attempt to get them to pay license fees, and when that fails, they sue to compel them to pay fees. ASCAP and BMI also employ sales people who try to sell licenses to establishments that they think might want to play music (e.g. stores, bars, restaurants).

In one extreme case, Jobete Music v. SBX Management and Michael Wellek (IL N. Dist 01-C-2715), the defendants, operators of a bar, had not obtained an AS-

CAP license despite numerous letters from ASCAP. The plaintiffs sued, and a default judgment was entered, including triple damages. The defendants' bank account was garnished. Only at that point did the defendants appear in court, but at that point, it was too late; attorney's fees were also awarded to the plaintiff, and the defendants were forced to enter into a licensing agreement. There were also four other music performance cases among these fifty. It appears typical that when there aren't problems in locating the defendant or having her appear in court, that ASCAP or BMI obtains both a cash settlement and an agreement to enter into a license.

Generally, these music performance licensing cases involve establishments such as bars and restaurants, which are numerous and are more likely to be able to evade licensing requirements, by slipping under ASCAP and BMI's radar. However, there was one case among this sample of 50 that involved a radio station; radio stations are also required to get performance licenses. This case seemed somewhat odd, in that radio stations are much more likely than bars and restaurants to be aware of the licensing requirements, in that the licensing fees are negotiated in a corporatist manner between ASCAP and the National Association of Broadcasters, under the supervision of a court. The licensing fees are set as a share of the radio station's revenue, except for small stations. However, there may be some radio stations that attempt to slip through the cracks, or have inexperienced or uninformed management; this case, Black Eye Music et al. v. Hawkins Broadcasting Co., Inc. et al (N. Dist IL 00-C-7847), concerned a radio station in Joliet that was broadcasting music without a license; under a consent agreement, the defendants paid $25,000 and entered into a license agreement.

There were also various cases that didn't fit directly into one of the types of cases described above. There was one case, Bertino Smith v. Fieldcrest School of Performing Arts et al (N. Dist. IL 01-C-6243), in which a dance academy accused a former employee of stealing choreography developed while employed by the academy. This case was similar in its sociolegal structure to the cases involving software contracting and the cases involving home designs. Again, the main issue was whether a "work-for-hire" had occurred and how rights should be assigned between the two parties. The specific outcome of such cases, of course, depends on the actual facts and evidence that can be marshaled about the division of the intellectual property between the parties.

Another, similar, case of collaboration leading to litigation was found in Hewitt Associates v. Great Place to Work et al. (N. Dist. IL 00-C-3405). Both companies had been involved in developing employee satisfaction surveys for *Fortune* magazine, for publication in *Fortune*'s "Great Place to Work" set of articles. This was a declaratory judgment case; the defendant had been alleging that employee satisfaction surveys, which the plaintiff had been using for its own purposes independent of the *Fortune* magazine contract, infringed the surveys that the defendant had developed. Here, it is easy to see how overlap could creep in, because there are only so many ways to ask certain questions on surveys. The case was settled through mediation, which is a unusual outcome in my examination of case files. The relative rarity of mediation in case files may indicate that most cases can be settled by the lawyers for each side without need to bring in an outside mediator.

Some of the cases involved small or individual (asserted) owners of intellectual property rights attempting to enforce those rights. In Hiram Villa v. Brady Publishing (N. Dist. IL 02-C-570), the plaintiff, a mural artist, sued because one of his murals was reproduced in a book without his permission. However, he had failed to show that he had registered his copyright on the mural with the copyright office, so the suit failed. In Dunkel v. Rex Travel et al. (N. Dist. IL 00-C-7917), the plaintiff was a freelance magazine writer, whose article from National Geographic Traveler had been illegally posted on the defendant's Web site; the case was settled. In Bryant et al. v. Progressive et al. (N. Dist. IL 01-C-8002), the plaintiff was a writer, and the case concerned the electronic republication of written material that had been initially published on paper. This case referenced the well-known New York Times v. Tasini case (121 S. Ct. 2381), in which the Supreme Court found that electronically republished materials were a "new work" for copyright purposes, if they were electronically reposted not in their original context (such as would be the case in, for instance, a searchable online database such as Lexis/Nexis), and therefore rights reverted to the writers, and publishers would need to obtain a new license. Thus, in this scenario, the republication rights become more akin to the performance rights of musicians holding song copyrights, and can potentially generate some additional litigation.

In Rostarchuk v. Douglas (N. Dist IL 01-C-2213), the plaintiff, a Russian translator, had entered into a contract to translate the defendant's books on the Nazi Gestapo chief Muller into Russian, and to obtain exclusive rights to these books in Russia and Eastern Europe. The case sought to enforce this contract, which had allegedly been breached because the defendant had entered into another contract with someone else, and had unilaterally abrogated the agreement with the plaintiff. The case was dismissed because the plaintiff was unable to serve the defendant. Problems with service occur frequently in litigation, in my examination of the case files. One could assume that problems with service occur even more in piracy cases, because the pirates tend to try to keep a low profile, and do not want to be located. (However, this particular case–Rostarchuk v. Douglas–was not a piracy case.)

In Pritikin v. KQED et al. (N. Dist. IL 01-C-8068), the plaintiff, a photographer, sued a public television station for using, without compensation, a photograph of Harvey Milk taken by the plaintiff; the case was settled. In Richter v. Wholesale Craft Supply (N. Dist. IL 01-C-2280), the plaintiff, a designer of greeting cards, sued the defendant for reselling defective cards as opposed to destroying them as agreed; the case was settled. In Placek et al v. Action Bag et al. (N.Dist. IL 00-C-6522), the plaintiff, a photographer, sued the defendant for placing photos of models that he had taken on bags without his permission. In Howard Communications v. Golf Gifts, the plaintiff had developed a copyrighted product called the "Quick Pro Golf Shot Reference Card," designed for golfers to take to the course with them. The defendant was selling a product called "Golf Pocket Pointers." Both products were reproduced in part in the record; they were very similar, with only minor changes in arrangement and titles in the latter product. The case was settled. Thus, we can see that relatively small, individual copyright holders do generate some litigation.

Thus we have seen that copyright cases, as reflected by these Chicago case files, can be classified into several categories. Some are classic major-media piracy cases, which typically involve a large plaintiff, like a record company, movie studio, or large software company, and a small, often obscure, defendant. Others involve parties that were involved in a prior relationship, like a choreographer that breaks off on his own and allegedly violates the copyrights on dances owned by a former employer or partner, or a home builder that allegedly infringes the home designs of his former employer. In a another variety of case, we see relatively small owners of copyrights asserting their rights against those who use them without proper licensing; the defendant could be large or small, but there usually is no prior relationship between the parties. However, this final variety of case appears to be less frequent than the piracy cases with plaintiffs that represent major media companies.

Chapter 14

Trademark Cases

14.1 Legal Background

Rights to trademarks originated in common law, and have since been put into statute. Such rights are designed to prevent people from passing-off their own products or services as those of others, to protect customer goodwill earned by a manufacturer, and to prevent confusion in the marketplace. A trademark is "a word, phrase, symbol, or design, or a combination of words, phrases, symbols, or designs, that identifies the source of the goods of one party from those of others."[1] A service mark is the same thing as a trademark, except that it is used in conjunction with services instead of goods. Trademarks must be distinctive, in that they are easily distinguished in the minds of customers; if a name falls into common use for all the versions of a particular product, than the trademark can be lost. Ironically, a product's very success in the market may lead to the loss of the trademark.

[1]Quoted from U.S. Patent and Trademark Web page, found on Novemeber 16, 2003 at http://www.uspto.gov/web/offices/tac/doc/basic/trade_defin.htm

In addition, the owner of a trademark or service mark must use it in order to it to be in force. It is not simply enough to register the trademark with the U.S. Patent and Trademark Office; if one doesn't use the mark, someone else can come along and use it freely. After registration, other parties have seven years to protest that they have made prior use of the mark; after that, there is a presumption of non-contestability.

Trademarks can also be owned and used by multiple parties if they use them only in certain geographic areas or in particular product areas. The basic test on whether or not a trademark's use is infringing is if it is likely to create confusion among consumers. For instance, if I open a hamburger restaurant and call it McDonald's, I am infringing, but if I open up McDonald's Engineering Services, I am not. Trademark holders may gain damages and injunctive relief against uses that cause consumer confusion and/or are likely to be dilute the value of the trademark.

14.2 Understanding the Trademark Caseload

There has been robust growth in the number of trademark cases in the last thirty years. However, they still represent a small share of total federal litigation. The number of cases has grown from about 500 in the early 1970s to between 3,000 and 4,000 today, as shown in Figure 14.1. The share of total litigation has also increased, from less than 1 percent to about 2 percent, as shown in Figure 14.2. Thus, growth in litigation in this area has been even more robust than growth in litigation as a whole. This may reflect the increasing economic importance of brands to corporations, both nationally and internationally. Also, the increasing internationalization of the economy makes infringement more common, as companies have little control over remote jurisdictions (like China) where infringing products are being manufactured.

It may also reflect increasing aggressiveness on the part of companies and individuals to push the envelope in attempting to obtain valid trademarks, because of increasing awareness of their potential value. There are two well-known recent cases of this. The first was Fox News's attempt to get a trademark on the phrase "fair and balanced" and sued satirist Al Franken when he used the phrase. The case was thrown out of court on free speech ground, and the judge said that the trademark was likely not valid [194]. In 2004, Donald Trump tried to get a trademark on the phrase "You're fired!" that he used in firing candidate apprentices on his popular television show "The Apprentice," in order to control the revenue stream from products emblazoned with the phrase as a result of the show [88]. While some of these trademarks may be found valid, trademarks that test the boundaries like these are more likely to lead to litigation, because trademarks have to be distinctive and cannot be drawn from everyday usage.

In most trademark litigation, the trademark holder is the plaintiff, alleging infringement. Trademark litigation almost always involves only private parties, as Table 14.1 shows. Over the past thirty years, the percent of cases won by the plaintiff has remained very high, although it has declined slightly. Figure 14.3 shows this. The plaintiff win rate fell from around 90 percent in the 1980s to about 84 percent by 2000. It is possible that the decline in the win rate is due to companies registering less defensible trademarks. Still, the aggregate win rate of 87.3 percent for trademark cases over the period 1986-2001 was much higher than the corresponding rate of 56.8 for all cases.

As we saw in the case of copyrights, part of the reason for such a high plaintiff win rate is the large number of consent judgments. Table 14.2 shows that 50.3 percent of adjudicated trademark cases end in default judgments, as opposed to only 10.2 percent of all cases. Consent judgments have very high win rates; 96.5 percent of such judgments in trademark cases are won by the plaintiff, and 92.4 percent in all cases. As I have seen by looking at case files, consent judgments in trademark litigation have a similar logic to those found in copyright litigation; they often consist of an admission of guilt, payment of restitution, and a binding (court-enforceable) promise to not repeat the infringement.

The next most common dispositions in trademark cases are pretrial motions (19.2 percent) and default judgments (17.5 percent). Plaintiffs win 62.7 percent and 98.5 percent of these, respectively. The high win rate for default judgments is normal; it exists for all case types. However, the win rate for plaintiffs on pretrial motions is unusually high; the corresponding win rate for all cases for such motions is only 28.0 percent. Many other case types involve successful pretrial motions by defendants, such as successful motions to dismiss, or for summary judgment, in civil rights cases. I suspect what is going on in trademark cases is that plaintiffs are winning many of their motions for summary judgment; in many of these cases the evidence of infringement is pretty clear and there is no need for a trial to establish the facts.

In terms of the amount awarded, trademark cases are lower stakes than average. Table 14.3 shows that the median amount demanded, $116,000, in trademark cases is a bit higher than the respective $103,000 for all cases, but the amount awarded for those cases in which there was an award was only $26,400 as opposed to $40,000 in all cases. This is probably because the vast majority of trademark infringement cases involve relatively small-time operations.

Figure 14.1: Trademark Suits Filed, SY 1971-2001

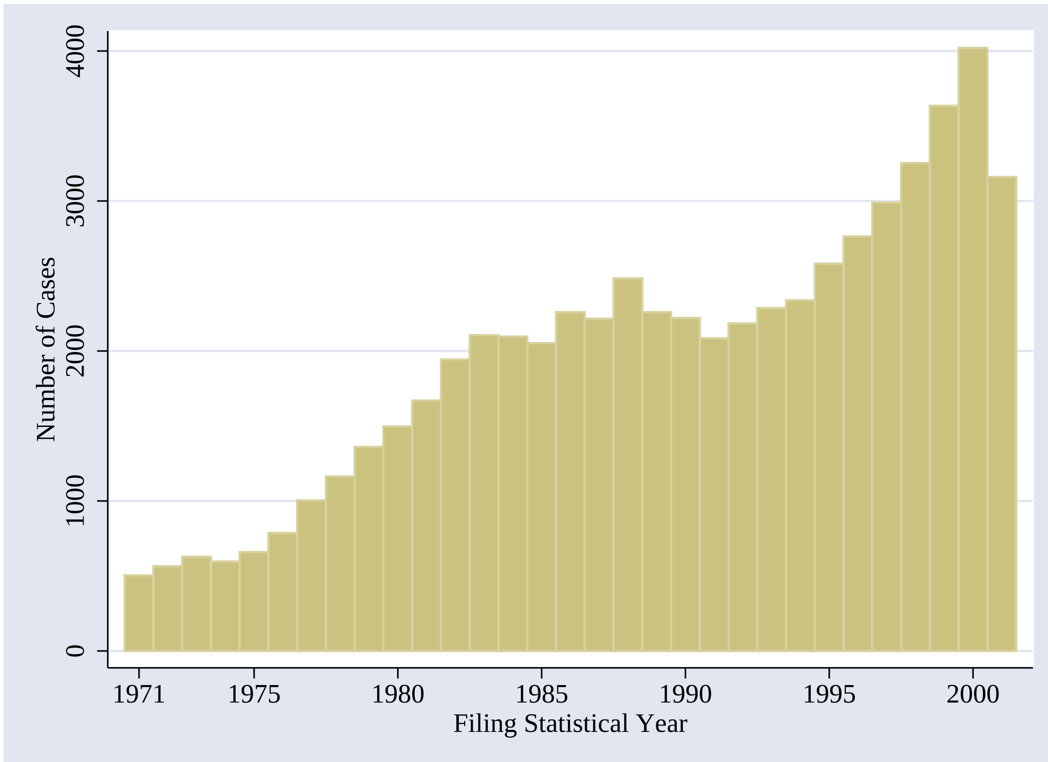


Table 14.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, Trademark Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		% Adjudicated		Plaintiff Win Rate	
Jurisdiction	Trademark	All	Trademark	All	Trademark	All
U.S. Govt Plaintiff	0.3	13.6	0.2	27.4	90.9	90.4
U.S. Govt Defendant	0.0	5.3	0.0	5.9	0.0	21.5
Federal Question	99.7	48.1	99.8	42.3	88.0	44.8
Diversity	0.0	33.1	0.0	24.4	0.0	61.6

Figure 14.2: Trademark Suits Filed as a Share of Total Cases Filed, SY 1971-2001

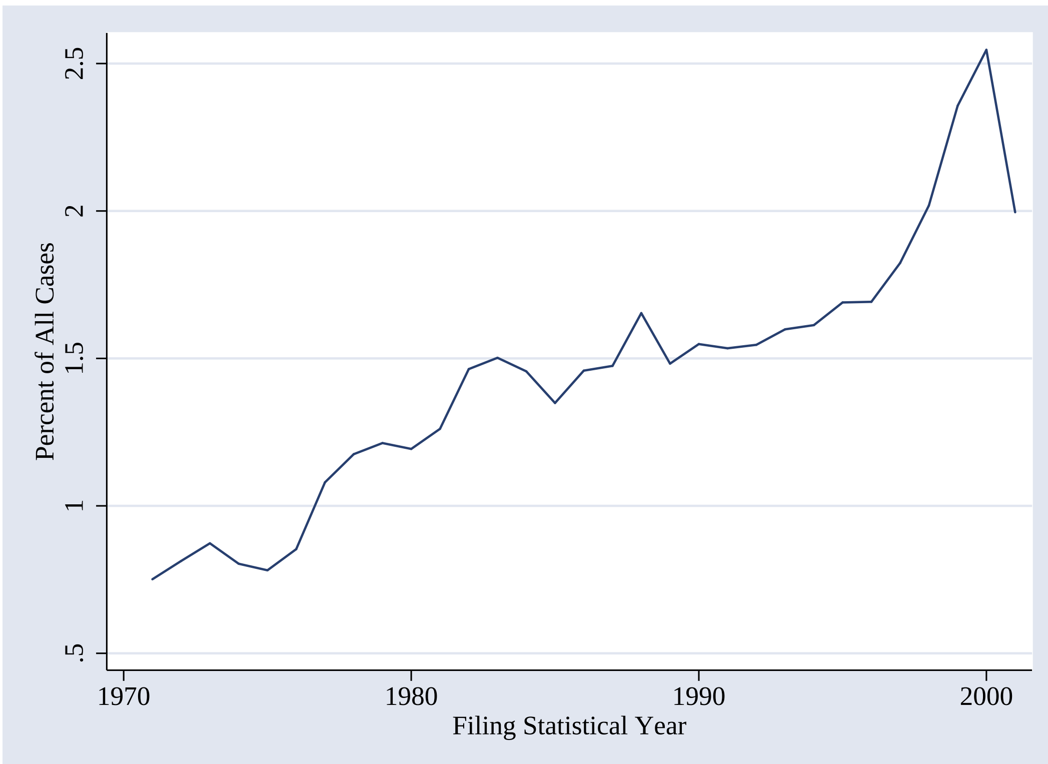


Figure 14.3: Percentage of Adjudicated Trademark Cases Won by the Plaintiff, SY 1979-2001

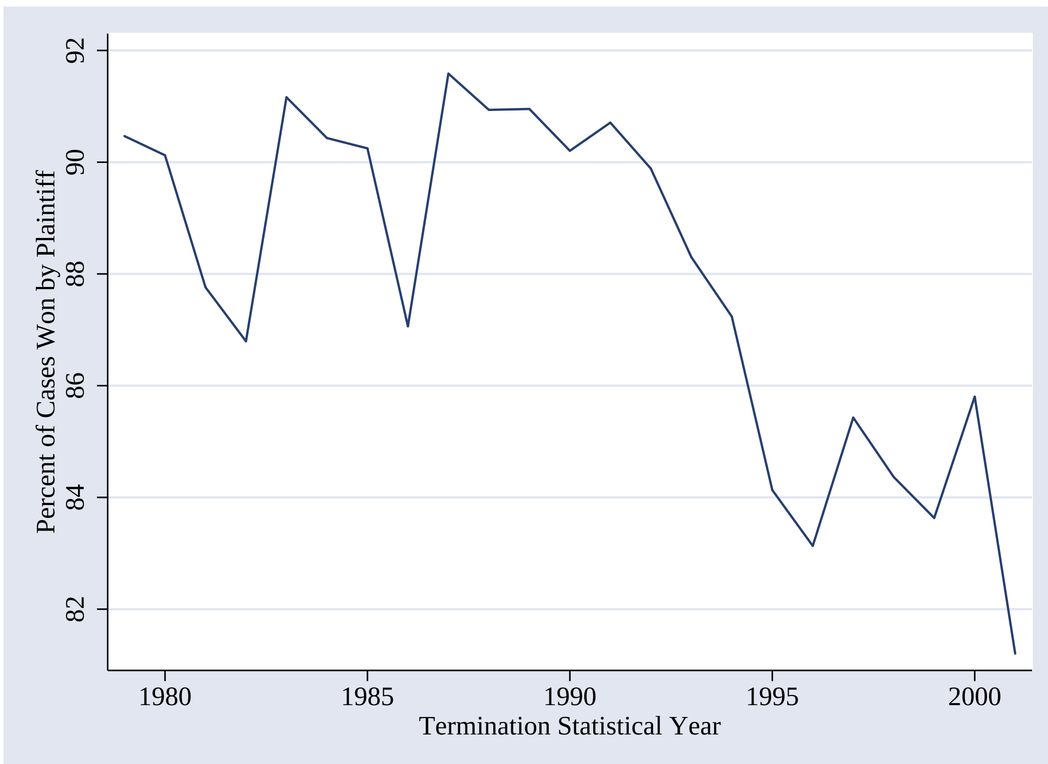


Table 14.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, Trademark Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Trademark	All	Trademark	All
Default Judgment	98.5	98.2	17.5	25.8
Consent Judgment	96.5	92.4	50.3	10.2
Judgment on Motion Before Trial	62.7	28.0	19.2	42.3
Judgment on Jury Verdict	64.3	46.6	1.8	7.7
Judgment on Directed Verdict	57.1	27.9	0.2	0.7
Judgment on Court Trial	64.4	48.5	4.3	5.1
All Other Dispositions	81.5	47.9	6.8	8.1
All Dispositions Combined	87.3	56.8	100.0	100.0
Consent & Default	97.0	96.6	67.8	36.1
All but Consent & Default	66.9	34.4	32.2	63.9

Table 14.3: Median Amounts Demanded and Median Judgments Received for Trademark Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate

	Trademark Cases	All Cases
Sample Size	59366	3894150
Median Amount Demanded	116.0	103.0
Sample Size (Amount Demanded)	7959	1434123
Median Amount Awarded	26.4	40.0
Sample Size (Amount Awarded)	3342	404512

14.3 Trademark Cases with F2000 Plaintiffs

Many of the top F2000 plaintiffs in trademark cases are some of the companies with the best-known and most valuable trademarks, such as Coca-Cola, PepsiCo, and McDonald's. There were a total of 5,537 trademark cases in the 1971-1991 period with a F2000 plaintiff. The top plaintiff, Coca-Cola, was found in 666 of these cases, over four times as many as the next most common plaintiff, PepsiCo, with 150 cases.

14.3.1 Coca-Cola as Plaintiff

Since the company's early days, Coca-Cola made aggressive use of the law in defense of its trademarks. In the early part of the twentieth century, when Coca-Cola was becoming a popular drink, a large number of competitors appeared, such as Co Kola, Coke-ola, Coke, Koke, Afri-Cola, Okla-Cola, etc. Coca-Coca sued many of these; by 1926 it had brought 7,000 trademark lawsuits, effectively quashing all competitors except for Pepsi [29]. If the economy is viewed ecologically, the establishment of the Coca-Cola/Pepsi-Cola duopoly owes a great deal to trademark law and the willingness of "alpha dog" Coca-Cola to enforce its dominance. Interestingly, though, the formula for Coca-Cola has never been patented; Coca-Cola prefers to attempt to protect it as a trade secret, although it is unclear to what extent it can do so after a hundred years and in the age of advanced chemical analysis.

Clearly, Coca-Cola continues to take up good deal of the time of the federal courts in defense of its trademarks, the most valuable of which is the name "Coca-Cola" itself and the name "Coke" (although it holds many trademarks, such as "Minute Maid" for orange juice, that are also valuable.) Of the 223 of Coke's cases that were judged, Coke won virtually all of them: 213. Most often, the result was a consent judgment, and Coke won injunctive relief in 95 cases. Examination of the party name of the defendant in Coke's cases reveals many restaurants, bars, food service companies, recreational facilities (such as ski areas and golf courses), and hotels-basically, places where soda is served. There are basically two groups of defendants in trademark suits brought by Coke: places that serve soft drinks, and other manufacturers of soft drinks.

Coca-Cola is defensive of its valuable trademark. In particular, it tries to prevent companies, such as restaurants, that serve Coca-Cola from substituting any other product in lieu of Coke (often, Pepsi or a generic syrup). For instance, in Coca-Cola Co. v. Overland, Inc., 692 F.2d 1250 (9th Cir. 1982), Coca-Cola charged the defendant, an operator of a hotel and casino, with trademark infringement and unfair competition because of its substitution of Pepsi for Coke. Coca-Cola sought injunctive relief. Overland made an antitrust counterclaim against Coke. The hotel and casino only sold Pepsi.

Coke sent in members of its "Trade Research" department to the casino and produced affidavits that on 23 of 29 separate occasions, over three years, employees substituted Pepsi when Coke was requested without asking the customer. Overland argued that Coke was using trademark infringement suits to achieve a monopoly of the cola soft drink market, that "Coke" had become a generic expression for a cola drink and therefore the substitution was warranted, and that Overland had given adequate notice, given that signs were posted that Pepsi was the only cola drink sold, that the substitution would be taking place. Neither the district court or the appeals court were persuaded of any of Overland's arguments, and found summary judgment in favor of Coke. Overland was permanently enjoined from substitution without notice. This is interesting because this decision imposes real, if individually insignificant, costs on the public. Many members of the public who order Coke are probably really happy with either Coke, Pepsi, or any other Cola, and the requirement that the server ask “Is Pepsi OK?” eats up their time and that of the server. Every individual incident is minor, but this occurs millions and millions of times a year, so the real costs are high. An economist from Coke, as well as some Law and Economics scholars, would argue that this price is worth it to maintain the quality of the brand.

According to a 1978 article, Coke had–at the time of the article–25 investigators in its Trade Research Department, who order Coke and send it in to the chemical lab at Coke headquarters in Georgia for testing to verify it is actually Coke. Between 1945 and 1978, Coke sued over 800 restaurants, and claimed to win injunctions every time it asked for one. Coke maintained that it would lose its trademarks if substitutions were allowed and "Coke" entered the language as a generic term [127].

Coke also has, on occasion, defended its trademarks against other manufacturers. For instance, in Coca-Cola Co. v. Seven-Up Co., 497 F.2d 1351 (U.S. Court of Customs and Patent Appeals, 1974), Coke challenged Seven-Up’s filing of the trademark "Uncola" on various grounds, none of which were found meritorious by the courts, which allowed Seven-Up to obtain the trademark.

Coke is also defensive against "passing-off" of other drinks as Coke. For instance, in Coca-Cola Co. v. Cahill, 480 F.2d 153 (10th Cir. 1973), Coke sued Cahill and his company, who was manufacturing a cola drink similar to Coke that they were marketing under the names "Tocola" and "Tocola-Cola." The district court found that these marks were confusingly similar to "Coca-Cola" and enjoined the defendant from using them. The appeals court upheld the decision. The district court reviewed Coke's previous trademark infringement cases that were similar, noting that Coke won some of them, and lost some of them.

14.3.2 PepsiCo as Trademark Plaintiff

Pepsi is caught in something of a contradictory position, while it wants to protect its own trademark, it also wants to see Coke's weakened, and should have a mixed reaction to the substitution of Pepsi for Coke, given that this dilutes both trademarks, but also increases Pepsi's sales and market share. In 1998, Pepsi's market share was 31% to Coke's 44% [21]. Coke's dominance in the world market is even stronger. In 1998, Pepsi filed a lawsuit against Coke in federal district court, alleging that Coke was abusing its market power to keep Pepsi out of the fountain market (bars, restaurants, entertainment venues, etc.)

The apparent absence from the published cases of cases where Pepsi goes after a restaurant or other establishment that serves soft drinks for substituting Coke for Pepsi, as Coke goes after establishments for substituting Pepsi for Coke, indicates that Pepsi does not engage in such activity, perhaps because, on balance, it benefits from such substitutions. Of course, if Pepsi ever exceeds Coke in market share, its behavior would be expected to change.

Pepsi, like Coke and other large companies with trademarks, goes after companies with similar marks. For instance, in PepsiCo, Inc. v. Grapette Co., 416 F.2d 285 (8th Cir. 1969), Pepsi sued another soft drink company that was using the name "Peppy." Ultimately, the appeals court found that the defendant could not use this name.

The rights to distribute Pepsi's (and Coke's products) are territorial in nature. In PepsiCo, Inc. v. Torres, 1993 U.S. Dist. LEXIS 17588 (Dist. CA (Central)), the defendant was importing legitimately-bottled Pepsi products intended for the Mexican market into the U.S. The court ruled that Pepsi's trademark rights were territorial, that it was entitled to control when and where that trademark was used, and enjoined the defendant against further such importation. In a similar case, PepsiCo, Inc. v. Giraud, 1988 U.S. Dist. LEXIS 12864 (Dist. PR) the court enjoined the defendants from importing Pepsi bottled in Venezuela into Puerto Rico, which they had been doing. Such importing can be profitable due to price discrimination practiced by manufacturers in order to adapt to markets with varying standards of living. These cases are similar to the gray market cases against retailers that we discussed above.

14.3.3 McDonald's as Trademark Plaintiff

According to McDonald's Corporation's general counsel, McDonald's has the first or second most recognizable trademark in the world [185]. Unlike Coke, which has a professional investigative department, McDonald's relies on its large network of franchisees and their employees, friends and families to inform it of potential infringements, and the general counsel, Shelby Yastrow, says that he usually gets multiple reports of any particular incident of infringement. (Of course, the difference with Coke is due to the fact that Coke lacks franchisees, except for its bottlers.) McDonald's in-house legal staff are expert in trademark law, says Yastrow, but if a case goes to trial, they employ an outside litigator, who they brief on the relevant trademark law. (In 1993, they used 600 law firms, many of which were "boutique firms" which specialized in a particular area of the law.) One of Yastrow's main concerns is protecting McDonald's trademarks from becoming generic and losing protection.

Consistent with the "dispute pyramid" [77], most of McDonald's trademark infringement incidents are handled relatively amiably and without resort to litigation or even threats of litigation. Because it is mindful of its reputation, it needs to practice good public relations in handling these cases. Many of them, if they are not considered serious, and are one-time, are simply ignored. However, Yastrow points out that he can't let a man named McDonald open up a restaurant somewhere called McDonald's. On such occasions, a company official is sent out to pay the person off and get them to change the name.

McDonald's trademark cases sometimes arise as a result of its relations with its franchisees. For instance, In Lewis v. McDonald's Corp., 1995 U.S. App. LEXIS 37083 (6th Cir.), Lewis, a black McDonald's franchisee who had been dropped for past due franchise fees, sued McDonald's for violations of the civil rights laws and for violating the Michigan franchise law. McDonald's counter-sued, for trademark infringement, injunctive relief against the further use of its trademarks, and for the franchising fees owed it. Lewis's claims were thrown out, and McDonald was granted its injunction and the fees.

In a similar suit, McDonald's Corp. v. Watson, 69 F.3d 36 (5th Cir. 1995), McDonald's sued a former franchisee who continued to use its trademarks without authorization. McDonald's again won injunctive relief and payment of fees. Because these disputes with its franchisees are primarily contract cases, they may be classified as such in the database, rather than trademark cases.

McDonald's has restaurants around the world, and therefore has the problem of enforcing its trademarks internationally. In 1994, it lost a battle against the owner of a Danish hamburger stand who was using the name "McAllen." And in 1995, it lost the right to use the name "McDonald's" in South Africa to a rival, since it hadn't been using the name during the Apartheid era.

McDonald's occasionally has disputes with its international franchisees. For instance, in McDonald's Corp. v. Bukele, 960 F. Supp. 1311 (Dist. IL (N) 1997), McDonald's sued an El Salvadoran franchisee, Roberto Bukele, and his company, in Illinois federal court. A franchise agreement had broken down, in that McDonald's felt that Bukele had not met the terms of their agreement. The court ruled that the appropriate venue for the case was El Salvador, especially since the agreement between McDonald's and Bukele was governed by El Salvadoran law.

Like Coca-Cola, McDonald's fights the registration of trademarks that it feels are too similar to its own. In J & J Snack Foods Corp. v. McDonald's Corp., 932 F.2d 1460 (Fed. Cir. 1991), J&J was attempting to get a trademark on "McPretzel" and "McDugal McPretzel", which McDonald's opposed. The U.S. Patent and Trademark Agency denied the trademark request, accepting McDonald's argument that this would create confusion with McDonald's trademarks, and the appeals court upheld this view.

It appears that McDonald's attempts to have a court disallow any trademarks that use the prefix "Mc." For instance, in McDonald's Corp. v. Druck & Gerner, P.C., 814 F. Supp. 1127 (Dist. NY (N) 1993), McDonald's sued two dentists who were using and attempting to get trademark registration for the name "McDental." The dentists were enjoined from the use of the name. In McDonald's Corp. v. McBagel's, Inc., 649 F. Supp. 1268 (Dist. NY (S) 1986), McDonald's sued Ken McShea, owner of a bagel shop called McBagel, to get him to stop using that name, and was successful with the court. McShea's defense that all he meant to do was market an "Irish Bagel" was not accepted.

McDonald's also sues competitors who use its trademarks or service marks or marks that it thinks might be confused with its own. For instance, in McDonald's Corp. v. Moore, 243 F. Supp. 255 (Dist. AL (S) 1965), McDonald's sued a smaller hamburger chain, for using a symbol it felt was similar to its "golden arches." In addition, McDonald's alleged that the other chain, Colonel Dixie's, had copied other aspects of its operation, and had even hired former McDonald's employees. The trial court did not find any merit to McDonald's allegations, and the appeals court upheld its decision. In McDonald's Corp. v. Arche Techs., 1990 U.S. Dist. LEXIS 18545 (Dist. CA (N)), McDonald's sued a computer manufacturer who used a logo in various colors that was a single arch (as opposed to McDonald's usual pair of golden arches). The court enjoined the defendants from using a gold or yellow arch, but allowed them to continue to use arches in other colors.

Sometimes McDonald's comes up against a corporate rival with substantial resources. For instance, in 1987, Quality Inns announced plans to open up a chain of low-end motels under the name McSleep. In Quality Inns v. McDonald's Corp., 695 F. Supp. 198 (Dist. MD 1988), Quality Inns sought declaratory judgment on non-infringement, arguing that the "Mc" prefix had become generic and that they were using it in a non-competing domain (e.g. hospitality rather than food service). Interestingly, at trial, both sides introduced survey research done by commissioned expert witnesses, with an eye to showing that the proposed name "McSleep" would or would not be identified with McDonald's. Each side's survey research, because of differences in methodology, tended to support the side for which it was done.

Quality Inns also introduced evidence on the generic use of the prefix "Mc," giving numerous examples of businesses that used the "Mc" prefix, other than McDonald's. This is interesting because it shows that McDonald's policing activity is incomplete. They also brought in a linguist who testified as to the use of the prefix as a generic word in the language meaning fast, inexpensive, and designed for mass consumption. However, fortunately for McDonald's, the court was not persuaded, and enjoined Quality Inns against proceeding with the McSleep brand. As we will see below, Quality Inns is also a frequent plaintiff in trademark cases, so it may have felt that it had sufficient knowledge and experience in trademark law to take on McDonald's and prevail.

14.4 Trademark Cases Viewed with the Adjacent Word-Pair Frequency Method and the Single-Word Frequency Method

The most frequently occurring adjacent word pairs in the plaintiff string in trademark cases are shown in Tables 14.4 and 14.5; the corresponding pairs for the defendant string are shown in Table 14.6. The list of plaintiffs is dominated by important brand names, notably in food and beverage (e.g. Coca-Cola, Dunkin' Donuts, Kentucky Fried Chicken), hotels (e.g. Best Western, Choice Hotels), luxury goods and fashion (e.g. Rolex, Polo, Louis Vuitton). Retailers are prominent on the list of defendants; in many cases, this will be because they are accused of selling knockoff goods, such as fake Louis Vuitton bags or fake Rolexes. In addition, many of the same important brand name holders found on the plaintiff list are also on the defendant list; they may appear also as defendants because they are involved in declaratory judgment cases testing the limits of their trademarks or in franchising cases (for instance, in hotels or fast food; see below for examples).

The name "Patel" appears frequently (detected by the single-word frequency method), as a defendant almost entirely in hotel cases; this is due to the involvement of many South Asian immigrants in the hotel business, Patel being a common South Asian name. It may also be that these immigrants are less informed on trademark law than native-born operators, although this is by no means certain.

As an example of one of the hotel plaintiffs, let us consider Choice Hotels. Choice Hotels operates (primarily budget) hotels under the brand names "Sleep Inn", "Quality Inn", "Comfort Inn", "Econolodge", "Clarion Inn", "Rodeway Inn", and "Mainstay Suites." Because many of these names are somewhat generic, especially those involving "sleep", "comfort", and "quality," it appears that Choice Hotels tends to get into disputes with other hotel operators using similar names.

I was only able to find one published case involving Choice Hotels as named plaintiff, and this was a case primarily involving a franchise contract, not a trademark. Evidently, the remaining Choice Hotel cases were settled prior to a decision. However, searching for defendant "Patel", I was able to find a case involving Quality Inns as Plaintiff and two men named Patel as defendant, doing business as the "Comfort Lodge." The case was Quality Inns Intl., Inc v. Patel, 622 F. Supp. 826 (Dist. MS (S) 1985). The plaintiff alleged that the use of the name "Comfort Lodge" infringed its "Comfort Inn" trademark. The plaintiff won a preliminary injunction; the published record ends there.

Dunkin' Donuts is the best-known brand name in doughnuts; let us consider its cases to represent cases in food franchising. Because of the dominance of its brand in the market, the company spends a good deal of time defending its trademark in court. Examination of the party names in the cases where in appears as plaintiff indicates that virtually all the defendants are individuals or small companies. The published record consists mainly of two kinds of cases: franchising contract cases, and the trademark cases we consider here.

Most of the published cases are franchising cases. However, these two case types are not always neatly separated, since franchising involves the use of trademarks. For instance, in Dunkin' Donuts Inc. v. Mercantile Ventures, 1992 U.S. Dist. LEXIS 4900 (Dist. TX (W)), the defendants were Texas franchisees of Dunkin' Donuts that operated legitimate stores in El Paso. They also operated imitation "Donkin Donuts" (sic) stores in Mazatlan, Mexico. Their experience as legitimate franchisees no doubt helped them in making the knock-off locations as close as possible to actual stores. The plaintiff won damages in this case.

To represent the luxury goods cases, consider Louis Vuitton, which is a French manufacturer of very high-priced designer luggage, bags, and other leather goods and fashion items. These items feature a distinctive design and arrangement of the initials "LV." Of course, the higher-priced the genuine item is, the more appealing it is to counterfeiters. The luxury goods firms, and other firms with valuable trademarks, such as Levi-Strauss, often employ professional investigators who specialize in trademarks, either directly or as contractors. Another way that the firms fight piracy is by enlisting the help of customs officials, who seize counterfeit goods, whether brought in by businessmen who plan to sell them or tourists who have bought them on trips overseas for their own use.

There are a number of published cases in which Vuitton sued merchants, typically of the fly-by-night variety, or in Chinatown, that have sold counterfeit merchandise with its distinctive design and logo. In Polo Ralph Lauren Corp. v. Chinatown Gift Shop, 1996 U.S. Dist. LEXIS 1647 (Dist. NY (S) 1996), Vuitton joined with two other plaintiffs, Polo Ralph Lauren and Rolex, in suing a landlord for contributory infringement. The landlord had rented space to another company that had been previously sued. Polo Ralph Lauren also makes high-fashion goods, and Rolex makes expensive watches. It is not surprising that this case was litigated, given that it is unclear whether the landlord is liable for the infringement activity of the tenant.

However, there are a number of other cases that were litigated that appear to be open-and-shut cases for the plaintiff. Sometimes the defendants will claim that they didn't know that the goods were counterfeit, but this is rarely credible, due to the much lower price of counterfeit goods. Two such cases are Vuitton v. Wright, 1992 U.S. Dist. LEXIS 20153 (Dist. GA (N)), and Vuitton v. Rags, 1992 U.S. Dist. LEXIS 20803 (Dist. CA (E)). These may be litigated for their publicity/deterrence effect.

It is not surprising that such goods are available in Chinatown, which has social connections with manufacturers in the Pacific Rim that are able to manufacture such goods. Any manufacturer that tried to make such goods in the U.S. or Europe would promptly be shut down by a court order at the request of the intellectual property holders,

Sale of counterfeit goods is also expanding onto the Internet. The difficulties of enforcement here are obvious; if Vuitton or another manufacturer is able to shut down a given web site, it is very easy for the offender to pop up a short time later at a different web address, using a different Internet access provider. There is also a problem with counterfeit items placed on legitimate auction web sites such as E-Bay. Luxury goods makers are employing people to search the Internet for such items, but of course this is a difficult endeavor, given the size of the Internet. Rolex has sued one online purveyor of "replicas"; the purveyor argues that he isn't trying to deceive anyone, since he doesn't claim they are actual Rolexes. This indicates a misunderstanding of the law, which forbids the sale of counterfeits, no matter whether they are passed off as genuine or not [180].

14.5 Trademarks and the Internet

Trademark law has been tested and modified in the age of the Internet. This is mainly because of the domain name system (DNS). DNS allows for the registration of Internet addresses, such as ibm.com or whitehouse.gov, in a manner so that each of them uniquely identifies a service (like a Web server) or a machine on the Internet. DNS was developed independently and without much thought given to its relationship to trademark law, since it was originally developed, in the early days of the Internet, to serve educational, research, and military purposes.

The early days of the Web led to a situation where one had a number of "cyber squatters." This was because of the first-come, first-served nature of the registration system; the first person to apply for registration of a domain name got the rights to and control of that name, without regard to a pre-existing trademark. The registrars were not set up to check on trademarks. So, for instance, in 1988, I could have regis-

Table 14.4: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Trademark Cases (Part 1 of 2)

1	Coca Cola	30	American Honda
2	Rolex Watch USA	31	Tommy Hilfiger
3	Polo Fashions	32	BMW of (North America)
4	Dunkin Donuts	33	United Feature Syndicate
5	Best Western	34	Scott Fetzer Company
6	Levi Strauss	35	Ramada Inns
7	Choice Hotels	36	Travelodge Hotels
8	Roto Rooter	37	Goodyear Tire
9	Days Inns	38	Electronic Realty
10	Burger King	39	Jordache Enterprises
11	KFC Corp	40	American Dairy Queen Corp.
12	Century 21	41	Lacoste Alligator
13	Harley Davidson	42	Shell Oil
14	Chrysler Corp	43	Sears Roebuck
15	Winterland Concessions	44	Europe Craft Imports
16	Howard Johnson	45	Warner Lambert
17	Baskin Robbins	46	Gucci America
18	Louis Vuitton	47	Mobil Oil
19	Lyons Partnership	48	Tandy Corp
20	Ramada Franchise Systems	49	Brockum Company
21	Microsoft Corp.	50	Ford Motor
22	Anheuser Busch	51	Electrolux Corp
23	Grateful Dead (Productions)	52	Estee Lauder
24	Calvin Klein	53	Little Caesar
25	Under Seal	54	Days Inn
26	Volkswagenwerk AG	55	AT&T
27	Southland Corp	56	Jack Daniel Distillery
28	Hard Rock (Cafe)	57	Hewlett Packard
29	Gucci Shops	58	Cobra Golf Inc.

Table 14.5: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Trademark Cases (Part 2 of 2)

59	7 Eleven
60	Arby's
61	Great Southern co.
62	American Automobile Association
63	Schering Corp.
64	Mcdonald's Corp.
65	Daimler-Benz
66	Christian Dior
67	Brockum Co.
68	Sony Corp
69	Taylor Made Golf Co.
70	Blue Cross
71	Quality Inns
72	Callaway Golf Co.
73	Nice Man Merchandising
74	Wells Fargo and Co.
75	Toys-R-Us
76	NBA Properties
77	Minnesota Mining
78	Super 8
79	Knights Franchise Systems
80	Exxon Corp
81	Ziebart Intl
82	Directed Electro
83	Playboy Enterprises
84	Red Carpet Corp.
85	Rolls Royce Ltd.
86	Precision Tune Auto Inc.

Table 14.6: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Trademark Cases

1	Various John Does	15	Anheuser Busch	29	Pizza Hut
2	U S	16	Montgomery Ward	30	Warner Brothers
3	Under Seal	17	American Express	31	Hallmark Cards
4	Wal Mart	18	Burger King	32	Hard Rock Cafe
5	Sears Roebuck	19	Toys-R-Us	33	Ben Elias Industries
6	J C Penney	20	Walt Disney	34	Ford Motor
7	Various Does	21	Coca Cola	35	New Line Cinema
8	K Mart	22	Microsoft Corp	36	Levi Strauss
9	Blue Cross	23	Bristol Myers (Squibb)	37	Wells Fargo
10	Nature's Bounty	24	Warner Lambert	38	Bugle Boy
11	R J Reynolds	25	City Of ...	39	Dayton Hudson
12	R H Macy	26	Dart Drug	40	Rite Aid
13	Century 21	27	Avon Products	41	Computer World
14	AAA Auto	28	General Motors		

tered "citibank.com" if Citibank had not gotten around to registering it at that time. Later, when the Web took off, this address would have great value to Citibank, and I could turn around and sell it back to them at a great profit. Sometimes, cyber squatters obtained domain names so that they could criticize or satirize companies, but more typically their motives were financial. Some companies, such as Panasonic and Hertz, paid the squatters to get the rights to use the name back, before Congress took action to strengthen trademark holders' rights in this area. This was done through the passage of the 1999 law called by its sponsors the "Anti-Cybersquatting Consumer Protection Act." This law allowed trademark owners to sue to get control of a name back or, even better from their point of view, to use arbitration run by the Internet Corporation for Assigned Names and Numbers (ICANN), the international organization which controls all names on the Internet and regulates the various competing name registrars. In order to get control of a name, the complainant needs to show that the person or other entity who has registered a name similar to a trademark owned by the complainant to have a bad faith intent to profit from the use of the trademark.

People continue to register domain names to criticize or satirize other people or organizations. For instance, the hacker magazine 2600 (which was also involved in disputes involving DVD encryption) registered the domain name "verizonreally-sucks.com." As a result, Verizon (the huge telephone and telecommunications concern) sent 2600 a cease-and-desist letter, claiming infringement of its trademark under the 1999 anti-cybersquatting act, and threatening legal action if 2600 used the domain name. (Verizon itself had earlier registered "verizonsucks.com" itself to prevent anyone else from getting it, as well as at least 724 other domain names with versions of "verizon" in them, in preparation for the launching of the new "verizon" trademark, which came out of the merger of GTE and Bell Atlantic). The problem was that 2600's registration did not meet the bad faith requirement of the anti-cybersquatting law, since 2600 had no intent to profit from the trademark, but just wanted to use the site to exercise its free speech right to criticize Verizon. Emmanuel Goldstein, publisher of 2600, instead of backing down, registered "VerizonShouldSpendMore-TimeFixingItsNetworkAndLessMoneyOnLawyers.com" Apparently Verizon had sent cease-and-desist letters to over 200 people who had registered domain names that had "verizon" in them. Of these, according to Verizon, the 2600 domain was the only one in which the intent of the registrant was based on free speech; the rest presumably had commercial motivations, which would be prohibited by the anticybersquatting act. If some of these domains become disputes, then some litigation may be generated, although probably not much, because Verizon (or other companies in a similar situation) are more likely to use the arbitration provision of the Anticybersquatting Act, because arbitration is cheaper than going to court.

In fact, it has become normal practice for companies, especially large ones with valuable trademarks, to preemptively register large numbers of domains (each domain can now be registered for less than $10 per year since competition has been introduced into the registration system). For instance, United Parcel Service controls UPSsucks.com, IHateUPS.com, and UPSBites.com as well as four more profane names; apparently companies are most concerned about domains that contain "sucks" in them [215]. The problem with all this is that there are so many possibilities for variants on a name that there is no way that the companies can cover all of them. For instance, just before I wrote this, I checked to see if "UPSSucksEggs.com" is available, and it is, so if I wanted, I could register the site and put anything I wanted on it.

Chapter 15

Antitrust Cases

15.1 Legal Background

> People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices – Adam Smith, The Wealth of Nations [209]

Antitrust cases stem from statutes that date back to the late 1800s and early 1900s, when public consciousness of the power of "trusts" was acute. Antitrust law was built upon a foundation in the common law. The first legislation to counter monopolies was the Sherman Antitrust Act of 1890. In section one, it banned a "contract, combination, or ... conspiracy" in restraint of trade. In section two, it prohibited monopolies and attempts at monopolization. The Clayton Act, passed in 1914, dealt with issues such as price discrimination, "tying" arrangements whereby customers are obligated to buy one product in order to obtain another, exclusive dealing arrangements, mergers, and interlocking directorates. The Federal Trade Commission Act of 1914 established the FTC and gave it regulatory power to combat monopolistic practices. The Clayton Act was amended in 1936 by the Robinson-Patman Act, which made it illegal to sell the same commodity at a different price to different buyers if the effect of doing so was to reduce competition.

Criminal penalties can be imposed for violating the Sherman Act, including prison time. The United States, and private parties who allege that they have been injured by actions prohibited by the Sherman and Clayton Acts, can obtain treble damages if they win their case. Legislation passed in 1976 permitted states to obtain treble damages on behalf of injured parties residing within their borders.

Considerable latitude has been left to the courts in determining what types of behavior are anti-competitive. For instance, at different times in the history of antitrust law, different courts have had differing opinions about what would constitute an anti-competitive merger. While antitrust law is perhaps not as central a concern as it was during the early 1900s, during the period of the great trusts such as Standard Oil, it remains a concern in the current era, of Microsoft and of the mega-merger.

15.2 Examining the Antitrust Caseload

Unlike most other case types, and bucking the trend in federal litigation in general, we saw a decline in the period 1971-91 in the number of antitrust cases filed. The total number of cases of all types filed rose by a factor of 2.11, and F2000 cases of all types rose slightly more rapidly, by a factor of 2.21. In contrast, all antitrust cases fell from 1206 in 1971 to 684 in 1991, a 43 percent decline; antitrust cases involving one of the F2000 fell from 531 to 205, a 61 percent decline. Cases overall remained roughly stable from 1992 to 2001 at roughly the same level as 1991, with some short-term fluctuations.

Many observers believe that the relatively vigorous enforcement of the antitrust laws in the mid-to-late sixties was arrested by the anti-regulatory environment that began to take hold under Carter. As one can see by looking at Figure 15.1, this decline did not really start until after when Reagan was elected; Reagan was much less inclined to antitrust enforcement than were his predecessors, and this continued under Bush. Under Clinton, the precipitous decline in the number of suits was arrested, but the number of suits stabilized at late-1980s levels. So Clinton did not (re)create an environment that encouraged the filing of a large number of antitrust suits. As we will see, the vast majority of antitrust suits brought in recent years have been brought by non-federal actors. Antitrust cases have never been a large share of the federal caseload; they have declined from about 1.5 percent in the early 1970s to less than 0.5 percent today, as shown in Figure 15.2.

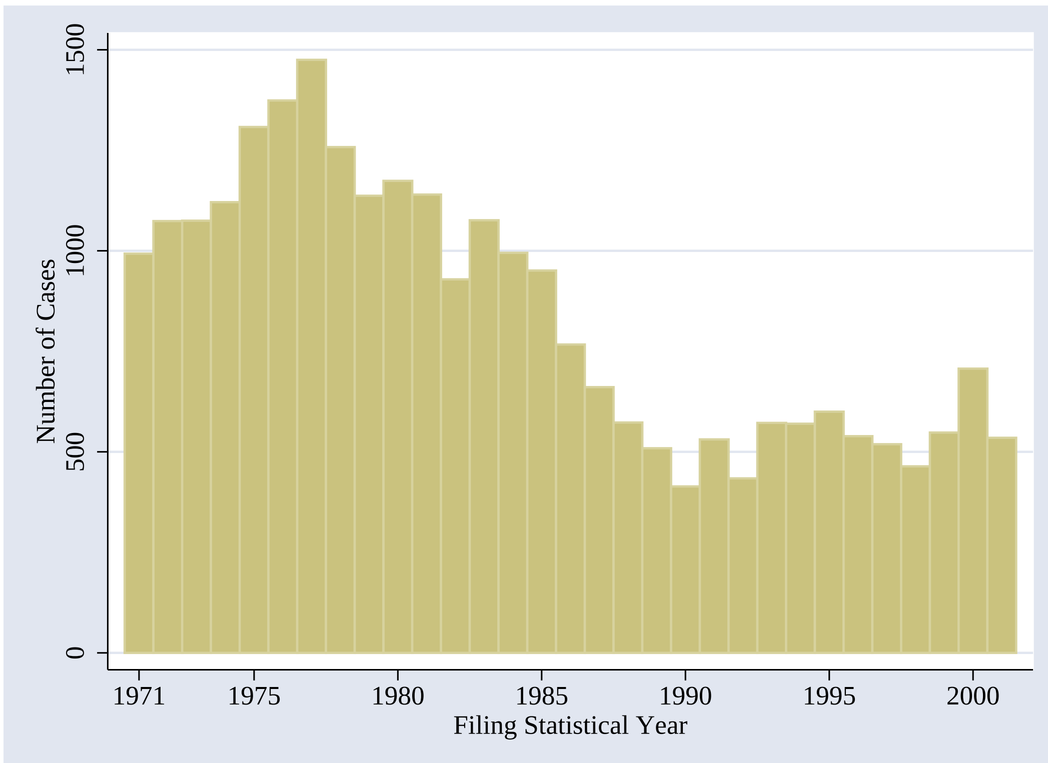
Plaintiffs have historically (over the 1979-2001 period) fought an uphill battle in antitrust cases. Figure 15.3 shows that the plaintiff win rate over this period has almost always been below 50 percent, and usually was somewhere in the 30 to 40 percent range. This may be because antitrust cases are hard to prove, and because the defendants are almost always well-resourced, large companies with ample ability to defend themselves.

Table 15.1 shows that the federal government is the plaintiff in only 3.3 percent of cases. However, it fares much better in its cases, winning 86 percent of them in the 1986-2001 period, as opposed to those with a non-federal plaintiff (jurisdiction is “federal question”) in which plaintiffs win only 29.5 percent of the time. Like it does with respect to many other case types, the federal government is engaged in “creaming;” that is, it brings only the what it judges to be the most meritorious cases out of those that come to its attention for prosecution; it has many more possible cases than it has resources to prosecute. As we will see later in this chapter, the federal government may prosecute a relatively small number of cases, but those that it does prosecute have a disproportionate impact on the rest of the caseload; if it is successful in prosecuting a major monopolist, private parties usually “pile on” with their own private antitrust cases, the evidentiary heavy lifting having been done by the government. This occurred in the government’s case against Microsoft. I theorize such behavior in Sections 4.9 and 4.10.

Table 15.2 shows that a majority (63.2 percent) of antitrust cases are resolved on a motion before trial, and the plaintiff wins only 15.8 percent of these. Many of these are likely motions to dismiss or motions for summary judgment, and this demonstrates the fact that winning an antitrust case is usually an uphill battle. The second most common disposition, a consent judgment, is far less common at only 14.9 percent of dispositions. Here, the plaintiff win rate is much higher, 91 percent. This is because consent judgments are a common way that antitrust suits are resolved in the favor of the plaintiff; the defendant often agrees to some redress and to modify its behavior in the future. This is what happened in the Microsoft case, for instance.

Table 15.3 shows that antitrust cases tend to be much higher stakes than the average case. The median amount demanded in an antitrust case was $544,000, as opposed to only $103,000 for all cases. For those cases in which there was money awarded, the median amount awarded was $286,300, as opposed to only $40,000 for all cases. This is not surprising, since antitrust actions involve large companies engaged in allegedly anti-competitive activity that has high costs for other competitors in their sector. Also, the antitrust laws allow for treble damages, which boosts awards.

Figure 15.1: Antitrust Cases Filed, SY 1971-2001



The late-1970s/early 1980s change in the attitude toward antitrust enforcement was probably in part due to an intellectual attack by such scholars as Richard Posner against the overuse of the antitrust laws. This may have an effect upon judges as well; Flynn maintains that there has been, since the late 1970s, an increase in judicial hostility to the bringing of private antitrust lawsuits [67]. Part of the increase in this judicial hostility (if it in fact exists) may be due to the perception by judges

Figure 15.2: Antitrust Cases Filed as a Percentage of All Cases, SY 1971-2001

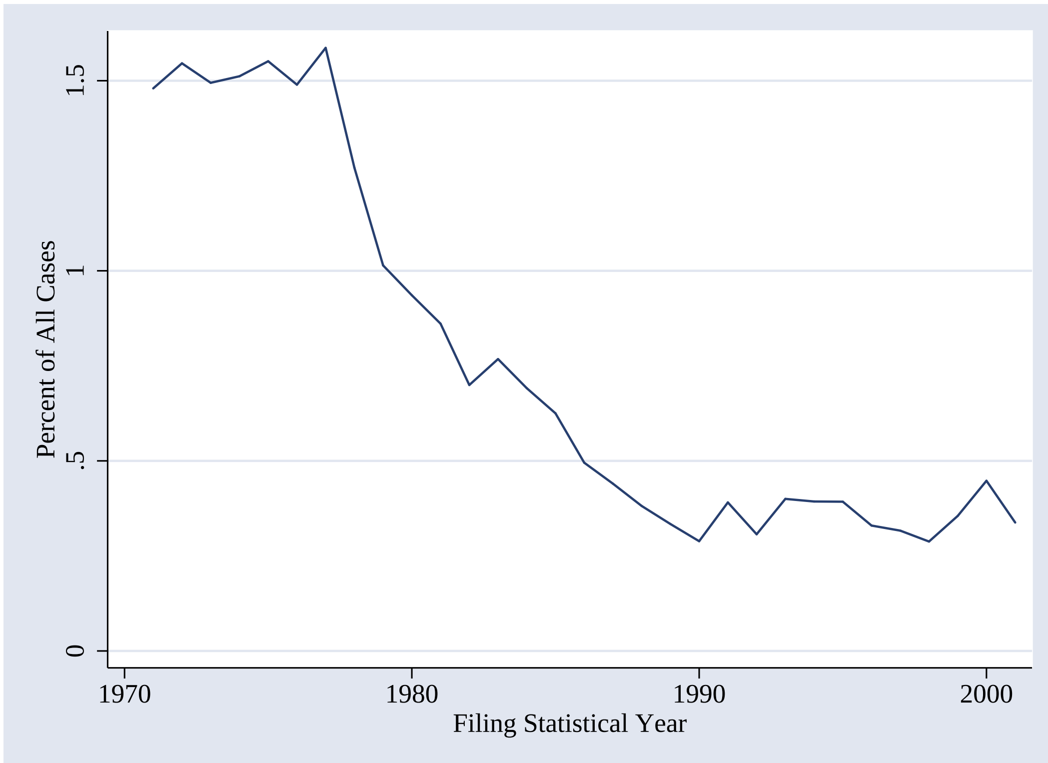


Table 15.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, Antitrust Cases, Aggregate for Terminations in SY 1986-2001

	% of All		% of Adjudicated		Plaintiff Win Rate	
Jurisdiction	Antitrust	All	Antitrust	All	Antitrust	All
U.S. Govt Plaintiff	3.3	13.6	7.4	27.4	87.0	90.4
U.S. Govt Defendant	0.8	5.3	1.1	5.9	15.2	21.5
Federal Question	96.0	48.1	91.5	42.3	29.5	44.8
Diversity	0.0	33.1	0.0	24.4	0.0	61.6

Figure 15.3: Percentage of Adjudicated Antitrust Cases Won by the Plaintiff

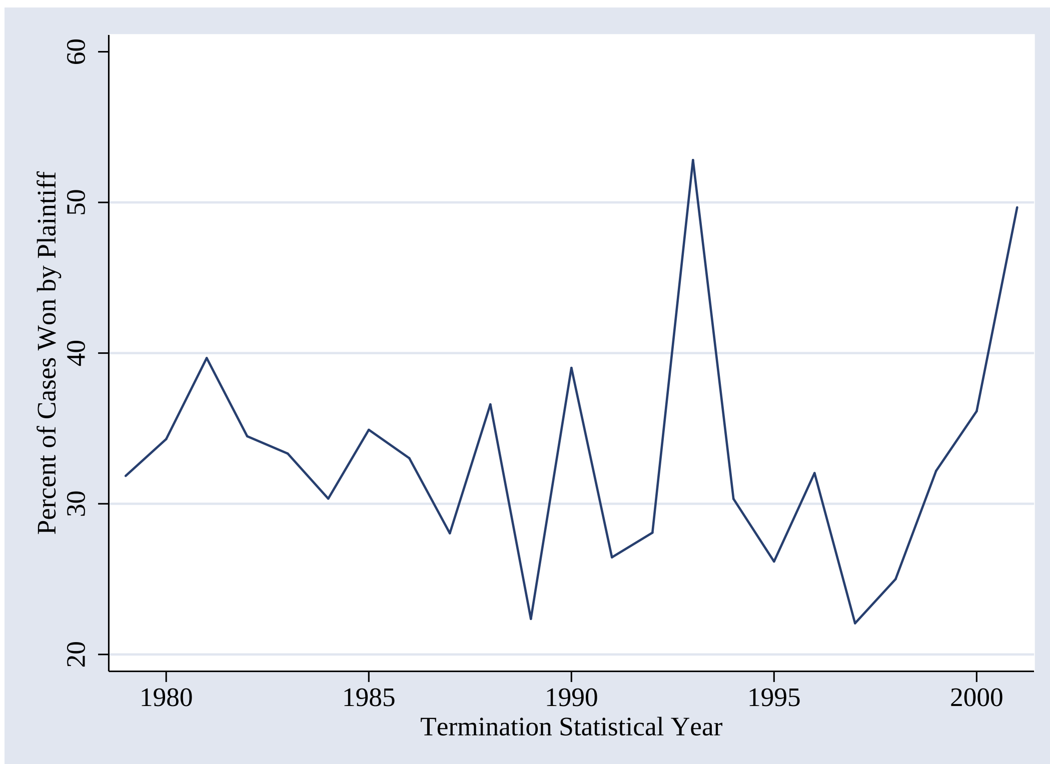


Table 15.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, Antitrust Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Antitrust	All	Antitrust	All
Default Judgment	82.5	98.2	1.8	25.8
Consent Judgment	91.0	92.4	14.9	10.2
Judgment on Motion Before Trial	15.8	28.0	63.2	42.3
Judgment on Jury Verdict	48.1	46.6	9.4	7.7
Judgment on Directed Verdict	25.8	27.9	1.4	0.7
Judgment on Court Trial	29.9	48.5	3.9	5.1
All Other Dispositions	30.3	47.9	5.4	8.1
All Dispositions Combined	32.8	56.8	100.0	100.0
Consent & Default	90.1	96.6	16.7	36.1
All but Consent & Default	21.3	34.4	83.3	63.9

Table 15.3: Median Amounts Demanded and Median Judgments Received for Antitrust Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate

	Antitrust Cases	All Cases
Sample Size	25350	3894150
Median Amount Demanded	544.0	103.0
Sample Size (Amount Demanded)	6050	1434123
Median Amount Awarded	286.3	40.0
Sample Size (Amount Awarded)	932	404512

that the economy is increasingly open to world trade, and thus sellers are less able to control prices. During the Clinton administration, there was been a moderate reversal of the antitrust enforcement trend, reflected not in an increase in the absolute number of lawsuits but in the willingness of public actors to take action when they feel it is warranted. However, the continuing movement toward consolidation of large firms made this moderate level of action seem not as strong as it might have been otherwise. After George W. Bush took office, there was a shift back in the direction of less stringent antitrust enforcement.

An example of renewed activity under Clinton was the Justice Department's highly publicized antitrust case against Microsoft. The Justice Department and the FTC also pursued cases against Archer Daniels Midland (for fixing of corn syrup prices), Toys-R-US, and traders on the NASDAQ stock exchange. In fiscal 1997, a record total dollar amount in fines was accessed, over $200 million [176]. Most of these fines stemmed from large international price-fixing arrangements. However, the Clinton administration indicated that it did not want return to the earlier form of antitrust enforcement, which they characterize as believing that big was necessarily bad.

Large American companies, even some that might have been viewed as monopolies 20 years ago, some observers and regulators argue, are necessary to compete with large companies in other counties. Thus Boeing was allowed to absorb McDonnell Douglas, leaving it the only domestic commercial jet airline producer, so that it could supposedly compete more effectively with Airbus, the European consortium, in global markets, and take advantage of economies of scale. On the other hand, with increased globalization, the nature of antitrust enforcement has changed, as regulators and prosecutors consider competition not just at the national level but internationally as well. In fact, one is likely to see an increasing shift in enforcement from the national to the international level, and governments need to put in place international treaties and uniform laws in order to make international enforcement effective. This globalization also requires more international cooperation, as antitrust enforcement, in order to be effective, must cross borders, since cartels can be formed anywhere in the world and involve companies from several countries.

15.2.1 Activity Against Microsoft

United States v. Microsoft Corp., 165 F.3d 952 (Dist. DC 1999), was, by far, the most prominent antitrust case of recent years, and has been followed assiduously by the news media. Many state attorneys-general joined in this case. This case alleged that Microsoft engaged in a variety of illegal anti-competitive practices, including illegal tying of products, illegal exclusive contracts, and conspiracies to divide the market. It argues that Microsoft illegally leveraged its dominance in one subsector (i.e. operating systems) to gain a dominant position in others (Internet browser software, and application software).

I have argued elsewhere [244] that the computer industry lends itself to monopolies due to network externalities, and often cannot support more than two or three serious competitors in each market sub-sector. These monopolies tend to emerge with each major shift in the industry. For instance, the emergence of microprocessors led to the development of Microsoft. The former monopolists (here, IBM and Digital) did not have the foresight to take over the new market, and also did not want to risk parasitizing their existing businesses to move into the new one [220] . The regular creation of such monopolies leads to ongoing enforcement activity, including this case and the earlier, longstanding case against IBM. The IBM case became irrelevant not long after it was settled; it is possible that the same fate will befall Microsoft as it confronts newer powers such as the search engine Google and the open source operating system Linux. Microsoft settled the case with the government, agreeing to a consent degree, which required better access for competitors to technical information and for it to not engage in coercive behavior. It also settled over one hundred class action lawsuits [137]. It currently faces enforcement steps taken by European antitrust regulators.

One private suit against Microsoft, testing the waters, has failed. In Bristol Tech. v. Microsoft Corp., 42 F. Supp. 2d 153 (Dist. CT 1998), Bristol Technology, a small company in Connecticut, sued Microsoft for preventing access to the source code for Windows NT. Bristol had licensed access to the source code for a period, but had been unable to reach agreement with Microsoft on the terms for a renewal. Bristol alleged that Microsoft had illegally monopolized the market for microcomputer operating systems. The jury only accepted one of Bristol's allegations (on a state law claim) and awarded the company only one dollar on that claim. One academic observer, William Kovacic, noted: "It's a boost to (Microsoft) principally because it's going to discourage other private parties from taking a swing at it for the same type of behavior. It will slow down others who thought it was time to pile on." This schoolyard metaphor, of a large number of smaller kids taking on the one big kid (the bully?) is appropriate in many antitrust contexts [8].

Another private suit was Caldera v. Microsoft Corp., 181 F.R.D. 506 (Dist. UT 1998). Caldera, which has been tied to Novell, which has been in the past Microsoft's most significant competitor in personal computer networking, holds the rights to DR-

DOS, a product which competed with Microsoft's MS-DOS, which was Microsoft's major operating system offering before it developed its various versions of Windows. Caldera alleged that Microsoft engaged in monopolistic practices in marketing MS-DOS, such as charging PC makers on the basis of the number of PCs they sold, rather than the number of PCs sold that actually had MS-DOS loaded on them. This removed the incentive for the PC makers to sell the operating systems of competitors, such as DR-DOS or IBM's OS/2 [87]. Microsoft settled the Caldera lawsuit for a undisclosed amount which was estimated to be at least $150 million [184].

15.3 F2000 Antitrust Defendants

In antitrust, as with other case types, the vast majority of cases do not proceed to a final judgment. Of those that do, F2000 defendants, both in all of their cases, and in antitrust ones, perhaps due to their greater resources and experience, tend to prevail. Of all of the 381,306 cases in the database with a F2000 defendant during the 1971 to 1991 period, 55,520, or 14.6 percent, received a final judgment. Of these, the judgment was for the F2000 defendant in 61.3 percent of the cases. Of the 7,378 antitrust cases in the database with a F2000 defendant, 983 of them, or 13.3 percent, had a final judgment; the judgment was for the F2000 defendant in 63.4 percent of these cases. So we see that antitrust cases do not differ significantly from all cases in the database in this respect.

As we have seen, cases are not distributed uniformly among firms. Rather, a relatively small number of firms account for a relatively large number of cases. Moreover, cases often occur in groups, rather than uniformly distributed over time. This is the case in the antitrust area, whether one looks at the data by Standard Industrial Code (SIC) or by individual firm.

Table 15.4 lists the top 15 two-digit SIC codes of F2000 antitrust defendants. Collectively, firms in these industries account for 72.7 percent of litigation with a F2000 defendant, as opposed to 57.6 percent of all litigation with an F2000 defendant. So these industries, while over-represented among F2000 defendant cases, are even more over-represented among F2000 antitrust defendant cases. (There are only 7,738 F2000 antitrust defendant cases in our database, as opposed to 391,352 cases in which a F2000 firm is a defendant.) As the table shows, some of these SICs are very much over-represented in the antitrust area, compared to the baseline of all F2000 defendant cases. For instance, SIC 35 ("Industrial And Commercial Machinery And Computer Equipment"), appears over 3 times as often among the F2000 antitrust defendant cases as it does among all F2000 defendant cases. SIC 20 ("Food and Kindred Products") appears over 4 times as frequently. SIC 78 ("Motion Pictures") appears practically 8 times as frequently. And SIC 26 ("Paper and Allied Products") appears 3.1 times as frequently. Three other SICs appear twice as frequently. Of the 15 SICs, 11 appear more frequently in antitrust, and 4 appear less frequently. Therefore the appearance of these latter 4 as major players in antitrust should not surprise us, because they are even more significant players in the data as a whole.

Theoretically, one would expect more antitrust litigation against those firms that dominate their industries. Therefore, would be interesting to see what the correlation is between concentration ratios, as measured at the 2- and 3-digit SIC level, and the degree to which a particular 2 or 3-digit SIC is over-represented as an antitrust defendant, in that defendants presumably hold market power. This is a topic for

Table 15.4: F2000 Antitrust Defendants, Top 15 SICs, compared to all F2000 defendants

		F2000 Defendants, Antitrust			All F2000 Defendants	
SIC	SIC Name	# cases	percent	ratio	#cases	percent
35	Industrial and Commercial Machinery and Computer Equipment	938	12.12	3.0	15741	4.02
20	Food and Kindred Products	729	9.42	4.2	8817	2.25
37	Transportation Equipment	652	8.43	1.1	29253	7.47
13	Oil and Gas Extraction	645	8.34	1.6	19801	5.06
28	Chemicals and Allied Products	603	7.79	1.1	26748	6.83
48	Communications	267	3.45	2.0	6733	1.72
36	Electronic and Other Electrical Equipment and Components, except Computer Equipment	235	3.04	1.4	8400	2.15
67	Holding and Other Investment Offices	218	2.82	0.67	16526	4.22
38	Measuring, Analyzing, and Controlling Instruments; Photographic, Medical, and Optical Goods; Watches and Clocks	204	2.64	2.53	4077	1.04
29	Petroleum Refining and Related Industries	201	2.60	2.06	4931	1.26
78	Motion Pictures	200	2.58	7.98	1267	0.32
32	Stone, Glass, Glass, and Concrete Products	197	2.55	0.43	23018	5.88
63	Insurance Carriers	188	2.43	0.22	43922	11.22
45	Transportation by Air	178	2.30	0.69	13190	3.37
26	Paper and Allied Products	171	2.21	3.1	2776	0.71
	Totals			72.71		57.54

future work.

AT&T was granted a long-term monopoly by the government; it is therefore no surprise that it is a major litigant in the database. In addition, one might theorize that those firms that produce consumer goods and services (as opposed to intermediate goods and services that are consumed by other producers) might be more often the targets of antitrust litigation, both because they have substantial dealer/distributor networks which contain a large number of potential aggrieved parties, and because consumers, as citizens, may exert political pressure (through social movements and through consumer activists) to pursue cases against companies that are perceived as abusing their market power. There may be activists for consumers working for the regulatory agencies or for the Justice department, or politicians may launch populist attacks on the market power of established companies.

On the other hand, producers of intermediate goods are likely to be monitored closely by the companies (such as OEMs) that buy their goods, since they have purchasing departments that can do this monitoring. Price fixing and feather-bedding of contracts may often be discovered, with dire consequences for the supplier companies. Much for the same reason that one tends to see little contract litigation between OEMs and suppliers–because it tends to break down ongoing relations, on Macaulay's account–one is also not likely to find much antitrust activity in this area either.

In addition, one might theorize that companies that deal with the consumer are more likely to abuse their market power, because of the existence of major oligopolies in the consumer arena, in areas such as automobiles (with the Big Three still dominating the market, although their influence has declined with the rise of imports) and such goods as plumbing supplies (dominated by a few companies including American

Standard and Kohler) and soft drinks (dominated by Pepsi and Coke). In recent years, we have seen the advent of powerful brands in computers as well, such as Apple, Compaq and most notably Microsoft. In all of these categories, the companies in question have made large investments (mainly through advertising and the generation of goodwill through product quality where it exists) in the brands, and may be able to recoup these investments in terms of monopoly rents. In the case of the computer companies, network externalities play a role in maintaining the oligopolies. In this latter case, since antitrust regulators are aware of the substantial benefits to consumers of participating in large networks, it is necessary to balance these benefits with the dangers of a single company's dominance of an industry.

The renewed antitrust enforcement by the Clinton administration focused primarily on companies that deal directly with consumers. The actions against NASDAQ traders affected large numbers of retail stock traders and stock brokers. The action against Staples and Office Depot involved retail office supplies. The Justice Department, the FTC, and the FCC all reviewed the Bell Atlantic-NYNEX merger, with an eye to the impact on the residential and business telephone customer. After Bell Atlantic offered to make some commitments to open its markets, the merger was allowed to go forward.

Two of the major cases considered by the FTC and the Antitrust Division, the Boeing-McDonnell Douglas merger, and the ADM price-fixing case, both involved what were technically intermediate goods not directly sold to the consumer, but in both cases the indirect, but substantial, potential impact on the consumer was clear (through airfares and the large number of consumer food products containing corn syrup, respectively). Thus, these cases were not significant exceptions to the rule that antitrust enforcement has a consumer focus. In the former case, the Administration concluded that competition would not be significantly impaired (in part because there was continued competition from the European Airbus consortium) and in the latter case, the company was found (both civilly and criminally) liable for price-fixing.

The data seem to fit the theory of a consumer focus when you consider that all four of the top four two-digit SICs in Table 15.4 produce consumer goods, at least in part, and when you look in detail, within each of these SICs, you see that the firms against which the majority of cases have been brought do in fact produce consumer goods. The most pronounced example of this, as we will see in more detail below, is SIC 35, in which 501 of the 938 cases were filed against American Standard as first-named party, which produces goods used by the consumer (plumbing supplies) even though many of the firms within SIC 35 do not.

Within SIC 35, other notable defendants are IBM (68 cases) (IBM did not primarily, during the 1971-1991 period of the F2000 study, produce consumer goods, but its substantial market power, especially during the early part of our period, made it an antitrust target), General Electric (52 cases; again a company with substantial market power), and J. Ray McDermott and Co. (25 cases). No other company within SIC 35 had more than 20 cases filed against it.

In SIC 20, the top antitrust defendants are mainly large consumer food companies. PepsiCo leads with 68 cases, followed by CPC International (the maker of several popular consumer foods, such as Skippy peanut butter) with 74 cases, and Coca-Cola, with 63 cases. Amstar Corp., California & Hawaiian Sugar Co., Anheuser-Busch Inc., Borden Inc., Pillsbury Co., Amalgamated Sugar Co., Kraft Inc., Ralston Purina Co., and Schlitz Brewing Co. all had more than 20 cases. Collectively, all of these companies had 480 cases filed against them, out of the 729 filed within this SIC.

The most significant defendants in SIC 37 are the automobile manufacturers. General Motors is lead defendant in 410 cases, Chrysler in 88, Ford in 80, and American Motors in 22 cases. Other significant defendants in this SIC are military/aerospace firms: Martin Marietta with 27 cases, Rockwell International with 22, and United Technologies with 10. We examine some of the cases against GM and the other automobile manufacturers below.

In SIC 13, the most significant defendants are Texaco with 90 cases, Atlantic Richfield with 69 cases, Shell Oil with 65 cases, Gulf Oil with 61 cases, and Unocal with 46 cases. In addition, Amoco, which is classified under "Petroleum Refining" (SIC 29) rather than "Oil and Gas Extraction" (SIC 13), is the defendant in 95 cases.

The most common F2000 antitrust defendant over our period (1971-91), American Standard, the large manufacturer of plumbing supplies, is the first-listed defendant in 501 cases, over 6 percent of the cases in the period. General Motors is the first-listed defendant in 207 cases, or 2.7 percent; AT&T, in 129 cases, or 1.7 percent. All three of these companies exercised substantial market power in their industry during this period. All three of the industries in which they operate involve relatively few major companies, which makes it relatively easy to organize a cartel to violate the antitrust laws. In addition, the petroleum industry also is relatively concentrated and the frequent target of antitrust litigation. The two top defendants in this industry are Amoco and Texaco. There is also significant antitrust litigation in the food industry, as noted above. Thus we have six major industry groupings in antitrust; we consider each of these in the following sections.

We will see in these sections that the governance arrangements selected in these industries have a major impact on the number of cases seen. In the auto industry, soft drink industry, and the oil industry, there is much uncertainty and fluctuating consumer demand. In all three industries, the large companies that dominate have relied on independent dealer/distributors to handle the final marketing of the product. This is partly to deal with risk and partly to gain the advantages of a market for such contracts to deal. This creates large numbers of relationships between firms that would not exist if the firms were fully vertically integrated. Such relationships can create opportunities for collusion that can run afoul of the antitrust laws. For instance, a group of Chevrolet dealers may collude with General Motors to fix the prices of their cars in a metropolitan area. In addition, various other antitrust issues may arise, like illegal product tying in the franchising relationship, or (as was the case in soft drinks) exclusive distribution territories that limit competition. It is specifically these governance arrangements in these particular industries that leads us to see many cases. However, this does not apply to the plumbing supply industry (which was a straightforward example of peak-level price-fixing) and the telephone industry (which was a regulated monopoly that was said to have abused its monopoly power, notably in the telephone equipment and long distance markets).

15.3.1 Plumbing Manufacturers as Defendants

Almost all of the 501 cases that we found in the database with American Standard as first-listed defendant were filed in the early 1970s. 380 of them were filed in statistical year 1970, 94 in 1971, 20 in 1972, and 3 in 1973. There was one case each in 1976, 1977, 1982, and 1991. This is a "spike" in litigation.

This spike has a simple explanation. Governmental authorities had gone after American Standard and other plumbing supply companies for price fixing. After they proved their case, and reached a settlement, many other entities, private and public, jumped on the bandwagon. This explains the explosion of suits that we find in the database. Thus, cases of this type may constitute a type of social movement.

There was a series of price-fixing cases in the late 1960s and the early 1970s. A group of plumbing manufacturers, including American Standard, were indicted by the Justice Department on October 6, 1966 for price-fixing. The one-count indictment alleged price-fixing from 1962 to 1966. The indictment charged that, under the auspices of an industry organization, the Plumbing Fixtures Manufacturers Association, the manufacturers met in order to fix prices. Some of the defendants pled nolo contendre, and were convicted; six of the defendants, including American Standard, pled not guilty, but were convicted, and the convictions were upheld upon appeal. In 1972, the case was settled for a total of $355,000 and injunctive relief against further price fixing [229].

This was not the first case that the government had brought against American Standard. In a case that ended in 1956, American Standard (which was then named American Radiator and Standard Sanitary Corp.) was ordered not to make any acquisitions of companies that made plumbing fixtures, plumbing fittings, or steel kitchen cabinets for a five-year period. The court felt that any acquisitions by American Standard would inhibit competition.

In a case that followed the 1966 Justice Department case, New York State sued a number of such manufacturers, including American Standard, and received a $91,500 settlement, representing the overcharges from the price-fixing [161]. Thus the action of the New York State Attorney General followed that of the Justice Department.

Looking through the plaintiffs in the cases brought in the early 1970s, it is apparent that most of them are either governmental jurisdictions, such as cities or states, construction companies, or real estate developers: precisely those entities likely to buy plumbing supplies in large quantities in order to develop properties. Also found are universities, hospitals, and hotel companies. Many of these cases were consolidated into a single group action and settled out of court; settlement funds were set up to pay the plaintiffs. Presumably, since the government had established that there had been price-fixing, it was fairly easy for the plaintiffs to establish liability. In these cases, American Standard shows up as distinct in our database simply because it was the first-named defendant; several other plumbing manufacturers participated in the settlement.

Let us consider two published cases that may better illustrate more ordinary antitrust cases brought against American Standard, in that these two cases did not form part of the sudden flood of cases discussed above.

In Tarrant Service Agency v. American Standard, 12 F.3d 609 (6th Cir. 1993), the plaintiff (TSA) was a mail-order replacement parts company. Trane (an American Standard subsidiary) had instituted a policy under which it refused, along with its Commercial Sales Offices (CSOs), some of which were owned directly by Trane, and some of which were owned by franchisees, to sell replacement parts to TSA, because it believed that TSA was passing off non-genuine replacement parts as genuine Trane parts.

The court found that TSA had not shown that Trane controlled the market for replacement parts, and since replacement parts and original manufacturer parts composed parts of the same market (in this case; there are cases where there are no adequate replacement parts), Trane therefore did not control the market, and was therefore not in violation of the antitrust laws in refusing to allow TSA to carry its parts. TSA had also claimed that Trane had entered into a conspiracy with its CSOs in refusing to sell TSA its parts, but the court also ruled that since Trane had unilaterally set the policy prohibiting sales to TSA (a policy against sales to "brokers"), there was no conspiracy.

The TSA case could be categorized as a conflict between an OEM and a "dependent competitor," that is a company that depends on the OEM for its livelihood and is nevertheless in conflict with the OEM, since it is trying to do things in the market (such as selling non-genuine replacement parts) that the OEM would rather it not do. Such relationships are prone to conflict, as reflected in the TSA case. Relationships between OEMs and their dealers/distributors are also prone to conflict, in that, again, the dealer/distributor is dependent on the OEM, and their interests are at odds; for instance, the OEM may prefer to have dealers that exclusively carry their products, whereas the dealers may prefer to carry the products of several manufacturers, so as to reduce their reliance on any one manufacturer, and to better serve the consumer. Dealers often try to use antitrust law when they sue OEMs, especially OEMs (like American Standard or General Motors) that are commonly thought to have substantial market power.

The next case, H. F. & S. Co. v. American Std., Inc., 336 F. Supp. 110 (Dist. KS 1972) illustrates the potential for conflict between a dealer and an OEM. H.F. and S. Company, which was a dealer for American Standard in Kansas, sued American Standard for treble damages under the Sherman (Antitrust) Act. The case was decided in 1968.

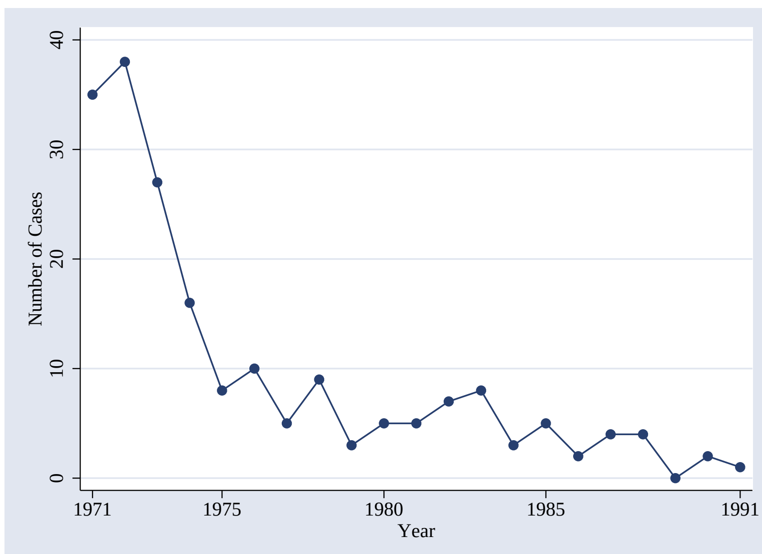
H. F. and S. was attempting to sell its plumbing and heating supply business to another company, Kamen Supply Company, the sale being contingent on Kamen obtaining the right to sell the American Standard line. American Standard informed H. F. and S. and Kamen that Kamen would not be allowed to carry the American Standard line unless it agreed to exclusive distribution. Kamen resisted this, and the result was that H. F. and S. was only able to sell its plumbing and heating supply business to Kamen at a reduced price.

H. F. and S. maintained that American Standard's requirement of exclusive distribution (to Kamen) amounted to an attempt to monopolize the plumbing supply business in the region of Kansas where H.F. and S. and Kamen operated. The court found that there was a burden on the plaintiff to establish the market structure of the particular industry in question (in this case, plumbing supplies) and positively show that the (allegedly illegal) actions of the defendant would lead to a monopoly. Moreover, there must be evidence of an intent to monopolize. The court found that the plaintiff had failed to do this. In particular, the court found that there was substantial competition among the various manufacturers of plumbing supplies in the particular area of Kansas in question. (This conclusion was ironic given that these manufacturers were concurrently being prosecuted for price-fixing, as described above). Given this competition, the court concluded that even if American Standard had succeeded in obtaining an agreement from Kamen for an exclusive distributorship, this would have had no impact on competition. The court thereby found for the defendant. The plaintiff may have been emboldened in bringing this case by the antitrust prosecutions of American Standard, because without some finding of monopoly power, the plaintiff's case was doomed.

15.3.2 Automobile Manufacturers as Defendants

Like the cases against American Standard and the other plumbing manufacturers, the cases in which General Motors was the first-named defendant are concentrated in the early 1970s, although not as starkly so. The pattern of cases between 1971 and 1991 is shown in Figure 15.4. These cases peak at 38 in statistical year 1972, and then decline, with numbers of cases per year in the 1980s in the single digits.

Figure 15.4: Antitrust Cases with General Motors as Defendant, SY 1971-1991



An inspection of the plaintiffs in these finds a mix of governmental entities (mainly states) and companies that (by their name) appear to be auto dealers.

The suits brought by the states and the federal government are various. Following are some illustrative published examples which may be similar to the cases found in

1971-91 period.

In United States v. GMC, 384 U.S. 127 (1966), the U.S. Attorney sued GM and a group of Chevrolet dealers in Southern California, seeking injunctive relief to prevent continuance of a conspiracy to restrain trade. The government alleged that GM and a group of its dealers had obtained agreement from a number of other dealers not to sell their cars to discount houses (in order to unload excess inventory, presumably). This case was appealed to the Supreme Court, which found that there was in fact a conspiracy, and instructed the district court to fashion relief.

The following case is an example of how antitrust can become a public policy issue. In United States v. Automobile Mfrs. Assn., Inc., 307 F. Supp. 617 (Dist. CA (Central) 1969), the Justice Department accused the four major automobile companies[1] and their trade association of engaging in conspiracy dating back to at least 1953 to delay the development and deployment of vehicle pollution-control devices, thereby acting in restraint of trade in violation of the antitrust acts [199]. This suit was filed in the waning days of the Johnson administration. The companies denied the allegations. Later that year, Los Angeles County asked to join the suit on the side of the government, seeking $100 million in damages for excess smog brought about by the manufacturers' alleged actions.

The Nixon administration planned to settle the lawsuit, arousing protest from consumer advocates, including Ralph Nader. There was concern by Nader and liberal politicians, such as Mayor John Lindsay of New York, that the settlement would forever seal the grand-jury deliberations that revealed unlawful, and perhaps criminal, activity by the automobile companies. After a day-long hearing in Los Angeles in

[1] This included the now-defunct American Motors.

October 1969, in which New York City and about 20 other states and cities argued that the settlement was unjust, the district court approved the settlement. New York City then asked the U.S. Supreme Court to set aside the settlement, but the Court ruled that the City lacked standing to intervene. The settlement provided that the companies discontinue any cooperative efforts to delay pollution-control device research and implementation, but the companies admitted no wrongdoing.

As was the case in the plumbing cases, action by the states and municipalities followed action by the federal government, here perhaps because some states felt that the federal action was insufficient. In mid-November 1969, New York State filed its own case against the automobile companies, on grounds similar to those alleged by the Justice Department. In February 1970, Philadelphia followed with its own suit; New York City filed suit in April. In September 1970, the federal district court in Los Angeles found that New York City and other similarly situated parties did have standing to sue for treble damages despite not being the direct targets of the alleged conspiracy to restrain trade. In October 1970, AMF filed a suit for treble damages, saying that it had spent over $3 million developing a device called a "smog burner" and then had to stop development in 1964, due to the illegal delaying activity of the auto companies. The district court found that the four-year statute of limitations barred AMF from recovering any damages, and the appeals court upheld this result.

Many of these suits were consolidated into In re Multidistrict Vehicle Air Pollution, 591 F.2d 68 (9th Cir. 1979). The appeals court found that the states and municipalities did not have the right, on behalf of their citizens, to recover damages from the companies, but did find that they had the right to seek equitable relief, that is, action on the part of the companies to redress the injuries that they alleged occurred as a result of the restraint of trade. In particular, the equitable relief sought by the plaintiffs was a free or reduced-cost retrofitting of cars sold by the defendants with pollution-control equipment, and the reimbursement of those who had already retrofitted their cars. The district court found, and the appeals court affirmed, that the antitrust laws do not allow for this type of relief, but are rather focused on restoring competitive conditions.

Both Senate committees and the Justice Department looked into GM's alleged domination of the market for passenger buses. In GMC v. City of New York, 501 F.2d 639 (2nd Cir. 1974), New York City again sued GM, alleging that it had illegally monopolized the market for buses in the United States. It sued on behalf of itself and of a class of similarly situated municipalities, and attempted, over the objections of GM, to certify this class in the U.S. District Court in New York. It asked the court to order GM to divest itself of enough of its bus-making capacity in order to make the industry competitive, and for treble damages on the amount that GM has been able to overcharge it and other cities for the buses.

During the previous four years (the period that was within the statute of limitations), the city had purchased a total of 1,137 buses for about $41 million, of which 806 were bought from GM and the rest from Flexible company, which the city argued was not a true competitor, because it only assembled buses from parts made by GM. The city employed an attorney that had previously worked at the Justice department, George Raycraft, who had worked on a similar case that Justice brought in 1956. GM moved to have Raycraft removed, and was ultimately successful in doing so, at the appeals court. The appeals court noted many material similarities between the 1956 bus case and the current case.

The following published cases give the flavor of the antitrust conflicts between GM and its dealers over the years.

Conflicts between the auto manufacturers and its dealers go back many years. For instance, in Emich Motors Corp. v. GMC, 229 F.2d 714 (7th Cir. 1956), Emich Motors, which owned two Chevrolet dealerships and a finance company, sued GM for violating the antitrust acts by illegally tying sales of vehicles to use of GM's finance company, General Motors Acceptance Corporation (GMAC). The suit was brought in 1941. Earlier, GM had been found guilty of a criminal conspiracy to restrain trade, in that it had been forcing its dealers to use GMAC's services preferentially. Emich's suit was inspired by the Justice Department's criminal prosecution, illustrating the principle that private civil action often follows upon public civil or criminal action.

GM had canceled Emich's Chevrolet franchises. Emich maintained that this was due to Emich's use of its own finance company, while GM maintained that Emich had violated the terms of the franchises and had engaged in customer service and financing practices that resulted in serious customer dissatisfaction. The district court, at trial, found in favor of Emich and awarded treble damages to both of Emich's companies and attorney fees. The appeals court found errors in the trial and ordered a new trial. The Supreme Court modified this to some degree, specifically in the use of the criminal prosecution's evidence in the civil trial, but still required a new trial. In the second trial, the district court found that the statute of limitations rendered meritless the main claims of the plaintiff, and, in 1956, the appeals court upheld this conclusion. This case illustrates the long duration of some antitrust cases.

In 1984, John Peterson Motors Inc. (JPMI), a GM dealer representing all of GM's five divisions, located in Lake City, Minnesota, about 70 miles from the Twin Cities, began a discounting program in which it sold cars for $45 over factory invoice. At the time, GM assigned each of its dealers an "Area of Primary Responsibility" (APR) in which they are responsible for the effective marketing of vehicles. JPMI's APR did not include the Twin Cities. JPMI began advertising in Twin City newspapers, encouraging buyers to order cars over the phone or by mail. Dealer associations and individual dealers in the Twin Cities complained to GM, saying that they were losing sales and profits of about $300 per vehicle, and urged GM to take action to end JPMI's program. GM decided to restrict JPMI's car supply. Since such a deep discounting program requires volume sales, GM's action drove JPMI into bankruptcy. Peterson, as an individual, and JPMI's bankruptcy trustee sued GM in Lovett v. GMC, 998 F.2d 575 (8th Cir. 1993).

GM maintained at trial that its major motivation in restricting the flow of cars to JPMI was JPMI's inability to provide adequate services to all the cars that it sold, and that other Twin Cities area dealers would have to pick up this slack, reducing their ability to service the cars that they sold. The district court jury did not accept argument, and found evidence of a conspiracy to restrain trade, even though there was little evidence that the Twin Cities dealers were directly involved in the decision to restrict JPMI's car supply. The district court ruled that Peterson himself did not have standing to recover damages from GM, and the appeals court agreed. The district court jury awarded damages of $986,000, which the court automatically trebled. The appeals court found that no conspiracy had existed, and GM had been acting within its rights in regulating its dealer network. It voided the judgment against GM.

As is the case with plumbing supplies, OEMs in the automobile industry often are in conflict with dependent firms other than dealers. One such class of firms are auto parts suppliers.

In Allied Accessories & Auto Parts Co. v. GMC, 901 F.2d 1322 (6th Cir. 1990), one such firm, Allied Accessories and Auto Parts Company, Inc. sued GM for price discrimination under the Robinson-Patman Act. There was clear evidence that GM had sold the same commodity (oil filters) at different prices to Allied and a competitor, causing Allied to lose a big contract to supply oil filters to K-Mart. The district court was reluctant to impose damages, however, maintaining that they would be hard to ascertain; the appeals court reversed this and instructed the district court to enter damages, which it set at about $1.35 million.

15.3.3 American Telephone and Telegraph as Defendant

American Telephone and Telegraph differs from most of the other firms in our database in that, at least until the breakup of the Bell System in 1984 (and thus for most of the 1971-91 period), it had a monopoly on telephone service, both local and long-distance, in most of the country. Because of this, it was a natural target of antitrust litigation. In fact, it is somewhat surprising that it is the defendant in only 130 cases over our period. The relatively low number of cases may have been because it was a monopoly that was explicitly sanctioned and regulated by the state.

Knowing something of the history of the regulation of AT&T and its subsidies shines more light on this. The chief executive of AT&T during the early part of this century, Theodore Vail, argued that telephone service was a natural monopoly and actively lobbied for the establishment of AT&T as a regulated monopoly, and his efforts were successful, and culminated in the creation of the Federal Communications Commission (FCC) in 1934. FCC regulation preempted antitrust enforcement in many cases [111].

However, the Justice Department did file suit against AT&T upon occasion. In 1948, Justice sued AT&T, arguing that it had precluded competition in telephone equipment through its Western Electric subsidiary. Justice wanted AT&T to divest itself of Western, and to split Western into three entities that would compete with one another. The case was settled with a consent decree in 1956. AT&T agreed to license its past patents free of royalties. AT&T was to be restricted to the provision of regulated telephone service, and Western Electric was restricted to the regulated market only [18, 111].

Technological developments, coming to fruition in the 1960s, changed the landscape of telecommunications. In particular, wireless microwave communication became an economically viable alternative to land lines (long cables). A new company, Microwave Communications Inc. (MCI) asked permission of the FCC to build a microwave-based system between St. Louis and Chicago to provide competing service to AT&T. AT&T attempted to delay this entry as long as possible with various regulatory arguments, but MCI eventually prevailed, setting the stage for the eventual breakup of AT&T, and the creation of competition in long distance. The argument for a natural monopoly in the provision of telephone service had always been stronger for local service than it was for long distance [18].

As a result, the FCC opened hearings on the subject of allowing so-called "limited service" carriers into the market. AT&T argued that these carriers would remove its more profitable routes. But a coalition of the upstart carriers and large companies that consumed AT&T's services in great quantity prevailed, and the FCC adopted a policy of unrestricted entry for new microwave carriers.

A large firm like AT&T has a large variety of firms that are, to a greater or lesser extent, dependent on its actions. Such firms include manufacturers of telephones, of computers, and of telephone switching equipment. Sometimes such a firm will file an antitrust action despite the fact that primary jurisdiction, in many cases, lies with the FCC.

During the period up until 1982 in which AT&T owned most of the local phone companies, it was a major presence in most U.S. communities, much as the Baby Bells are today. As a result, it sometimes came into conflict with other firms trying to do business. Since cable television companies, like telephone and other utility companies, need to lay cable everywhere, they are likely to come into conflict with the local telephone company.

TV Signal Co. v. AT&T, 617 F.2d 1302 (8th Cir. 1980) illustrates this. TV Signal, a cable television company, had attempted to get a "pole attachment" agreement to attach its cables to Northwestern Bell's telephone poles. Northwestern Bell (the local AT&T subsidiary) had refused, saying it had a policy of only one such agreement per pole, and it already had an agreement with one of TV Signal's competitors, Aberdeen Cable TV Service, Inc., so it couldn't enter into a second one. This forced TV Signal to bury its cables, with a substantial associated increase in cost.

The district court found that since the plaintiffs did not demonstrate what the relevant market was that AT&T and Northwestern Bell were allegedly acting to monopolize in violation of the antitrust acts, and found for the defendants. The appeals court, however, found that since AT&T knew that the coaxial cables that cable companies typically use can be used for broadband communications (which can support cable TV, telephone, and data services), its one-company-per-pole policy created a cable TV monopolist in each market that it would then have leverage over because it would control the cable TV company's ability to expand. It remanded the case back to the lower court, which then found that AT&T was in fact liable.

A watershed case, Carter v. AT&T, 365 F.2d 486 (5th Cir. 1966), which challenged AT&T's hegemony in the provision of telephone equipment, illustrates this dependency. Thomas Carter and his company, Carter Electronics Corporation, sued AT&T, Southwestern Bell Telephone Company (an AT&T subsidiary) and General Telephone Company of the Southwest. Carter had invented a radio phone, the Carterfone, which allowed the user to create a wireless extension which forwarded calls to a handset several miles away. Carter argued that the defendants had abused their market power by threatening to cut off telephone service to customers who used Carter's product. Carter argued that this was because the defendants also had a competing radio-telephone product. The defendants filed motions to dismiss, arguing that jurisdiction lay with the Federal Communications Commission and not the federal courts. The court agreed with the defendants, and the appeals court upheld the decision. In general, AT&T maintained that the attachment of "foreign equipment" to the telephone system would degrade the quality of service, while competitors argued that the ban on their equipment simply allowed AT&T to maintain its monopoly.

This is not the end of the story in the Carter case, however. The action shifted to the FCC. The courts had, in an earlier case (Hush-a-Phone Corp. v. United States, 99 U.S. App. D.C. 190 (1956)) found that if it could be demonstrated that particular third-party equipment (in this case, a device called a "Hush-A-Phone") could be attached to the telephone system without damaging the system and provided a tangible private benefit, then it should be permitted. The FCC found a similar situation in the Carter case, and allowed the use of the Carterfone. This opened the door to the more extensive use of third-party equipment. However, instead of publishing technical specifications for the design of third-party equipment ("certification standards"), AT&T decided to design a special adapter (a "black box") for each device, and dragged its heels on providing these adapters. AT&T maintained that these adapters were needed to protect the telephone network from third-party equipment, but the FCC later determined that this was not the case, and what was worse, AT&T had been opposed to certification standards in bad faith, rather than because of any valid technical arguments. The FCC then required AT&T to use certification standards rather than black boxes.

This behavior riled some of AT&T's competitors in the telephone equipment market. One such competitor, Litton Systems, brought suit against AT&T in Litton Sys. v. AT&T, 700 F.2d 785 (2nd Cir. 1983). Earlier in the 1970s (in 1971), when AT&T was still requiring the use of black boxes, Litton had attempted to enter the telephone equipment market, but left the market after not much time, in 1974. Litton claimed that AT&T made it so onerous for customers to switch from AT&T terminal equipment to Litton's that it made doing business impossible. For instance, Litton claimed that AT&T installers would cut back the wiring to make it more difficult for Litton's installers to put equipment in. They also claimed that AT&T would not cooperate very well in the transition from AT&T to Litton equipment, changing "cutover" dates (the dates on which the equipment would be switched), not providing the required black boxes (which were actually unnecessary), etc. And, Litton maintained, the black boxes sometimes malfunctioned. Plus, they charged a rental fee for the use of the black box, that Litton claimed raised its customers' equipment costs by between

18 and 35 percent, depending on the size of the installation. Litton decided to leave the market, on its own account, because AT&T had copied its successful products and AT&T seemed determined to fight for the continuance of the use of black boxes.

The jury found a $90 million verdict for Litton, which was then trebled, per the antitrust laws. The verdict was upheld on appeal. AT&T was not doing well in the pattern of cases running from Hush-a-Phone through Carter to Litton.

Both the Carter decision and the MCI decision opened up the door to more competition in telecommunications. The regulators at the FCC and the the lawyers in antitrust division of the Justice Department were developing a new attitude to telecommunications law and regulation, partly due to technological developments, and partly due to the activist government of the 1960s and 1970s.

The emerging convergence of computers and telecommunications, an trend that was nascent in the 1960s and has been developing steadily ever since, created a problem for AT&T as well. The terms of the 1956 consent decree prevented AT&T from entering non-regulated markets, and computing was a non-regulated market. Since computing was a growing business, and one in which AT&T had great expertise because of its experience in the use of computers for telephone switching, record-keeping, and billing, AT&T had an incentive to make an arrangement that would allow it to enter the computer business.

In 1974, the Justice Department, frustrated by what it perceived as AT&T's anti-competitive behavior and evasion of FCC rulings, filed suit again. The suit focused on the long-distance and equipment markets, in which Justice maintained that AT&T had been using its market power illegally. Justice sought the breakup of AT&T into local, long distance, and equipment companies.

The suit went on, as these things often do, for several years. However, in 1982, the government and AT&T reached a settlement in a consent decree in United States v. AT&T, 552 F. Supp. 131 (Dist. DC 1982). Unlike the 1956 settlement, in which the government gained relatively little (since competition in unregulated markets was not worth that much in 1956), here the government got much of what it wanted. I would assert, however, that it would never have come to pass if AT&T had not gained something significant, an ability to compete in unregulated markets. In concrete terms, AT&T could now enter the computer business. In exchange, it had to divest itself of the local operating companies, keeping only the long distance and equipment businesses. The settlement was modified in its details by Judge Harold Greene, who had jurisdiction over the case. Judge Greene also retained jurisdiction after the settlement was implemented, in making sure that the new companies created in the breakup, the so-called "Baby Bells," and what was left of AT&T, followed the terms of the settlement.

15.3.4 Food and Drink Manufacturers as Defendants

Soft Drinks

Both PepsiCo and Coca-Cola are among the top antitrust defendants in our database, PepsiCo with 68 cases and Coca-Cola with 63. Pepsi and Coke, of course, dominate the market for soft drinks. This may cause prices to be artificially high. In 1972, Senate hearings were held on this question [230].

By virtue of their market power, Pepsi and Coke may be able to control distributors and retailers. We would expect, as in the other industry areas involving retail distribution, three realms of antitrust litigation: government lawsuits, lawsuits brought by distributors and retailers, and lawsuits brought by competitors.

One of the important markets for the soft drink industry is the distribution of syrup to bars, restaurants, soda fountains, etc. In 1972, a smaller soft drink company, Atlas Syrup, filed suit in district court, alleging that Coca-Cola had attempted to monopolize the market for syrup by offering various incentives to use their syrup, such as case rebates, equipment, and illegal and discriminatory wholesale policies [160]. In 1977, another smaller company, AJ Canfield, filed suit, alleging that Coca-Cola engaged in predatory price cutting on its 32-ounce bottles in an effort to eliminate competition [162].

In Bayou Bottling, Inc. v. Dr Pepper Co., 725 F.2d 300 (5th Cir. 1984), a Louisiana bottling company, Bayou Bottling, sued Dr. Pepper Company and Coca-Cola Bottling Company of Lake Charles, arguing that Dr. Pepper's decision to use Coca-Cola Bottling rather than Bayou Bottling violated the antitrust laws by restraining competition in soft drinks. In Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling, 690 F.2d 411 (4th Cir. 1982), the Virginia and Maryland area Pepsi bottler, Allegheny-Pepsi Cola Bottling Co., sued the Coke bottler that covered the same area, Mid-Atlantic Bottling Co., alleging that the Coke bottler was engaging in predatory pricing in order to gain market share. This lawsuit was dismissed by a federal jury in 1981, and this decision was upheld by the appeals court in 1982.

In the early 1970s, the Federal Trade Commission challenged the soft-drink industry's (mainly Coke and Pepsi's) systems of exclusive bottling and distribution territories, saying that it unlawfully restricted competition between the bottler/distributors. To deal with this, the industry arranged for the introduction of a bill in Congress to exempt it from the antitrust laws in this area, and in protest, in 1973, a consumer group, the National Consumer Congress, called for a national boycott of Coca-Cola and Pepsi-Cola. In 1976, however, the House Judiciary Committee approved the bill sought by Coke and Pepsi.

In 1975, a FTC administrative law judge ruled that the systems of exclusive territories used by Coca-Cola and Pepsi-Cola do not violate the law. He found that while they limit competition within a single brand, they promote competition between brands. In 1976, a federal judge came to a similar conclusion in a case filed against Coca-Cola, reversing a jury decision. However, in 1978, the FTC ordered Coke and Pepsi to discontinue the practice of exclusive territories, and the companies challenged the order in court. Coke argued that it had been an "efficient and desirable" business practice for over 77 years.

The FTC action was not the only action taken against Coke and its bottlers. In 1974, General Beverage Sales, a Wisconsin company, filed suit against the Coca-Cola Bottling Company of New York, alleging that Coca-Cola illegally terminated its contract with General Beverage since General Beverage resisted its restrictions on certain wine sales, since Coca-Cola Bottling had interests in wine. General Beverage alleged this was an illegal use of Coca-Cola's market power [231].

Later that year, the FTC challenged Coca-Cola Bottling's acquisition of a winery, Franzia Brothers Winery, on antitrust grounds, saying it would limit competition. Ultimately, it found that this acquisition was acceptable. In a similar action, United States v. Coca-Cola Bottling Co., 1978 U.S. Dist. LEXIS 15475 (Dist. CA (Central)), the Justice Department filed suit against Coca-Cola Bottling Company in California, alleging that its proposed acquisition of a high-purity industrial water company would limit competition in the California market. In 1978, Coca-Cola agreed to divest itself of the industrial water subsidiary, in a settlement with Justice Department.

In part because of the threat that the FTC would remove its exclusive territory for distribution of Coke, Coca-Cola Bottling Company of New York embarked on a program of diversification throughout the 1970s, buying both related and unrelated businesses, although all in the consumer area. This was not a success financially, however, and it divested itself of most of these businesses. Ironically, in the end, Congress allowed Coke and Pepsi to keep their exclusive distribution territories.

Even under Reagan, antitrust enforcement continued, although at a reduced pace. For instance, the FTC, in Coca-Cola Bottling Co. v. FTC, 85 F.3d 1139 (5th Cir. 1996), filed suit in district court to prevent Coca-Cola from acquiring the Dr. Pepper brand and company, which it had started to attempt to do in 1984. Coke dropped its intent to acquire Dr. Pepper and, in a settlement with the FTC, agreed to get preliminary prior approval from the commission if it ever intended to make the acquisition of Dr. Pepper or any other name-brand soft drink companies with shipments of more than 50 million cases per year. The struggle continued until 1995, however, with Coke continuing to challenge the FTC's rulings, but the rulings stuck, and were most recently renewed in 1995, with Coke continuing to be restricted in its acquisition activity, although under different terms. Under the second agreement, Coke needs to inform the commission before buying any name-brand soft drink company with shipments of more than 10 million cases a year, and specifically requires prior approval to acquire the Dr. Pepper brand [20].

Many observers are skeptical that Coke and Pepsi's continued dominance of the soft-drink market is due to superior taste and quality. It is more likely it is mainly due to their massive marketing efforts. Some people, notably other soft-drink makers, think it is also due to questionable practices. One such practice is the "Calendar Marketing Agreement". Under such agreements, payments are made to grocers or other retailers to secure preferential shelf space, marketing displays, scheduled discounts and promotions, and exclusive promotion in flyers, circulars, newspaper promotions, and the like. These practices have ended up in court more than once as illegal attempts at monopolization, for example, Beverage Mgmt. v. Coca-Cola Bottling Corp., 653 F. Supp. 1144 (Dist. OH (S) 1986), and Sun-Drop Bottling Co. v. Coca-Cola Bottling Co. Consol., 604 F. Supp. 1197 (Dist NC (W) 1985). Such challenges are likely to continue, and not only in the soft-drink industry, but in other industries that sell directly to the consumer and vie for retail space, such as book publishing [219].

Because of improved transportation networks and the penetration of large chain stores such as Wal-Mart into rural areas, both Coke and Pepsi are in the process of consolidating their small bottlers into larger regional entities. The resulting entities are more tightly controlled by Coke and Pepsi. This is the source of potential conflict between the soft drink companies and their bottlers. For instance, in 1998, Pepsi asked its bottlers to sign a revised franchise agreement giving PepsiCo control of fountain accounts. Most of the bottlers signed the revised agreement [101].

Corn Syrup and Other Agricultural Products

There is a long history of antitrust action involving corn syrup and corn starch companies, including recent action (by the Clinton administration) against Archer Daniels Midland for price-fixing. There has also been action against sugar producers, which effectively compete directly against corn syrup producers in the market for sweeteners.

CPC International, which in 1992 was a $6.6 billion company involved in the production of corn starch and corn syrup, is the successor of companies founded in the 1800s to refine corn into starch and syrup (glucose). In 1916, Corn Products Refining Company (CPRC), a predecessor of CPC International, so dominated the corn starch and corn syrup markets that Judge Learned Hand ordered it to divest some of its holdings. The company was faced with antitrust charges again in 1922 in connection with its guarantee (to buyers) that Karo Syrup's price would not decline; the case was ultimately dismissed. In 1942, the government had more success; it managed to abolish CPRC's practice of "phantom freight" charges; that is, charging for shipping from a single fixed location no matter where the actual goods were shipped from, in order to control prices. Because this practice was abolished, CPRC's became less dominant in the market.

Antitrust action against the successor company, CPC International (which had acquired a number of prominent brands in addition to its corn starch and corn syrup businesses) continued into our period. This was a mixture of public and private antitrust actions.

For instance, in Dimmitt Agri Indus. v. CPC Intl. Inc., 679 F.2d 516 (5th Cir. 1982), Dimmitt Agri Industries, a farmers' cooperative, sued CPC International in the Northern District of Texas. Dimmitt had constructed a corn wet milling plant to produce corn syrup and corn starch. The plant failed, and Dimmitt alleged that CPC, the largest producer in the corn wet milling market, had forced it out of the market in violation of the antitrust laws. Dimmitt alleged price-fixing, monopolization, and price-discrimination. In the trial court, the jury accepted only one of Dimmitt's theories, the monopolization, and found that this monopolization violated the antitrust laws and was a proximate cause of the injury to Dimmitt's business. The jury awarded $5.3 million to Dimmitt, which was comprised of treble damages and attorney's fees. The plaintiffs had uncovered a paper trail of internal CPC memoranda which were concerned with the possible entry of cooperatives into the market and steps (including setting prices) to prevent such entry. There was evidence that CPC had priced corn syrup below its own costs. The appeals court found that the plaintiff had not proved that monopolization sufficiently, since CPC's market share was too low. One can act as a monopolist if one practices predatory pricing as a market leader, but the appeals court found that this had not been proven. It reversed the trial court verdict and remanded for a new trial.

In a related case, Harsh v. CPC Intl., Inc., 395 F. Supp. 578 (Dist. TX (N) 1975), the plaintiff, who represented the interests of a management company set up to manage the Dimmitt venture, also sued under the antitrust statute. Here, the court found that the relation was too indirect, and that the plaintiff did not have standing to sue.

In the early 1970s, the government commenced action against a number of sugar producers, including CPC, alleging price-fixing in a number of states west of the Mississippi river. This triggered a number of private antitrust suits by parties that alleged price-fixing in both eastern and western states; that is, virtually nationwide. This pattern was similar to what happened in the plumbing industry, as described in Section 15.3.1. This pattern of state-led litigation can occur whenever the government, either through the Justice Department or one of the regulatory agencies, and private parties can both bring lawsuits. This occurs are in antitrust (where Justice and the FTC are involved) and in employment discrimination (where Justice and the

EEOC are involved). If the government abdicates its role, private suits may increase, to fill the gap. On the other hand, if the government stops taking the lead, private actors may be reluctant to sue on their own.

In the case of the litigation against the sugar producers, a number of the cases were consolidated into class actions. Many of the eastern cases were consolidated into one class action, and the western cases into another.

Cases are typically brought by large consumers of sweeteners, such as producers of soft drinks, candy, and grocery stores (those of the latter that buy sweetener directly). In Pepsi-Cola Bottling Co. v. Cargill, Inc., 1995 U.S. Dist. LEXIS 19735 (Dist. MN), the plaintiff brought a class action against Cargill, Archer-Daniels-Midland, CPC, and A.E. Staley, all producers of corn syrup. The plaintiff claimed that all the defendants followed the prices of market leader ADM. I found no further published record, indicating that it probably was settled. However, as we have seen, the federal government pursued ADM aggressively, even bringing criminal indictments against some of its executives. Pepsi can be either the plaintiff or the defendant in an antitrust case, depending on where its interests lie. Antitrust can involve conflicts between very large businesses, not simply between the small retailer or consumer and a number of large companies as defendants.

Around the same time, the government was also investigating ADM and other companies in the food ingredients industry for price-fixing of other substances, notably lysine and citric acid. Lysine is an animal feed additive. Citric acid is used in soft drinks and other products. ADM pled guilty to fixing prices of both of these in 1996 and paid a file of $100 million, which was a record at the time. In 1998, three ADM executives were convicted of criminal charges relating to this price-fixing. The conspiracy was world-wide, and other countries-notably Canada-also imposed fines on the company. The European Union also made its own investigation. In addition, ADM paid a $30 million settlement to shareholders unhappy with the company's behavior and its effect on the stock price. This is an example of how large liability settlements and convictions against a company can trigger shareholder suits.

Antitrust issues can also arise between competitors. Since intellectual property institutionalizes as state policy the granting of limited monopolies, every assertion of an intellectual property claim amounts to the assertion of a monopoly. For instance, in CPC Intl. Inc. v. Archer Daniels Midland Co., 31 F.3d 1176 (Fed. Cir. 1994), CPC sued ADM for violating one of its patents, a patent for the crystallization of dextrose in a continuous process. This illustrates how a patent claim is often accompanied by an antitrust counterclaim. ADM asserted that the patent was invalid and unenforceable, and alleged that CPC, in asserting the patent, was violating the antitrust laws and engaging in unfair competition. The court found that ADM was correct, and that the CPC patent was invalid. The antitrust issue was ignored by the court.

15.3.5 Oil Companies as Defendants

Oil companies have been some of the most prominent targets of antitrust enforcement ever since antitrust law was devised in the early part of this century. In fact, American antitrust law was partially a response to trusts in the oil industry. John D. Rockefeller's Standard Oil trust was one of the first companies that the "trust-busters" of the Progressive Era attacked, and its successor companies such as Exxon and Mobil(which themselves are the result of government action in seeking a breakup) continue to be the targets of enforcement.

Such major oil companies are involved in complex business networks. Many of them are highly vertically-integrated, with activities ranging through oil exploration, extraction, shipping, refining, distribution, and wholesale and retail sales. Some of them are also horizontally-integrated as well, engaging in such activities as chemical production. They engage in business activities with, and compete with, many other companies along the way. Because of their size, integration of various activities, and relatively small number, they are a frequent target of public and private antitrust action.

The oil companies are often accused of collusion in excluding competitors and in fixing prices. Since their operations are international, international politics can sometimes result in a case ending up in court. For instance, in Interamerican Ref. Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291 (Dist. DE 1970), a case involving export of oil from the resource-rich country of Venezuela, the Interamerican Refining Corporation sued Texaco Maracaibo, Monsanto, Monsanto Venezuela, and Amoco Trading Company, charging that the defendants agreed, in violation of the antitrust laws, to boycott the plaintiff and deny it the Venezuelan crude oil that it needed in order to operate. Apparently, on instructions of the Venezuelan government, Amoco ceased making shipments to Interamerican's refining plant in New Jersey. All other suppliers followed suit.

The owners of Interamerican were Venezuelans who were, at the time of the boycott, political enemies of the leaders of Venezuela. There were also some questions of the legitimacy of Interamerican's activities, since it planned to resell the refined oil in New York harbor to the world market and thereby sidestep U.S. import quotas. The defendants admitted that they had refused to deal with Interamerican, but said that it was only because they were forced to do so by the Venezuelan government, and asked the court to find that "compulsion by a foreign sovereign" allowed for an exception to the antitrust laws. The court granted this request, finding that, whatever Venezuela's reasons for the boycott, it was not up to the defendants, and therefore they were not liable. In this case, the defendants actions may have looked like collusion, but this perception was wrong. Why Interamerican thought that they could recover in a American court for actions taken by the Venezuelan government against other Venezuelans is beyond me;perhaps they were driven by emotion rather than rationality, or perhaps poor judgment, or perhaps since the stakes were so high, they thought that there was no harm in trying.

The relations of the big oil companies with their franchised gas stations are similar to the relations of the large automobile companies to their dealers. Litigation often stems, as a last resort, from severed ties between an oil company and an individual or company that owns stations.

In 1969, Gerald Olmstead began operating a Amoco gas station in Florida on a year-to-year lease with Amoco. In 1973, with his gas sales in decline (presumably due to the Arab oil embargo), Amoco approached Olmstead with the idea of installing an automatic car wash at the station in order to attract business, by offering a free wash with each purchase of gas. Olmstead's business, in decline, caused him to be in danger of losing his lease. Olmstead resisted installing the car wash for some time, and finally installed it 1974, but it did not improve his business, so Amoco decided, in 1976, to terminate his lease. He refused to vacate the premises and was finally evicted.

In Olmstead v. Amoco Oil Co., 725 F.2d 627 (11th Cir. 1984), Olmstead then sued Amoco for illegal tying, under the antitrust laws, of the car wash to the gas station lease, for attempting to monopolize the car wash business in Florida, and common law fraud, saying that Amoco orally committed to not terminate his lease for a five-year period if he agreed to purchase a car wash. After a trial, a jury dismissed the antitrust claims, but awarded almost $300,000 in damages on the fraud claim, which the appeals court reduced to $5,300. The jury found that Olmstead had not established the market power of Amoco in the market in question on either of the antitrust claims. This seems to be the linchpin on which these antitrust cases between a small business and a large business succeed or fail; the small business often has a very difficult time establishing the market power of the large business, even though it must seem, subjectively, that the power of the large company is enormous. Small business owners may fail to distinguish the difference between power that is legal, such as the enormous power that a franchisor or lessor has over the franchisee or lessee, in that they can terminate the relationship, or attach onerous terms to it, and power that is illegal, due to too much market power possessed by the large company.

The following case is evidence that large oil companies do not always act in good faith toward their dealers. George Arnott was a Amoco dealer in Sioux Falls, South Dakota. In 1973, Amoco terminated Arnott's lease on an Amoco station and evicted him. In Arnott v. Amoco, 609 F.2d 873 (8th Cir. 1979), Arnott sued, arguing that Amoco had made fraudulent representations as to its policies toward its stations, in particular toward the carrying of non-Amoco-brand products. Amoco had said, in its policy statement, that carrying such products was permissible. He also argued that Amoco had, in violation of the antitrust laws, attempted to instruct all its dealers on what price they should charge. Arnott had attempted to carry other brands of products, and had been put under pressure from Amoco not to do so. In addition, he had resisted Amoco's pressure to set retail prices. As a result, Arnott maintained, his lease had been terminated. A jury agreed with all of these allegations, and awarded Arnott $325,000 plus attorney fees, based on lost business and treble damages under the antitrust laws. The appeals court substantially upheld this verdict.

This behavior by Amoco, if common, or at least not unusual among franchisors and lessors, may result from the following logic. It is difficult to induce potential franchisees to commit to enter a franchise, given the substantial risk they are taking. In fact, the main reason why companies franchise is to get rid of some of the more risky parts of the business. Thus terms are advertised that do not reflect the reality of the actual franchise relationship. After the franchisee enters into the relationship, and finds out what the actual terms are, he or she is already so invested in the relationship that it is too costly to exit. It is similar to a "bait-and-switch" in retail sales. A relatively small proportion of these franchise relationships break down and lead to litigation. Any amounts awarded in such litigation may be viewed by the large franchising company as simply part of the cost of doing business.

Since oil companies tend to do business with large public utilities, actions can arise out of these relations as well. The playing field tends to be more equal here than in the cases involving gas station owners. In 1985, three public utilities in Kansas sued five companies involved in the production of natural gas. Similar suits were filed by the states of Kansas and Missouri, acting on behalf of their citizens (*in parens patriae*). These suits were consolidated into In re Wyoming Tight Sands Antitrust Cases, 866 F.2d 1286 (10th Cir. 1989). All the suits alleged that the defendants conspired to artificially inflate the price of natural gas produced in natural gas fields in Wyoming. The court found that the states did not have standing to sue because the utilities were already acting on behalf of their customers. The suit was settled in 1990 for $212 million, some of which was paid out in installments over time. The value of the settlement was passed back to utility customers.

Oil companies, since they dominate so much of the energy business in the United States, and because they are so invested in petroleum exploration, extraction, refining, and distribution, tend to be hostile to alternative fuels. Illinois is one state that has promoted the use of alternative fuels, notably "gasohol" which is a mixture of gasoline and ethanol, an alcohol, which can be produced from corn. In Greater Rockford Energy & Tech. Corp. v. Shell Oil Co., 998 F.2d 391 (7th Cir. 1993) a group of ethanol producers brought suit against a number of large oil companies, arguing that the defendants had violated the Sherman and Clayton Acts, in disparaging the use of gasohol and in actively encouraging their retail dealers not to deal in gasohol.

They alleged that the companies engaged in an anti-alcohol campaign by labeling their gasoline as containing no alcohol, limited use of credit for gasohol transactions, and sharing competitive information about gasohol among themselves, in violation of the antitrust laws. This case was similar to the AT&T antitrust cases we discussed in Section 15.3.3 involving the attachment of third-party telephone equipment to the telephone network, if you substitute the gasoline stations for the telephone network and gasohol for the third party equipment. The industrial structures are similar, although the oil companies were oligopolistic, and AT&T (at the time of the cases) a monopoly in many regions. However, the ethanol producers were not as successful in their legal efforts as were the telephone equipment makers.

All but one of the plaintiffs had failed in their business and were trying to blame the defendants for this. However, this was made difficult by facts such as the following: Amoco, Arco, Chevron, and Mobil, four of their eight defendants, had actually sold gasohol at their stations during the period in which the alleged violations took place. In addition, the court found that the posting of signs warning of alcohol content was not in itself discriminatory, and did not violate the antitrust acts. They also found that the membership of the defendants in various industry and standard-setting groups did not amount to enough collusion to violate the antitrust acts. They found that gasohol sales actually rose during the period in which the plaintiffs claimed harm, thus making it not very credible that the defendants had done an effective job restraining trade in this area.

The plaintiffs had also accused the defendants of violating the Gasohol Competition Act of 1980, a law that was designed to promote the use of gasohol. This law was designed in main to protect gas stations who wanted to carry gasohol from retaliatory action from the oil companies. The court found that the plaintiffs lacked standing under this bill in order to sue, because they were ethanol producers, not dealers. Since the plaintiffs lacked this standing, and since they had not demonstrated injury convincingly, the court found for the defendants.

The Olmstead case and the gasohol case are further examples of a phenomenon noted by Macaulay [139]: litigation often results when continuing business relations have ceased to exist, often because of a business failure, but sometimes for other reasons. When business relations are continuing in a normal manner, business people are reluctant to resort to litigation, but when relations have broken down anyway, litigation may ensue, because the parties have nothing further to lose. Since small businesses fail at a high rate in the U.S., these failures may themselves be the source of much litigation. The small business owner may be looking for someone to blame (other than him or herself), and a large company on which the small business was dependent is a logical target. Of course, many of these cases may have merit, and the large companies may win more of them than they should, because, following Galanter, they are more experienced legally, or because judges are biased in favor of big business.

15.3.6 Drug Companies as Defendants

The emergence of the HMO as a major force in medicine has changed the landscape of health care. Previously, the largest corporate entities in health care were the hospitals, but now large corporations–HMOs–with thousands of employees own many hospitals and clinics. Many of these HMOs are owned by even larger insurance companies. Previously, many doctors practiced in small clinics that they personally controlled, but now, more and more, they are either employees in large clinics run by HMOs or working in groups that contract to HMOs. As a result, the industrial structure of health care has been radically transformed. As the players regroup to adapt to the new environment, conflict, and litigation, is likely to be generated, at least in the short- and medium-term. We saw an example of this in Section 4.11.1, which described new forms of insurance litigation, in which patients and doctors are challenging HMO decisions to deny care. Another example stemmed from the pharmaceutical industry's reaction to the HMOs' attempt to apply cost containment to the pricey world of patent medicines.

Because of the large size of many HMOs, they were able to negotiate with drug companies to get discounts on drugs bought in bulk. These discounts were denied to independent drug stores. This was been a factor in a decrease in the number of independent drug stores by 20 percent from 1991 to 1996 [112].

In 1993, a number of these drug stores filed suit, alleging illegal price-fixing and price discrimination under the antitrust laws. Many of these suits were consolidated into a class action, with many large chain-store pharmacies, such Wal-Mart, Walgreen's, joining independent pharmacies, resulting in thousands of plaintiffs. There were 12 major drug company defendants. Also named as defendants were a group of large drug wholesalers. It was alleged that the defendants used industry meetings and conferences to conspire to create a two-tier pricing system. In 1998, eight of these drug companies settled for $350 million. The remaining four refused to settle, and are took the case to trial [112].

15.4 Exploring Antitrust with the Adjacent-Word-Pair Frequency Method and the Single-Word Frequency Method

I used both word frequency methods to discover the most frequent parties to antitrust cases. The top adjacent word-pair plaintiffs are shown in Table 15.5, and the top adjacent-word-pair defendants in Tables 15.6 and 15.7. As one can see, the top plaintiffs are mainly either governmental entities (e.g. various states, the FTC) or number-two or number-three companies in a particular industry (e.g. Pepsi and Seven-Up for soft drinks, MCI in the telephone business). The defendants are a wide range of companies, but there appears to be a concentration in the pharmaceutical, automobile, and oil industries. Archer Daniels Midland, the agricultural processing firm, Microsoft, and Boise Cascade, the paper company, are also notable defendants.

As an example of pharmaceutical industry cases, let use consider the cases against Abbott Laboratories. These cases appear to be brought mainly by pharmacies, and are part of what became a class action by pharmacies against the drug companies for price discrimination in favor of the HMOs. Abbott appears so frequently because it is the first drug company in alphabetical order, and only the first-listed plaintiff is listed in the database.

Such lawsuits account for only some of the actions against Abbott. There were also an earlier group of actions against Abbott and three other drug companies (Bristol-Myers Squibb, Mead Johnson, and American Home Products) for allegedly inflating the price of infant formula, in violation of state and federal antitrust law. Some of these states were brought by governments, e.g. the State of Mississippi., and the FTC. Some of these cases were also consolidated into a class action. The companies settled the suit, and made direct payments to people who purchased the formula. This also led to a shareholder suit against Abbott and its directors for breaching their fiduciary responsibility by allowing the antitrust violation to take place.

While Mead Johnson and Abbott were both defendants in the infant formula antitrust case, they also were in a dispute over the marketing of oral electrolytes for infants, a related product. Abbott, the plaintiff, claimed that Mead Johnson had marketed its electrolyte product in a misleading manner. While not a antitrust case, this case is relevant because it illustrates the complex manner in which competition between companies may work; while they may be cooperating in one domain (fixing prices or dividing the market for infant formula), they may be trying to supplant one another at the same time, and then suing one another over whether their competitive actions are legal.

Some of the cases against Abbott were also brought by another drug companies. For instance, in Ortho Diagnostic Sys. v. Abbott Labs., Inc., 920 F. Supp. 455, (Dist. NY (S) 1996), Ortho maintained that Abbott abused its market power in some diagnostic blood tests to increase its power in markets for other tests. In Barr Labs., Inc. v. Abbott Labs., 978 F.2d 98, Barr, a manufacturer of generic drugs, alleged that Abbott's contracts with drug chains for exclusive purchase of the drug erythromycin ethylsuccinate illegally banned them from buying generic versions, one of which was marketed by Barr. This latter case shows how patent drugs can lead to antitrust cases after they go off patent, as the former patent holder attempts to maintain market share.

The single word method found numerous cases against Sandoz, the drug manufacturer. These were almost all brought in 1991, and virtually all of the plaintiffs are states. In these suits, Sandoz was accused of overcharging for an anti-schizophrenia drug by colluding with another company, Caremark, which provided blood testing. Sandoz only would provide the drug to the patient if the patient underwent expensive weekly blood testing, provided only by Caremark. The FTC and the states alleged that this was an illegal tying arrangement. The companies settled the case, giving a cash rebate to patients and agreeing to dismantle the tying arrangement. This case illustrates the often inefficient nature of federalism; a single FTC investigation led to lawsuits by 33 states and the District of Columbia. The cases against Sandoz, Abbott, and the other drug companies indicate that regulatory attention is paid disproportionately to this industry in the antitrust arena, probably because the companies are prone to abuse the position granted them by their patents.

Archer Daniels Midland is a prominent plaintiff in the list. Many of its cases were from 1995 or later, indicating that they may be related to the corn syrup price-fixing class action brought by Pepsi against the large producers of corn syrup, or the government's case against ADM and some of its competitors for price-fixing of the food additives lysine and citric acid, both of which we have discussed above.

While Mitsubishi does not appear in the list of top adjacent word-pair defendants, it appears frequently as a single word, and is also a common defendant in numerous cases brought by a large number of states. Examination of the published Mitsubishi cases yields the following. In Paper Sys. v. Mitsubishi Corp., 177 F.R.D. 435 (Dist. WI (E) 1997), the plaintiffs accused the defendants, numerous divisions of Mitsubishi, of fixing the price of the roll paper that goes into many facsimile machines. In Gulfstream III Assocs. v. Gulfstream Aero. Corp., 995 F.2d 425 (3rd Cir. 1993), the plaintiffs sued makers of business jet aircraft, including Mitsubishi Aircraft, for fixing the prices of such aircraft.

In Ohio Ex Rel. Fisher v. Mitsubishi Elecs. America, 1992 U.S. Dist. LEXIS 17470 (Dist. MD) and Maryland v. Mitsubishi Elecs. America, Inc., 1992 U.S. Dist. LEXIS 17395 (Dist. MD), each of the states, on behalf of consumers, sued the company for attempting to set the prices at which its dealers sold its televisions in those states. Both cases settled for a consent agreement with the company. Consumers were issued rebates as well. It appears from the party strings in the database that a number of other states also sued Mitsubishi at the same time, most likely over the same issue. In fact, these lawsuits comprise most of the cases against Mitsubishi. Thus, though a few of the cases arise from Mitsubishi's various activities, given that it is a huge conglomerate, we see that most of them are due to the familiar pattern of a case congregation arising from a consumer-oriented antitrust enforcement.

A group of cases against Primestar Partners are another interesting example because Primestar was another target of cooperative state antitrust enforcement. Every single case against Primestar Partners was brought by either the United States or one of the individual states, in 1991. This was a case coordinated by the National Association of Attorneys General. It concerned the control that the defendants, which was a partnership of major cable companies, including the largest (TCI[2] and Time Warner), had over the distribution of cable programs via satellite. The companies reached a consent agreement with the states and the Justice Department, agreeing not to block competitors access to cable channels. The FCC, however, opposed the agreement, indicating that existing law already required the companies to provide non-discriminatory access.

Both the Primestar and the Mitsubishi cases indicate significant role that the states have played in antitrust enforcement. The National Association of Attorneys General has a Multistate Antitrust Task Force, which helps the states coordinate their activity. This strategy was devised in cooperation with the Justice Department, which has published guidelines for the involvement of state attorneys general in criminal antitrust prosecutions, and in the investigation of mergers. It certainly can deploy more resources toward antitrust enforcement.

It may not be the most effective way to enforce antitrust law to have 50 similar lawsuits filed, as opposed to a single federal one, however. In addition, as the Primestar case shows, it sometimes can create conflicts with federal policy, since the

[2]TCI no longer exists; it has been absorbed into other companies.

attorneys general are acting collectively like a federal agency, crafting national settlements. This activity, however, may come as a result of what is seen as weak antitrust enforcement coming from the Justice Department. The states led the way in a variety of areas in antitrust. The Mitsubishi case was only one of a series of price-fixing cases against large manufacturers; the others were against Keds, Minolta, Panasonic, and Nintendo. This illustrates how a new legal theory, or a trend toward the application of a theory, can lead to a group of cases [132].

The cases against Sunrise Carpet, which is near the bottom of our list of top defendants, arise from a government investigation of price-fixing in the carpet industry which was undertaken by the Atlanta Field Office of the Antitrust Division of the U.S. Department of Justice. These cases are of interest because they show how price-fixing can occur within a region that specializes in a particular economic activity. The government alleged that the conspiracy to fix prices started at least as early as October 1992 and continued through at least June 1993 [7]. The Justice Department investigation resulted from a 1993 lawsuit by Diamond Rug and Carpet against Shaw Industries (the largest U.S. manufacturer of carpeting) alleging price-fixing and other violations of antitrust law. The two companies settled the dispute in 1994 and arranged to seal the results of the settlement.

The cases against Sunrise Carpet appear to follow the familiar pattern (familiar, for instance, from the cases against American Standard and the other plumbing manufacturers) of the government getting a tip from a private party, then taking the lead in an investigation and bringing suit, and then private parties bringing private suits. In this case, it appears that most of the private plaintiffs were carpet distributors or retailers. These cases share with the plumbing cases the antitrust division's continuing interest in industries that supply directly to the consumer.

Most of the domestic carpet industry is based in Georgia, which makes it easier for manufacturers to engage in price-fixing. Many regions achieve economic success by specializing in a few industries (see, for example, Porter [173]); industries thrive when concentrated in a particular area because of economics of scale that are achieved when a group of firms can share a pool of skilled workers, engineering expertise and other information. In the economics literature, these economies of scale are referred to as "agglomeration effects." However, the physical proximity of competing firms also facilitates the formation of cartels, and the illegal activity that is associated with them.

The case against Sunrise Carpet, a relatively small manufacturer, led to a plea bargain, which involved a $150,000 fine and a year of prison for the head of the company. After the plea bargain, the investigation continued. The investigation involved some larger companies, including Shaw Industries. In 1997, the Justice Department closed its investigation, bringing no further charges. Many of the lawsuits by carpet distributors and retailers were consolidated into a class action in 1997, which continued beyond the close of the federal investigation.

Two airlines–American and United–appear in our list of top defendants, and numerous other airlines have been the target of suits (as the single-word method reveals). Airlines are particularly of interest to federal regulators (at the Departments of Transportation and Justice) because of the particular structure of competition in the industry. This interest is in addition to the normal interest in an industry that is close to the consumer, especially the upper-middle-class consumer, to which, some might argue, the government is most responsive. While no airline has a dominant position nationally or internationally, one or two airlines sometimes dominate the airport of a major metropolitan area, in part because of the hub-and-spoke system used by most of the large airlines. This may drive prices up for people who live in that area. Chase v. Northwest Airlines Corp., 49 F. Supp. 2d 553 (Dist. MI (E) 1999) was a class action on behalf of those living in the areas served by the hub airports of Northwest. Chase alleged that prices directly to and from Northwest's hubs are artificially inflated because Northwest controls almost all the gates at its hub airports. In addition, Northwest had taken steps to prevent passengers destined for one of its hub airports from buying tickets going through that hub to a spoke that were cheaper than tickets to the hub alone, and simply getting off the plane at the hub. Chase alleged that these steps were anti-competitive.

If a low-fare carrier attempts to enter the market in a hub market, the airline dominating that hub may lower prices sharply in response. Some regulators in a more activist government view this as predatory pricing, whereas other, more conservative regulators– or at least ones who oppose antitrust regulation– may view this as simply part of the process of normal competition. Because of the uncertainty of judicial opinion in the antitrust arena, especially where it relates to predatory pricing, a relatively high percentage of government lawsuits concerning airline behavior at hubs may be litigated, especially since the airlines have an interest in deterring further federal action by fighting back hard, and because the sums of money at stake are typically huge.

Although there has been much governmental antitrust action against the airlines, this does not appear to be primarily what is going on in this set of cases. Of the airline cases mentioned above, many of them appear to be private suits by travel agents against the major airlines, such as United, Delta, American, and US Air. In fact, these four airlines appear to account for most of the cases. In quite a few cases, the plaintiff is an individual, who may be a travel agent; it is hard to tell without looking at each case filing individually, which is difficult. A few of the cases are between two airlines.

The travel agent cases are likely cases about travel agent commissions which were later consolidated into a class action, In Re Airline Ticket Commission Antitrust Litig., 953 F. Supp. 280 (Dist MN 1997). The U.S. was an friend of the court in this litigation. The plaintiffs alleged that the defendant airlines had conspired together, in violation of the antitrust laws, to fix the ticket commissions received by travel agents. Note that this litigation is not surprising, even though travel agents engage in long-term continuing relations with the airlines, it differs from the relations between auto dealers and the auto manufacturers in that each agent deals with many airlines and the relationship is arms-length.

Such litigation is likely to be a thing of the past. Because of the increasing use of the Internet by travelers to directly book their own flights, travel agencies no longer get commissions from the airlines, so they have to charge service fees to the consumer. This obviously makes further disputes with the airlines over commissions impossible.

Table 15.5: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Antitrust Cases

1	State of	5	Cumberland Farms	9	Big D Building Supply
2	U S	6	Seven Up	10	Falstaff Brewing
3	Commonwealth Of	7	Pepsi Cola	11	MCI Telecom
4	FTC	8	Blue Cross		

Table 15.6: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Antitrust Cases (Part 1 of 2)

1	Abbott Laboratories	31	American Airlines
2	City of ...	32	Eastman Kodak
3	Alton Box Board Co.	33	Philip Morris
4	U S	34	Nissan Motor
5	Ford Motor Co.	35	Crane Co.
6	American Standard	36	Toyota Motor
7	Shell Oil	37	Amerada Hess Corp.
8	Boise Cascade	38	AT&T
9	Microsoft Corp.	39	Christie's International
10	Archer Daniels (Midland)	40	Union Oil
11	Mobil Oil	41	Matsushita Electric
12	General Motors	42	National Football League
13	Blue Cross	43	Rheem Manufacturing
14	Southland Corp	44	Nine West Group
15	PPG Industries	45	American Home Products
16	Gulf Oil	46	Kimberly Clark
17	Olympia Brewing Co.	47	Hartford Fire Insurance
18	Schering Plough	48	Visa USA
19	Charles Pfizer Co.	49	American Cast Iron Pipe Co.
20	Coca Cola	50	Anheuser Busch
21	Keds Corporation	51	Pennsalt Chemicals Corp.
22	Grinnell Corp.	52	Atlantic Richfield Co.
23	Primestar Partners	53	American Radiator Corp.
24	Standard Oil Co.	54	Browning Ferris Industries
25	US Gypsum	55	Fibreboard Corp.
26	Bristol Myers (Squibb Co.)	56	Amstar Corp.
27	Toys-R-Us	57	Leviton Manufacturing Co.
28	Chrysler Corp.	58	F Hoffman Laroche
29	Harper Row (Publishers)	59	CPC International
30	Minolta Corp.	60	E I Du Pont

Table 15.7: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Antitrust Cases (Part 2 of 2)

61	Warner Brothers
62	Great Western Sugar Co.
63	Frito Lay Inc.
64	The Hearst Corp.
65	20th Century Fox
66	Sotheby's Holdings
67	Safeway Stores
68	Goodyear Tire and Rubber Co.
69	Mercedes Benz
70	Cabana Limited Partnership
71	Exxon Corp.
72	Alex. Brown
73	United Airlines
74	FMC Corp
75	Rockwell Manufacturing
76	ICI Explosives USA
77	Bayer AG
78	US Steel
79	General Electric
80	Sunrise Carpet
81	Johnson and Johnson
82	Rail Europe Inc.
83	Ashland Oil Inc.
84	Akzo Nobel
85	Phillips Petroleum
86	Hertz Corp.
87	Amoco Oil
88	Portland Cement Co.
89	BP Oil

Chapter 16

Contract Cases in Federal Court

"Messy reality keeps intruding on elegant theories." -Stewart Macaulay [141]

16.1 Introduction and Legal Background

This chapter discusses cases brought into federal district court under the Administrative Office's nature-of-suit (NOS) code 190, which is described as "other contract" on the cover sheet that attorneys fill out when they file a federal civil court case. I refer to these cases in this chapter simply as "contract" cases, with the understanding that other types of cases that are also contracts but have their own NOS codes are excluded. These other, more specific, types of contract include insurance contracts, marine contracts, and shareholder suits. Most of the cases in this category are diversity cases, since contracts are enforced under state law, so here we see federal courts enforcing state laws. (The remaining cases are cases in which a part of the federal government is one of the parties, which is another basis of federal jurisdiction.) A diversity case is one in which the parties are citizens of different states. A company is typically a "citizen" of a state in which it is headquartered or in which it does substantial business. Diversity cases require that a certain amount of money represent the potential damages in dispute; this amount has been raised over the years, in a attempt to keep financially small disputes out of the federal courts (and keep them in the state courts). It was raised to $10,000 in 1958, to $50,000 in 1988, and to $75,000 in 1997, the current value.[1]

The state contract law typically involved in these kind of cases is typically a combination of the common law of contracts, which dates back centuries, having its roots in the common law, and and an attempt, through statute, to create uniform state laws governing commercial transactions. Each state has its own common law, although there are strong similarities because judicial decisions in one state have influenced subsequent decisions in other states, and because they all have a common root in English common law. The major uniform statute governing transactions is the Uniform Commercial Code [UCC}, which was developed by a council of lawyers, judges, and law professors called the American Law Institute, and it has been enacted into law, in some form, in every state. Thus, federal judges charged with enforcing state contract law under diversity jurisdiction first determine which state's law governs the contract in question, and then typically consult the UCC and the case law of that state.

The availability of diversity jurisdiction for many contracts case allows plaintiffs to engage in forum-shopping, choosing state or federal court depending on their assess-

[1] These relatively high amounts may be the source of the popular expression "Don't make a federal case out of it."

ments of where they would get a better outcome. In the early days of the republic, diversity jurisdiction represented the major business of the federal courts, because most law was state law; now there are critics who feel that it has outlived its usefulness and creates a unnecessary burden on the federal courts, and that all contract cases should be moved into state court. The plaintiff bar, however, is opposed to the abolition of diversity jurisdiction; they argue that choice of forum is often necessary to obtain a fair hearing.

16.2 Examining the Contract Caseload

Figure 16.1 shows that the caseload in contracts[2] climbed steadily from the early 1970s until the mid-1980s, remained stable until about 1989, and then fell sharply in 1990, and remained slightly below the 1990 level through 2001. It seems almost certain that the sharp drop off in cases between 1988 and 1989 was due to the second increase in the amount-in-controversy requirement for diversity jurisdiction; there was also a drop between 1997 and 1998, but this was much less of a drop, and it is therefore less certain that it was due to the third such increase. Growth in the 1990s may also have been hindered by increased use of alternative dispute resolution. In any case, the relatively stable number of contract cases in the federal courts in the 1990s may have decreased the political pressure for measures to reduce the burden on the courts (since contract cases have always been one of the mainstays of both state and federal courts).

Figure 16.2 shows that contract cases rose from about 10 percent of the federal

[2]These cases are primarily diversity jurisdiction cases, but also include cases in which the federal government is a party.

caseload in 1971 to about 17 percent of cases in the late 1980s and then fell back down to about 10 percent by 2001. This was caused mainly by two factors; the aforementioned increase in the amount-in-controversy requirement and the increasing importance in the caseload of other case types, most notably employment discrimination cases. (Figure 6.2 shows the increase in the share of the caseload accounted for by employment discrimination cases.)

Figure 16.3 shows that the plaintiff win rate in federal contract cases is high, but has been falling. It fluctuated around 80 percent in the early 1990s and fell to about 65 percent by 2001. Part of the reason for this very high win rate is the extremely high win rate of federal parties; as shown in Table 16.1, federal plaintiffs win their cases 97.6 percent of the time, and federal defendants win their cases 74.2 percent of the time. However, in aggregate, federal parties accounted for only 12.5 percent of the caseload from 1986-2001. There are also some cases that have neither a federal party nor are diversity jurisdiction; these are due to various federal statutes, such as the Fair Debt Collection Act, which are classified under nature-of-suit 190 along with other contract suits.

As Table 16.2 shows, dispositions in contract suits are dominated by three kinds: default judgments (36.1 percent), consent judgments (12.0 percent), and pretrial motions (33.4 percent). Like in all case types, the plaintiff win rate for default judgments is overwhelming, here 98.7 percent. This may be because there are many breach-of-contract actions in which the defendant has become insolvent and does not show up in court. This high number of default judgments is contributing to the high overall plaintiff win rate. The plaintiff win rate for consent judgments is also very high– 94.7 percent– and this is also contributing to the high overall win rate. Parties that seek consent judgments may have reasons to seek court-enforced settlements; they may want the option of going back to court if breaches in performance under a contract continue. We see that if we consider only the cases that do not terminate in default or consent judgments, we have a plaintiff win rate of 52.9 percent, close to what the Priest/Klein theory says that it should be. These cases one might view as the "truly contested" cases, although it is not altogether clear that some of the consent judgments are not also contested.

As shown in Table 16.3, federal contract cases are of similar stakes to the overall caseload. The median amount demanded in federal contract cases is \$96,600, as opposed to \$103,000 among all cases. The median amount awarded is \$59,900 in contract cases; it is \$40,000 in all cases. Federal contract cases do have a higher rate of obtaining awards; 35.8 percent percent of plaintiffs making (recorded) demands obtain (recorded) awards, as opposed to 28.2% in all cases. This is no doubt due in part to the higher overall plaintiff win rate, since a plaintiff needs to win her case in order to get an award. Of course, this is not a hard-and-fast rule, since many plaintiffs are seeking injunctive relief.

Table 16.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, Ordinary Contract Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		%Adjudicated		Plaintiff Win Rate	
Jurisdiction	Contract	All	Contract	All	Contract	All
U.S. Govt Plaintiff	9.5	13.6	21.1	27.4	97.6	90.4
U.S. Govt Defendant	3.0	5.3	2.3	5.9	25.8	21.5
Federal Question	6.3	48.1	5.2	42.3	57.6	44.8
Diversity	81.2	33.1	71.4	24.4	72.5	61.6

Figure 16.1: Contract Cases Filed, SY 1971-2001

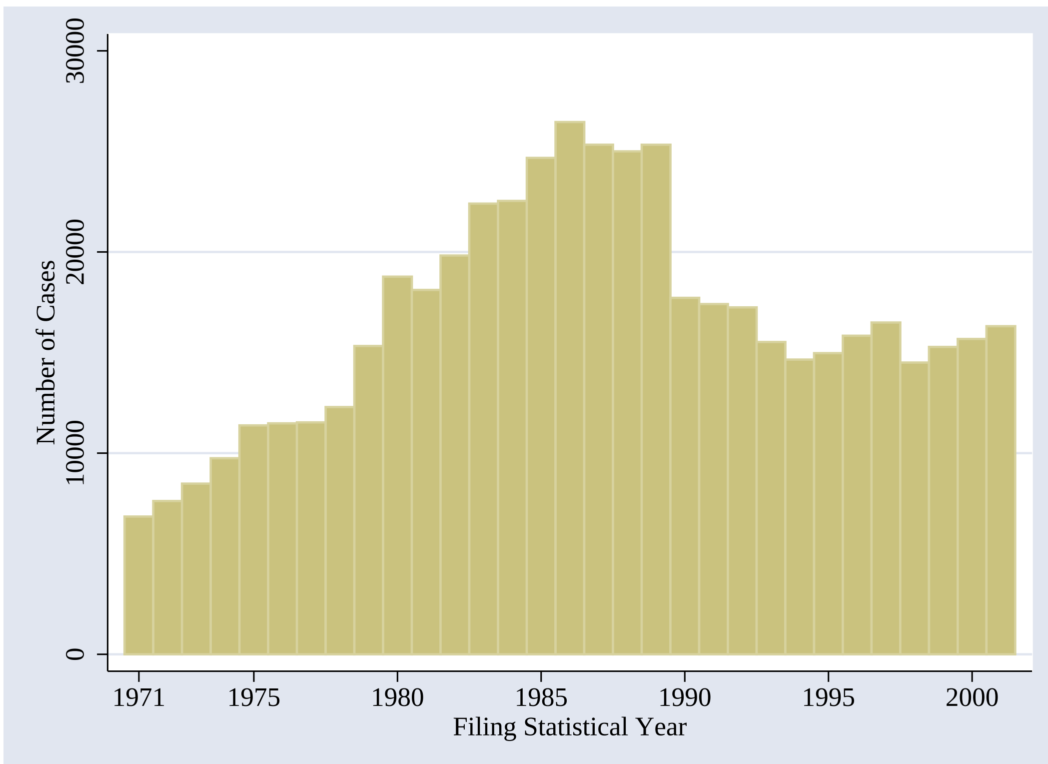


Figure 16.2: Contract Cases Filed as a Percentage of All Cases Filed, SY 1971-2001

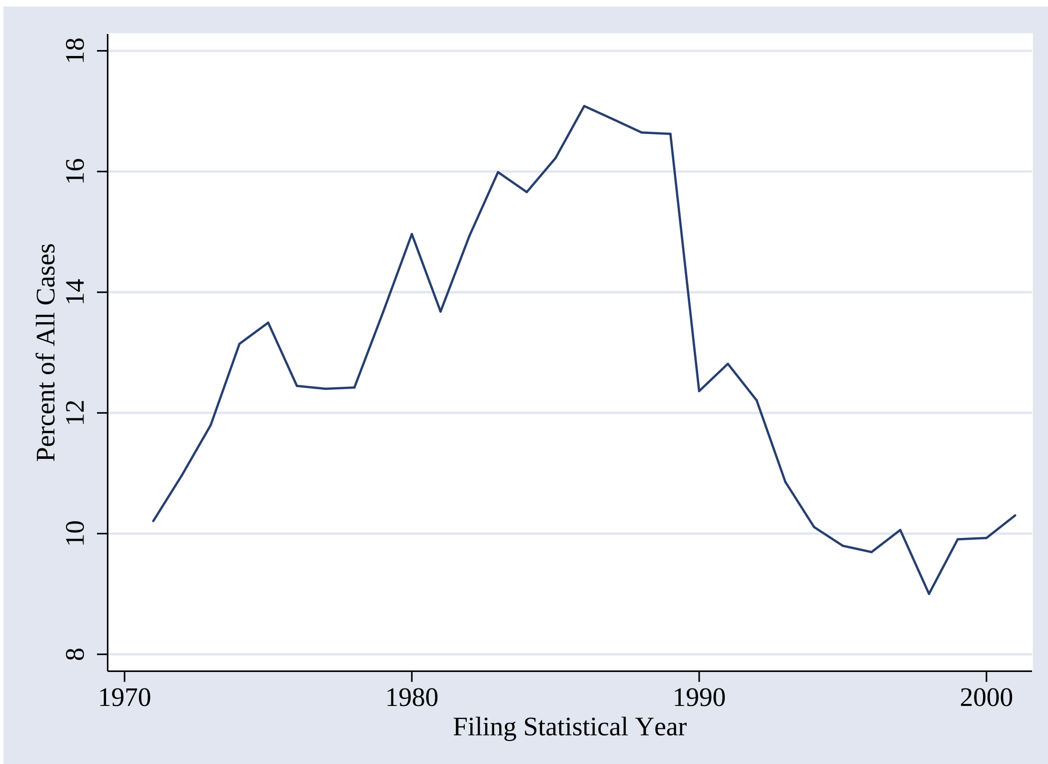


Figure 16.3: Percent of Adjudicated Contract Cases Won by the Plaintiff, SY 1979-2001

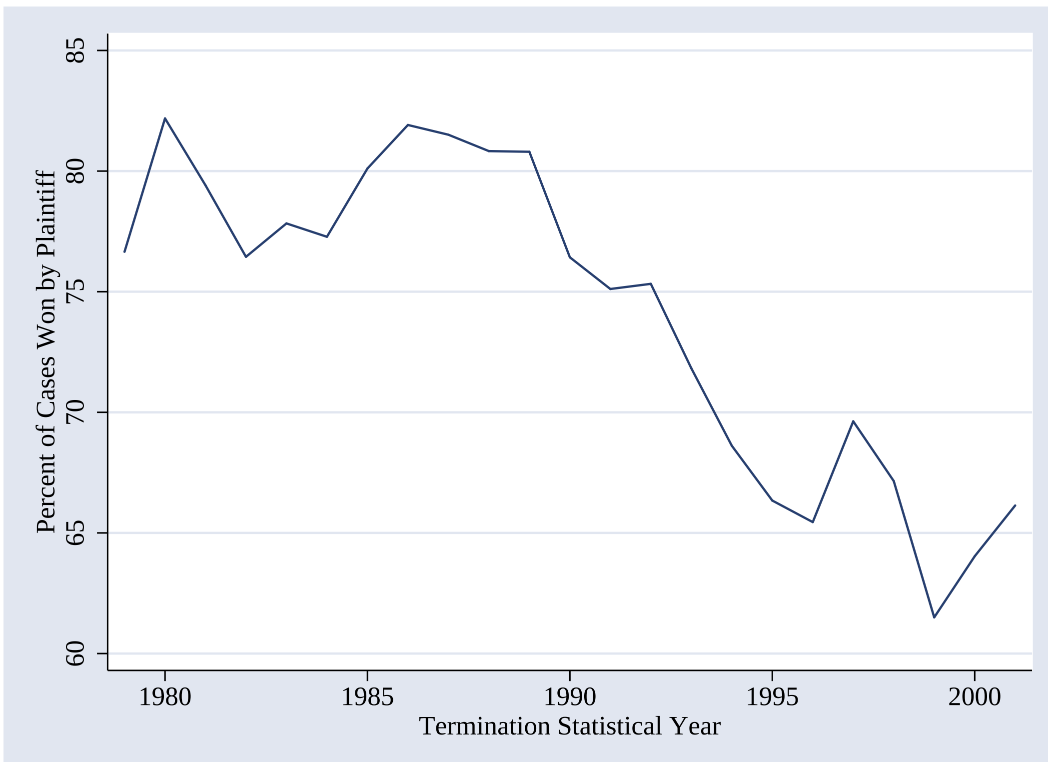


Table 16.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, Ordinary Contract Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Contract	All	Contract	All
Default Judgment	98.7	98.2	36.1	25.8
Consent Judgment	94.7	92.4	12.0	10.2
Judgment on Motion Before Trial	45.5	28.0	33.4	42.3
Judgment on Jury Verdict	65.7	46.6	5.3	7.7
Judgment on Directed Verdict	49.0	27.9	0.7	0.7
Judgment on Court Trial	64.8	48.5	6.1	5.1
All Other Dispositions	69.6	47.9	6.5	8.1
All Dispositions Combined	74.4	56.8	100.0	100.0
Consent & Default	97.7	96.6	48.0	36.1
All but Consent & Default	52.9	34.4	52.0	63.9

Table 16.3: Median Amounts Demanded and Median Judgments Received for Ordinary Contract Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate

	Ordinary Contract Cases	All Cases
Sample Size	504175	3894150
Median Amount Demanded	96.6	103.0
Sample Size (Amount Demanded)	256745	1434123
Median Amount Awarded	59.9	40.0
Sample Size (Amount Awarded)	91906	404512

16.3 F2000 Companies in Contract Cases

Over the 1971-1991 period, F2000 companies appeared 38,312 times as defendants and 41,198 times as plaintiffs in contract cases. This case type reverses the overall pattern for F2000 appearances in the database, in which F2000 companies appeared as plaintiffs 136,830 times and as defendants 391,352 times. In fact, F2000 firms' appearances as plaintiffs in contract cases constitute 30.1 percent of all their appearances as plaintiffs.

The top F2000 defendants in contract cases are shown in Table 16.4. As one can see from the table, the list is dominated by large automobile companies, telephone companies, oil companies, electrical equipment manufacturers, and insurance companies. The top F2000 plaintiffs are shown in Table 16.5. The list is similar. Again, electrical equipment manufacturers, automobile companies, and insurance companies are prominent. Non-depository financial institutions (C.I.T. Financial and Heller Financial) play a more prominent role, and oil companies and telephone companies play a less prominent one, with the exception of MCI.

16.4 Contract Cases with Ford as Plaintiff

Ford Motor Company is the number two plaintiff and the number two defendant in contract cases. It appears 721 times as plaintiff in such cases in our database. Thus, its cases are high-volume, and bear examination.

An examination of the party names in Ford's cases indicates that a majority of the cases involve Ford's credit division, Ford Motor Credit Corporation. These cases are primarily cases in which Ford is attempting to repossess goods or to make a consumer

Table 16.4: Top F2000 Defendants in Contract Litigation, SY 1971-1991

Company	Cases
General Motors Corp	780
Ford Motor Corp	578
General Electric Co.	445
AT&T	425
Chrysler Corp.	418
Amoco	336
Southwestern BellCorp	335
Exxon Corp	302
Aetna Life and Casualty Co	295
USF&G	283
Travelers Corp	274
Mobil Corp	271
Westinghouse Electric Crop	264
Texaco Inc	253
ITT Corp	243

or a dealer pay back a loan.

Of the 229 cases for which the nature of the judgment was recorded, 165 involved a monetary award (presumably to the plaintiff, Ford). Most of the cases (353) were dismissed, probably because the parties had reached an accommodation. Of the 216 cases that were judged, Ford won 198 of them, or 91.7 percent. These cases are for the most part fairly routine, in that it is clear that the money is owed to Ford. Ford (or Ford Credit) is a repeat-player in the game of getting payment for loans it made (or at least getting a judgment for payment). These types of cases often do not have equal states for both players. If the defendant loses, he or she may be forced into bankruptcy, a much more dire circumstance than anything that could happen to Ford. Thus they may defend these cases as strongly as possible, despite the low probability

Table 16.5: Top F2000 Plaintiffs in Contract Litigation, SY 1971-1991

Company	Cases
General Electric Co	1048
Ford Motor Co	721
Westinghouse Electric Crop	583
Deere & Company	571
MCI Communications Corp	558
Chrysler Corp	531
ITT Corp	522
C.I.T. Financial Corp	514
Heller (Walter E.) Int'l Corp	458
Consolidated Rail Corp	412
Merrill Lynch & Co Inc	398
USF&G	347
Amoco Corp	345
Citicorp	314
Travelers Corp	301

of victory.

In Ford Motor Credit Corp. v. Solway, 825 F.2d 1213 (7th Cir. 1987), Solway, a Ford dealer, had entered into a secured credit agreement in which his collateral was the Ford vehicles on his lot. Because he had missed payments, FMCC took possession of the vehicles and sold them at auction. This did not cover all of Solway's debt, however, and FMCC sued him to recover the rest. Solway argued that he had not been given proper notice of the auction (since he was no longer at the locations where notice was sent) and that FMCC's auction did not recover the maximum value for the collateral. (Solway had wanted to sell the vehicles to the public; FMCC sold them to other dealers.) FMCC won summary judgment against Solway, and the appeals court upheld this.

In another dealer case, Ford Motor Credit Corp. v. Milburn, 615 F.2d 892 (10th Cir. 1980), FMCC attempted to recover a loan amount from some people who had personally guaranteed a loan to a bankrupt dealer. The district court had found the guarantors not liable, but the appeals court reversed. In Ford Motor Credit v. Garner, 688 F. Supp. 435 (Dist. IN (N) 1988), FMCC also attempted to recover on a personal guaranty from one of its dealers. It appears that FMCC makes a practice in at least some cases to get such a guaranty, and then sometimes has to enforce it in court. The court enforced the guaranty against the Garners as well.

Some cases involve the franchise agreements between Ford and its dealers. For instance, in Ford v. West Seneca Ford, 1996 U.S. Dist. LEXIS 17616, Ford claimed that the West Seneca dealership had violated the terms of an agreement whereby it became part of the Ford car rental system. Ford had cut off the franchise agreement with this dealer for poor performance, a typical circumstance leading to litigation. West Seneca Ford counterclaimed that Ford had violated the New York law regulating automobile dealerships. Like in the Solway case, Ford had auctioned some vehicles to pay off a debt from West Seneca, and West Seneca claimed that Ford had not gotten the best price for the vehicles. The court ordered the dealer to pay Ford for some vehicles that it hadn't paid for, and ordered Ford to pay the rent for the dealer's property for one year, as required by the New York franchise law.

FMCC also gets into disputes with consumers. For instance, in a 1979 case from Arkansas, Ford Motor Credit Company v. Harper, 671 F.2d 1117 (8th Cir. 1982), Harper purchased a tractor from Ford that was financed by FMCC. The tractor broke down and the Ford dealer had difficulty determining what was wrong. Harper withheld payment on the tractor and it was repossessed. The district and appeals courts allowed Harper to revoke acceptance of the tractor under the Uniform Commercial Code due to breach of warranty, and returned his down payment. There are quite a few other repossession cases brought by FMCC that have been published. For instance, in Ford Motor Credit Company v. S.E. Barnhart and Sons, 664 F.2d 377 (3rd Cir. 1981), FMCC attempted to repossess some equipment that was used in strip-mining.

Ford has a large number of facilities and enters into contracts with building contractors to construct or remodel these facilities. These contracts can lead to disputes. In Ford Motor Co. v. W.F. Holt and Sons, 453 F.2d 116 (6th Cir. 1971), W.F. Holt was hired as general contractor to remodel some Ford facilities. During the course of the remodeling, one of the employees of one of the subcontractors that Holt hired was injured. The injured employee claimed that Ford was responsible for the injury, having been negligent, and sued Ford. Ford settled the case for $25,000. Ford claimed that an indemnification clause in the contract with Holt relieved it of liability, and sued to enforce this clause. The district court ruled that although the accident was the employee's fault and not Ford's, Holt should pay Ford. The appeals court found that Ford shouldn't have paid the employee, and therefore Holt did not have to pay Ford.

Some of these cases appear to be against employees that Ford claimed had violated the terms of their employment contract with Ford. For instance, employees that are entrusted with letting out bids for Ford can sometimes be tempted to take brides or kickbacks in exchange for favorable treatment of bidders.

In Ford v. Toth, 872 F.2d 1025 (6th Cir. 1989), the defendant, Edward Toth, was a Ford employee of 43 years tenure. Ford alleged that one of its suppliers had given various kinds of financial inducements to Toth and Toth had reciprocated by giving the supplier as many spot orders (those below $300 and thereby not subject to competitive bidding) as possible. Ford alleged that this constituted a breach of Toth's employment contract with Ford. The jury found, however, that Ford had failed to demonstrate that it had suffered financial damages as a result of the steering of the business to this particular supplier, and awarded no damages. The district court and the appeals court upheld this result. This is an example of a case in which the stakes to Ford exceed the monetary value of the particular case. If Ford employees are made aware that the company will go after them if they take bribes or kickbacks, this may discourage this behavior.

16.5 Contract Cases with Ford as Defendant

Ford was the defendant in 578 contract cases between 1971 and 1991. These occurred rather uniformly across time; they are part of the ordinary course of doing business for the company. 292 of these cases were dismissed. Ford did not do as well in these cases as it did as plaintiff. Nevertheless, of the 84 cases for which a judgment was reported, Ford won 51 of them, or 60.7 percent. There was a monetary award in 26 of the 81 cases in which the nature of the judgment was reported. This is a pretty good record, having to pay out in only 26 cases out of 578, although some of the dismissed cases may have been settled for monetary amounts. An examination of the party names reveals quite a few dealers as plaintiffs. Ford Motor Credit appears as defendant quite frequently as well, although not quite as frequently as it did when Ford was the plaintiff.

Because of the large number of contracts that Ford enters into with its franchisees and others, some of these contracts are bound to end up in disputes.

Sometimes regulatory matters enter into the calculations. For instance, in Allen v. Ford, 1999 U.S. App. LEXIS 20355 (6th Cir.), the plaintiff, Wayne D. Allen, maintained that Ford had breached an agreement to sell stock in a Ford-Mercury dealership that it owned. Ford decided not to sell the stock after it found out that it would not be able to obtain permission to issue a new franchise agreement for the dealership to Allen from the Ohio Motor Vehicle Dealers' Board. This stemmed from unresolved issues with the previous dealer. These issues were subsequently cleared up, and Ford was willing to enter into the stock transfer, but at a later date than what had been initially proposed.

The plaintiff, who had been managing the franchise in the interim, got impatient, and demanded an earlier deadline for the transfer of the stock. When this deadline was not met by Ford, Allen resigned, and a year later filed suit against Ford, maintaining that the representations made by Ford in the initial negotiations over the contract amounted to an enforceable contract, and that Ford was obligated to transfer the stock to him. The district court, looking at the details of contract law, disagreed, and found for Ford.

Some of the contract disputes are with consumers. For instance, in Baldwin v. Laurel Ford-Lincoln-Mercury, 32 F. Supp. 2d 894 (Dist. MS (S) 1998), the plaintiff alleged that in her agreement to finance a vehicle with the defendants, the defendants, a Ford dealer and FMCC, illegally (in violation of the federal Truth-in-Lending statute) and secretly agreed to split the profits from the transaction the interest collected on the financing.) The court found that this was not an illegal arrangement, since all the terms of the financing were disclosed to Baldwin, and these terms were proper. Baldwin had contended that since the proportion of interest and other fees (there was a fee for an extended warranty) that were to be paid to Laurel Ford as a commission for the assignment of the financing to Ford Credit were not disclosed, this amounted to a violation of the Truth-in-Lending statute. The court felt otherwise. This case illustrates that dealers and the manufacturer are not always on opposite sides of a case; sometimes they are allied, against the consumer.

The Allen case is typical of many cases filed against Ford Credit. Many involve Truth-in-Lending or other statutes designed to protect the consumer. Thus we see that regulation of contract tends to generate cases.

Another case in this vein was In Re Ford Motor Credit Co. Motor Vehicle Lease Litigation, 1998 U.S. Dist. LEXIS 4174, a class action. In this case, the plaintiffs alleged that the Truth-in-Lending statute and some other statutes were violated by the manner in which Ford Credit handled a security deposit required in long-term vehicle leases. This was a complex case, and the court found for Ford Credit.

Some consumer cases against automobile dealers and manufacturers have been brought under the RICO statute. Here, the consumer alleges that allegedly fraudulent activity by the dealer or manufacturer which is practiced repeatedly and in a pattern constitutes a violation of the RICO statute. For instance, in Williams v. Ford Motor Co., 37 F. Supp. 2d 1033, (Dist. IL (N) 1998), Williams alleged that Ford and one of its dealers had conspired, in violation of RICO, to defraud him and others similarly situated. He had bought a used car from Highland Park Ford and an Extended Service Plan. When he brought the car in for service, the dealer said that Ford required the payment of a substantial "inspection fee" to determine what was wrong with the car. This was not the case: the dealer was pocketing the fee, and Ford was not involved. The RICO claim attempted to show that the dealer was Ford's agent in a RICO enterprise composed of both of them, but the court found that since Ford did not control the dealer and could not be shown to be aware of the imposition of the "inspection fee," it could not be found liable under RICO.

Such a RICO claim is not an unusual accompaniment to a fraud claim. Since the early 1980s, when lawsuits under the RICO statute skyrocketed (see Section 19.2), plaintiffs have been using it in conjunction with a fraud charge when they think they may be able to demonstrate a pattern of illegal activity (two or more acts) by an organization. The law provides for treble damages and attorney's fees, which act as a incentive to bring such suits. Also, adding a RICO claim to another claim, such as a fraud claim, is fairly easy to do, and this may intimidate the defendant. A RICO charge is also a way to take a case that would ordinarily have to be filed in state court into federal court. Many of these cases, despite the RICO charge, may continue to be classified in the "other contract" category in the database. So the increase in RICO cases may be part of the cause for the increase in contract cases.

As the Williams case illustrates, Ford is involved in numerous cases that result from the dubious practices of its dealers in selling various credit instruments, extended warranties, rust-proofing and undercoating. Ford is often named as one of the defendants in such suits, even though typically it is the dealer who is engaging in most of the dubious activity. In another case, Taylor v. Bob O'Connor Ford, Inc., 1998 U.S. Dist. LEXIS 5095 (Dist. IL (N)), a class action, the plaintiffs alleged that the defendants, which included Ford, its dealer, a finance company, and a company allied with the dealer that sold rust treatments, had violated RICO, the Illinois Consumer Fraud

Act, and other statutes in its sales of a rust-proofing treatment, a vehicle extended warranty, and a extended warranty on the paint job and exterior of the vehicle that the Taylors had purchased. In addition, the dealer had received a cut of the profits from the financing from the finance company.

16.6 Contract Cases Viewed with the Adjacent-Word-Pair Frequency Method

As viewed with the adjacent-word-pair frequency method, contract cases appear to be more uniformly distributed across the population of firms than are other case types. A wide variety of firms are found. This makes sense, because every firm in the economy engages in many transactions, each of which is legally underpinned by contract law. The top plaintiffs are shown in Tables 16.6 and 16.7; the top defendants, in Tables 16.8 and 16.9.

Some industries that appear to appear frequently in this category are the banking, leasing, and insurance industries, the auto industry, and the oil industry. All of these industries are huge and transaction-rich; virtually all firms and individuals have some substantial interaction with these industries.

One reason that the auto industry appears so often is its sheer size and number of transactions; virtually every business and individual in the country has some transactions with it. Another reason, which we have already explored in some detail, is that there is a good deal of franchising in the auto industry, between manufacturers and dealers, and these relationships are often tense, and lead to litigation when they break down. A third reason is that auto industry firms often make secured loans to many companies and individuals, and often sue to recover.

The parties frequently appearing in plaintiff strings in contract cases are similar to those most frequently appearing in the defendant strings, for the most part. There is a certain symmetry to contract cases between plaintiffs and defendants, in that either party to a contract (typically, the buyer and the seller) can act as plaintiff. However, financial firms appear more frequently in the table of top plaintiffs than in the defendant table, which appears to more generally reflect the economy as a whole. This is because financial firms are frequent plaintiffs in the recovery of loans.

The Resolution Trust Corporation (RTC) appears frequently as both plaintiff and defendant. Clearly, these cases come out of the savings and loan debacle (the reason the RTC was established) and represent a "case congregation." When the RTC appears as plaintiff, it appears, from a perusal of the party names involved, that many of the defendants are individuals or developers (since many of the deals that caused the savings and loan associations to fail were real estate deals). Examination of the published cases involving the RTC in Lexis/Nexis indicates that the RTC, acting as receiver for the failed savings and loans, often sued the former directors, auditors, and liability insurers of those savings and loans to recover money damages that could be used to pay off their depositors. In addition, it often sued those who had defaulted on debts to the failed savings and loans. Many of the disputes with the RTC as defendant appear to be disputes over how or whether claims of depositors or other creditors of the failed institutions would be paid out.

The FDIC (Federal Deposit Insurance Corporation) appears frequently. Some of these cases were also savings and loan cases, as the FDIC served as insurer to some of the failed thrifts, and some were the result of the FDIC's role as receiver for failed banks. The cases that are associated with the savings and loan crisis can be considered part of this case congregation.

The word pair "U S" is the top item on both the plaintiff and defendant lists. Some of these cases actually involve the US government, and some are simply companies with "U S" in their name. It appears, from manual examination of the party strings for these cases, that the federal government is more likely to act as plaintiff than as defendant.

Credit, banking and other financial companies, such as Agristor Leasing, LFC Lessors, and Chase Manhattan, appear frequently in the list of top plaintiffs. These cases are most likely cases that are filed for recovery of defaulted loans. Many of the large manufacturers that appear in the list of plaintiffs, such as Ford Motor or John Deere, are involved in cases over the recovery of secured goods.

There are many cases involving the stockbroker Merrill Lynch and other stockbrokers. An examination of Merrill's published cases indicates that many of these cases may be attempts by Merrill to enjoin former employees from taking clients away that they had serviced while they were working at Merrill. These suits are often based on employment contracts that Merrill had with the defendant former employee, and were often in part based on state trade secrets statutes.

Franchising also appears to be involved in these cases. The cases involving Dunkin' Donuts, Burger King, Choice Hotels and Quality Inns most likely involve franchising, since this is the major transaction these companies are involved in. Indeed, the defendants in Choice Hotels' suits are often small companies with "hotel" in their name, indicating a franchisee. Some of the cases involving Chrysler, Ford, and General Motors (often as defendants) appear to be franchising cases as well.

MCI, the telecommunications company is one of the only non-financial companies that appears most frequently in the plaintiff string;. Examination of the party string in these cases indicates that many of the defendants appear to be small long-distance telephone companies. In addition, some of these cases are simple collection disputes with customers.

Examination of the published cases with MCI as plaintiff indicates that many of them were disputes, often over payment, with smaller firms that resold MCI's services, often taking advantage of volume discounts offered by MCI, who attempt to pass some of these discounts along to the public. As this is a competitive, risky business, many such carriers, many who tend to be "fly-by-night," fail, and this leads to collection disputes. Many of these cases appear to have to do with the "filed tariff doctrine," which holds that the tariffs that are filed under regulatory requirements with the FCC are the actual rates, and may not be deviated from. In addition, the existence of such public documents affords protection against fraudulent misrepresentation of the rates by the carriers, which is alleged in some of these cases.

The existence of many of these MCI cases are a result of the transformation of the governance of the long-distance telephone industry from a regulated monopoly (AT&T) to an oligopoly, with several large companies (AT&T, MCI, Sprint and a few others) dominating the long-distance market, and many resellers popping up in a dependent relation with these companies. Such dependent relations often lead to litigation, which we have seen in the franchisor-franchisee context; these MCI cases are similar in that respect.

Another industry appearing frequently in general contracts cases is the steel industry. Examination of the party strings indicates that many of the defendants are construction companies or other steel companies. Many of these cases are likely to be disputes over payment.

Table 16.6: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Contract Cases, Part 1 of 2

1	U S	25	Heller Financial
2	Merrill Lynch	26	Chrysler Credit
3	Ford Motor	27	St Paul Fire Insurance Co.
4	Resolution Trust Corporation	28	Sogelease Corp.
5	AT&T	29	National Credit
6	General Electric	30	Salomon Smith (Barney)
7	Orix Credit Alliance	31	Quality Inns
8	John Deere	32	Bell Atlantic
9	MCI Telecommunications	33	Allis Chalmers (Manufacturing Corp.)
10	Bank of ...	34	Eastman Kodak
11	National Union Insurance	35	Dean Witter
12	Agristor Leasing	36	Mobil Oil
13	City of ...	37	Massey Ferguson
14	Dunkin Donuts	38	Bank One
15	FDIC	39	US Fidelity
16	Burger King	40	Consolidated Rail Corp.
17	Airlines Reporting Corp.	41	CIT Group
18	Choice Hotels	42	Heller Co
19	LFC Lessors	43	Leasing Service Corp.
20	Amoco Oil	44	Howard Johnson
21	Borg Warner Corp.	45	American Equipment
22	Chase Manhattan (Bank)	46	Aetna Casualty
23	Rentrak Corporation	47	State Of ...
24	First National Bank of ...	48	ITT Commercial Finance Corp.

Table 16.7: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Contract Cases, Part 2 of 2

49	Mack Financial
50	Aloha Leasing
51	Maaco Enterprise
52	Midlantic Nation
53	J I Case Credit
54	Ralston Purina
55	American Express
56	Equico Lessors
57	Walnut Equip
58	Pittsburgh National Bank
59	Ramada Franchise Systems
60	Hartford Fire Insurance
61	Goodyear Tire and Rubber Co.
62	E F Hutton
63	Equilease Corp.
64	Marine Midland Bank
65	Wells Fargo Bank
66	E I Du Pont
67	First Interstate Bank
68	Finova Capital Corp.
69	Chemical Bank
70	Helena Chemical Co.
71	Satellite Music Network

Table 16.8: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Contract Cases, Part 1 of 2

1	U S	23	Blue Cross
2	Ford Motor	24	Gulf Oil
3	City of ...	25	United Parcel (Service)
4	General Motors	26	Allstate Insurance
5	Resolution Trust Corporation	27	St Paul Fire and Marine Insurance
6	United States	28	Trans World (Airlines)
7	Chrysler Corporation	29	Jim Walter (Homes)
8	AT&T	30	Amoco Oil
9	Mobil Oil	31	J C Penney
10	Bank of ...	32	Montgomery Ward
11	Merrill Lynch	33	State Of ...
12	FDIC	34	Exxon Corp
13	Sears Roebuck	35	Chase Manhattan
14	State Farm	36	Nissan Motor
15	Federal Express	37	J A Jones Construction
16	Shell Oil	38	US Fidelity and Guaranty
17	Wal-Mart	39	First National
18	General Electric	40	E I Du Pont
19	Burroughs Corp.	41	K Mart
20	First National (Bank of ...)	42	First Union (Bank or Mortgage)
21	Aetna Casualty	43	Prudential Insurance
22	US Postal Service	44	Orkin Exterminating

Table 16.9: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Contract Cases, Part 2 of 2

45	Southwestern Bell
46	American Express
47	Holiday Inns
48	Pan American (World Airways)
49	Wells Fargo
50	E F Hutton
51	Air France
52	Pan American
53	Allied Van Lines
54	R J R Nabisco
55	United Airlines
56	Goodyear Tire and Rubber Co.
57	American Airlines
58	El Paso Natural Gas
59	Hyundai Motor Co.
60	NCR Corp
61	J B Hunt Transportation
62	Snap On Tools
63	Xerox Corp
64	W R Grace
65	Liberty Mutual Insurance
66	Union Oil Inc.

16.7 Franchising Contract Cases

Both product and trade-name franchising and business-format franchising have grown rapidly in the last 30 years. In product and trade-name franchising, the product alone is franchised, and the franchise business typically associates itself with the trade name (for instance, a franchised gas station, such as a Shell station). In business format franchising, the franchisee adopts not only the trade name of the franchisor, but also a fixed method of doing business, including marketing plans, operating methods and manuals, etc. Franchised restaurants like McDonald's are typical of business format franchising. Of course, business format franchising and product and trade name franchising are idealizations; various intermediate forms exist, depending on the level of control exercised by the franchisor.

The federal government issued an annual report on franchising until 1988, the last year for which statistical information on franchising was readily available. That report [227] showed that sales in product and trade name franchising rose from 115.2 billion dollars in 1972 to 449.6 billion dollars in 1988 (estimated), with the number of establishments declining from about 262,000 to about 141,000 (estimated). (Virtually all of this decline was due to the elimination of gasoline service stations.) Sales in business format franchising rose even more sharply, from 28.7 billion dollars in 1972 to 190.1 billion dollars in 1988 (estimated); the number of establishments rose from about 190,000 to 368,000 thousand (estimated).

Over a third of cash retail receipts are taken in by franchise outlets [177]. In addition, franchising is estimated to be growing at about 6 percent annually, faster than the economy as a whole, for which 4 percent is currently considered robust growth.

Thus the proportion of retailing that is in franchising can be expected to continue to grow [200]. In addition, one might expect that this subsector will continue to grow, as regional variation continues to be smoothed out by the large investments made in brands by multi-national companies, and businesses continue to be rationalized in their operations [182]. The franchising relationship tends to be rife with conflict, so we can continue to expect to generate a good deal of litigation.

Examination of the number of times that the word "franchise" appears in the federal district court database on Lexis/Nexis is one way to gauge the increase in franchising cases. Figure 16.4 shows the trend in this statistic from 1971-2002, plotted with franchise sales. Figure 16.5 gives the same statistic relative to the total number of published cases. Of course, not all of these are franchising cases, since the word franchise can appear in other types of cases (for instance, in regulatory cases involving a city franchise to a cable television company). However, this shows that franchising probably at least is maintaining its share among the overall population of federal civil cases.

Three quarters of new franchise systems fail within twelve years [200], and one third fail within their first four years. For several years prior to 1998, 200 new systems were born per year. However, the average franchise contract is for fourteen years. The failure of franchise systems must often lead to litigation, given the tensions in the franchisee-franchisor relationship as either party nears failure. Shane and Spell [200] found that a reputation for trustworthiness on the part of the franchisor was correlated with success. Writing long-term contracts was a signal of trustworthiness. Shane and Spell found that franchisors that made use of state franchise registration regulations that required termination of the franchisee only for just cause actually

Figure 16.4: Number of Published Federal District Court Cases in Lexis/Nexis Mentioning the Word “Franchise”, 1971-2002

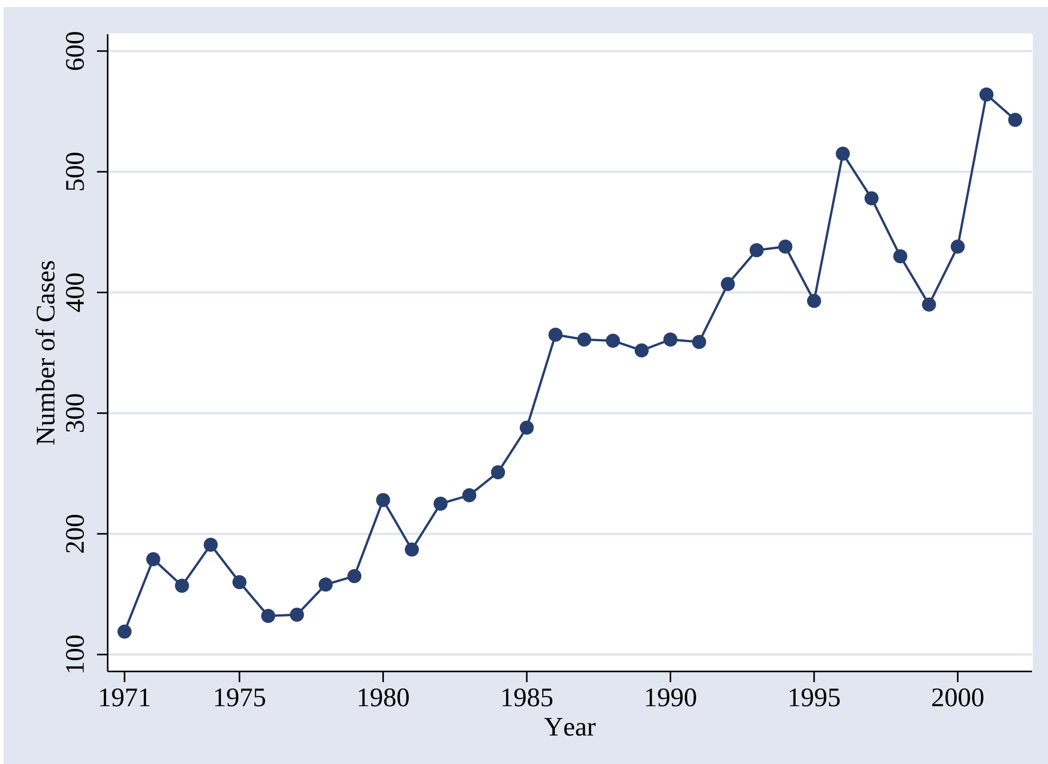
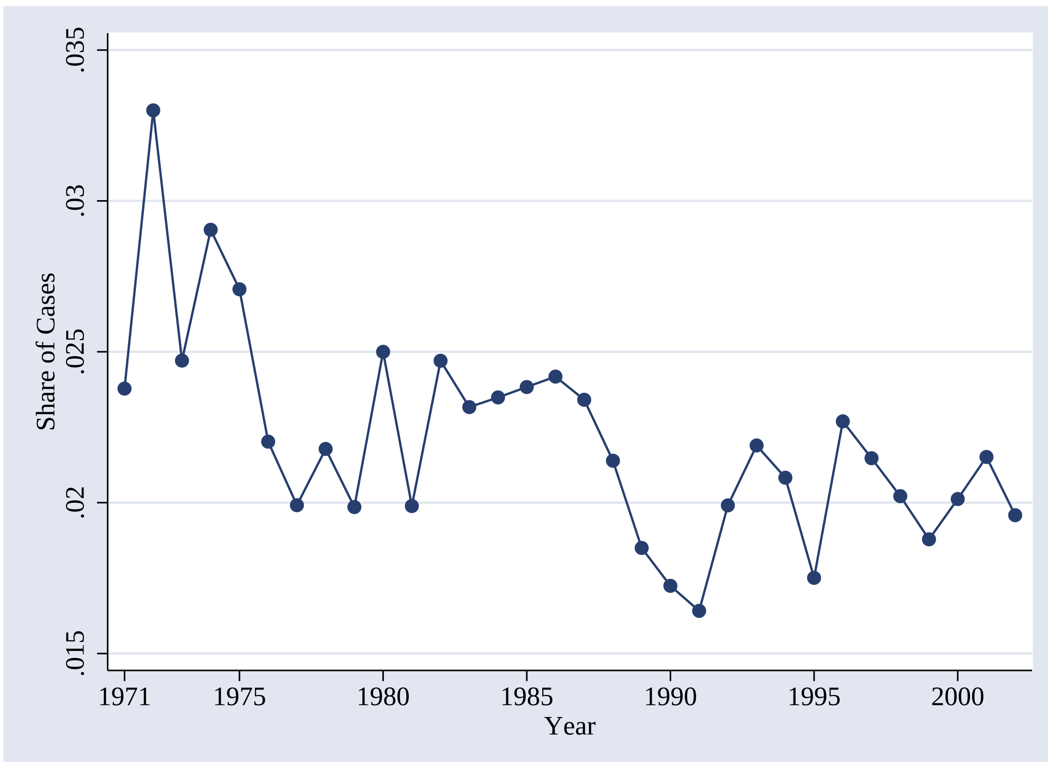


Figure 16.5: Published Federal District Court Cases in Lexis/Nexis Mentioning the Word "Franchise" as a Share of Estimated Total Published Cases, 1971-2002



helped the franchisor gain a reputation for trustworthiness.

The relationship between a franchisor and a franchisee is similar to that between an employer and an employee. In both cases, there is often a medium- to long-term contract (implied or explicit) between the parties, and an interdependence between them. Many observers would also maintain that there is also a power imbalance between the two parties, with one typically being much smaller than the other, although the proponents of the new institutional economics (e.g. Williamson [240]) would disagree with this, saying economizing behavior drives such interactions. In any case, it is clear that, often, employees and franchisees both make asset-specific investments as part of the contracting relationship. The employees often make such investments in their own human capital, and the franchisees make such investments in both their human capital and in physical capital (e.g. a McDonald's restaurant).

Klein and Leffler argue that advertising expenses (which constitute investments in brand names) may be the way that firms guarantee high-quality to the consumer in exchange for a stream of rents [125]. It is a way to guarantee performance in any one transaction, because if the firm doesn't perform on that transaction, it would lose its future rent stream. This is similar to the argument that firms sometimes pay "efficiency wages," which are wages above the market-clearing level, to guarantee loyalty and effort from employees. One could argue that the offer to share the stream of rents with the brand-name franchisee constitutes the bond posting by the franchisor, much as an asset-specific investment up front may be required as a bond by the franchisor.

Two other ways to think about the contracting relationship between franchisor and franchisee are by borrowing ideas from Galanter [76] and Simon [207]. Simon's idea of "bounded rationality" is that actors only devote a certain amount of cognitive energy to a particular decision. Because franchisors are "repeat players" (following Galanter), as opposed to franchisees, who tend to be "one-shotters", franchisors can accumulate all the knowledge that comes from repeat transactions with other franchisees in drawing up the contract with one particular franchisee.

A reason that companies may choose franchising over corporate-owned stores is that it decreases their monitoring costs. The theory here is that a small-businessperson franchisee will take better care of the bottom line than would a manager who works directly for the company. Krueger [129] offers some evidence for this. He found that wages for assistant and shift managers were 9 percent higher and wages for crew members were 2 percent higher at company-owned fast food outlets than they were at franchised outlets. He argued that these wage differences were due to the fact that owner-operators of franchised outlets spent more time monitoring employees and therefore employees had to be paid more to "elicit effort" in outlets where "monitoring is more difficult."

Therefore, one would imagine that the rate of franchising would be related to the ability of organizations to deploy institutions and technology in a cost-effective manner to monitor employees and managers. Martin [145] agrees that franchising may be undertaken by firms as a way to cope with uncertainty and risk, and argues that firms may be tempted to recapture franchises as company-owned stores after they become proven locations and the much of the initial risk of entry is gone. This itself may be a source of conflict, in that franchisees may resist (by lobbying their legislators or suing) attempts to terminate the franchise agreement upon the expiration of the contract.

By necessity, many of the terms of a complex on-going relationship such as franchising or employment are not specified in writing, because it is not possible to anticipate every contingency that may arise (see Macneil [142]). Since this is the case, when such contingencies not covered by the contract do arise, or contingencies that are ambiguous, litigation can ensue. Because both franchising and employment are long-term, complex relationships, the possibilities for disputes and litigation are increased.

Because of the potential for unfair dealing and conflict, the Federal Trade Commission requires that a good deal of information be disclosed to potential franchisees. I would argue that the federal government, through the FTC, has been responsive to the the needs of franchisees is because they are small businesspeople who tend to be well-organized and often prosperous; an analogy may be made to stockholders and the SEC. The information that FEC requires franchisors to disclose includes financial information, information on advertising programs (a frequent source of conflict), on training programs, and on litigation that involved the franchisor. This should have the function of alerting the potential franchisee (who may be considering several different business opportunities) as to which franchisors are particularly prone to conflict with their franchisees, and may actually act as a disincentive to conflict, since conflict, if it is disclosed and publicized (per the FTC requirements) can hurt a franchisor's reputation.

Going into a franchise relationship, the franchisor knows a good deal more about how the franchise will operate than does the franchisee. He also has an incentive to misrepresent the franchise contract in order to induce the franchisee to enter into the franchise, which typically involves more risk on the part of the franchisee than the franchisor, since the franchisee often makes a substantial investment. (Williamson refers to this dishonesty in contracting as "self-interest-seeking-with-guile.") In fact, some of the motivation behind franchising involves shifting risk onto the franchisee, lowering the costs of failure (to the franchisor) below what they would be in the case of a corporate-owned store.

Another source of conflict is poor performance on the part of the franchisee. It is difficult for a franchisor to predict how well a potential franchisee will perform under contract, and it may be necessary to terminate the contract due to poor performance. It is also hard to determine if a franchise failed because it was poorly managed or for other reasons (e.g. poor location, lack of franchisor advertising support, etc.) This is again similar to the situation with employment, and terminating a franchise contract is similar to terminating an employee. This itself can lead to litigation, and leads franchisors to seek legal advice on how to terminate a franchise without inviting litigation [133]. An increasing number of franchisees are former employees of large companies, often middle-level managers, with a great deal of business knowledge and some level of sophistication, including legal sophistication. As a result, they are likely to assert their perceived rights, often leading to litigation.

If the franchise relations break down, there is a serious risk of litigation. The failure rates for small business are high. They are not as high with franchises as they are with independent small business (because one is establishing an outlet of a established business), but they are still substantial. If an independent small business fails, the owner typically has no one to blame but him or herself. In the case of a franchisee, however, they can blame the franchisor. Often the franchisee will allege that some part of the contract terms were not fulfilled. As we have seen, franchise disputes make up a significant number of the disputes in general contracts. These disputes involve some of the top F2000 litigants in this area, such as the oil companies and the automobile companies. In fact, the prevalence of these companies among the top litigants in general contracts is directly related to the fact that they do a good deal of franchising.And there are substantial conflicts in each of these businesses which, as a previous study of the automakers and their dealers by Kenworthy, Macaulay, and Rogers notes [120], appears to be related to the business cycle (much as Siegelman and Donohue [206] note that the number of discrimination cases filed is also related to the business cycle).

Kenworthy, Macaulay, and Rogers [120] note that there is much more manufacturer-dealer litigation in the auto industry than there is manufacturer-parts supplier litigation. One of the explanations that they give of this phenomenon is that parts suppliers are unwilling to disturb lucrative relations with auto manufacturers with litigation. There are more dealers than suppliers and that the dealer business has a lower profit margin and a higher failure rate. These industry characteristics are part of the reason why manufacturers use franchising rather than corporate-owned outlets. In addition, a dealer is often dependent on a single manufacturer, whereas a parts supplier more often sells to more than one manufacturer. Unlike a dealer, who typically has an ongoing, continuous relationship with a manufacturer, which is not disrupted until it is severed, and if it is severed, it is not likely to be reestablished, a supplier may not win a contract at a given time, but may be in a position to bid for a contract later. Thus, the supplier has little incentive to disrupt a future contract with a dispute over a given contract. A terminated dealer has no such incentive.

Because of the high failure rate of automobile dealers, many lawsuits are filed by dealers who have already gone out of business (and therefore have no continuing long-term relations to disturb.) The phenomenon that there is more litigation involving franchised dealers rather than parts suppliers to manufacturers may be a general one; we have observed this in the auto industry (with car dealers), the petroleum industry (with gas stations), and we have seen that there is a high level of litigation involving franchisees in general. This litigation is both general contract litigation and antitrust litigation (in which the franchisee accuses the franchisor of abusing market power in franchise relations.) All these observations would tend to validate the hypothesis that there is a higher litigation rate involving franchisees as compared than suppliers.

Much of Macaulay's early, classic work (e.g. [139]) focused on auto dealers and gasoline service station dealers, and their relationships with their respective franchisors. Macaulay's views on franchising and long-term relationships are given in [141]. While automobile dealers are still important (although, as we will see, fewer in number), franchised service stations are in serious decline (replaced with corporate owned outlets that are often convenience stores as well as gas stations). The growth area in franchising is in restaurants and other service businesses, such as mailing and packing services, janitorial and maid services, etc. Still, I expect the theory used in Macaulay's analysis of the relations between franchisees and franchisors to continue to be applicable to newer franchise relationships, although faster social change is likely to lead to more turmoil and more litigation.

While many franchisees are small business owners, there are some large companies that own large numbers of franchises. This changes the balance of power between franchisor and franchisee. The ownership of many franchises by a single entity is likely to be resisted by the franchisor, which often justifies such resistance by a desire to maintain competition among its franchisees. One example of this is the following.

There is an ongoing process of consolidation in auto retailing, with the emergence of auto "superstores." The emergence of the Internet has also intensified price competition, as potential buyers are able to easily check prices online, and more likely to shop around and patronize superstores, which can operate by selling more cars on a smaller margin. The Internet has the potential to seriously reduce information problems in markets and seriously damage market power that has in the past been held by local actors as a result of these information problems (and transportation costs, which are also down).

In 1960, there were 35,000 auto dealers, who sold 7.3 million vehicles; in 1968, 31,100 dealers, who sold 11.1 million vehicles, and in 1998, 22,240 dealers, who sold 15.5 million vehicles. Thus, the average number of vehicles sold per dealer is increasing; fewer dealers are selling more vehicles. Smaller dealers' main weapon against this consolidation is attempting to compete by offering better or more personalized service to upscale buyers who can afford to pay a premium for it [27].

This is transforming the governance of the dealer-manufacturer relationship. For instance, the nation's largest auto retailer, the AutoNation superstores, ran into conflict with three major Japanese automakers (Honda, Nissan, and Toyota) over its plans to acquire a large number of dealerships. The automakers were presumably concerned about the amount of bargaining power that this would give the dealer in negotiations. Honda had sued AutoNation, arguing that it had violated rules about franchise acquisition. Honda settled with Republic, agreeing on the pace of dealership acquisitions, and had settled with Toyota earlier. It also had disputes with the big three domestic automakers (GM, Ford, and Chrysler), but reached agreements with them as well. The Honda settlement allowed Republic to make its immediate acquisition of 12 dealerships. The number of dealerships it would ultimately be allowed to buy was not disclosed. With respect to the Nissan dispute, a federal court ruled in favor of AutoNation, and the dispute was settled, allowing AutoNation to acquire more Nissan dealerships than Nissan would have liked.

The consolidation of auto dealerships into larger units has affected the business strategy of the automakers. For instance, General Motors has a long-term strategy of reducing the number of dealers that it has, partially to reduce the fixed (per-dealer) costs of interacting with smaller dealers who do not sell that many cars. GM planned to buy some of these dealerships out, but also had a team of lawyers at the ready to deal with the inevitable conflict over the downsizing [27]. It began this program in 1996 with the idea of moving from over 8500 dealerships in 1996 to 7000 in the year 2000 [193].

As new franchises enter the market, the market can become saturated, increasing the failure rate. Franchisees can enter at saturation without knowing that they are doing so. Because of this saturation, disputes over territory often arise. (Note that in the case of industrial suppliers and OEMs, geography plays a smaller role). If the franchisor opens new outlets near an existing one, that may drain sales, leading to a dispute. Because saturation occurs first in the best-known businesses (such as McDonald's and Taco Bell), the remaining opportunities tend to be in much more marginal businesses, although new "first-tier" franchises are emerging, such as the children's amusement franchise "Discovery Zone." In the more marginal franchises, the franchisor as well as the franchisee tend to be more marginal, in terms of finances and business experience. As a result, franchise contracts have become more complex, granting more rights to the franchisor, in an attempt to head off litigation. At the same time, aggressive sales tactics are often used by franchisor, so the actual contract becomes a combination of what the franchisee was told prior to sale and the written contract. Disputes often turn on discrepancies between these two things. In addition, since franchisors have more experience than franchisees–they are repeat-players, in Galanter's terms–they can write contracts in terms favorable to them, because they know how events are likely to evolve. The potential franchisee may be optimistic and overly discount some of the contingencies covered in the contract [198].

The following case gives the character of many of the published cases involving franchising. In Shoney's v. Schoenbaum, 894 F. 2d 92 (4th Cir. 1990), the Schoenbaums had the franchise to develop Shoney's restaurants in a defined territory in Virginia. Shoney's sought declaratory judgment that the franchise agreement only covered restaurants using the Shoney's name, not lodging. The district court found that the agreement did cover all uses of the name "Shoney's," not just in a restaurant context, and gave injunctive relief to the Schoenbaums. Based on a review of the contract, the court found that while the Schoenbaums only had the right, under the contract, to open restaurants with the name "Shoney's," and no other kind of establishment, they were nevertheless protected from the use of the name by others on all establishments. The Schoenbaums also claimed that there was an antitrust violation, as is typical in such cases, and unfair competition, but the district court did not find such violations. The appeals court upheld the district court's decision.

Territorial franchise rights tend to be quite valuable, because of the substantial amounts invested in the associated trademarks, and therefore disputes tend to arise over the assignment of these rights, of which this case is typical. In addition, they are more sophisticated in the way that they pursue litigation, leading to some successes.

In one such success, Broussard v. Meineke Discount Muffler Shops, 958 F. Supp. 1087 (Dist. N. Carolina (W) 1997) a group of Meineke muffler shop franchisees sued the franchisor, and received a jury award of $397 million [98]. They had claimed that the franchisor had used payments that they made to it for advertising for other purposes. The amount of the payments that were supposed to go to advertising, $32 million, was recovered, as was estimated lost sales. To arrive at the $397 million award, these amounts were tripled under a state unfair-trade statute, and were adjusted in other ways. The huge size of the award led to a uproar by tort reform advocates, but it was reversed on appeal.[3]

Some franchisors have a reputation for difficult relationships with their franchisees. One such company is Subway, which is the second-largest restaurant franchisor, after McDonald's. Its required FTC report lists 160 disputes, more than the number listed by all of Subway's major competitors combined. A number of these disputes were over territory, with the franchisees contending that Subway defrauded them with respect to territorial issues. Instead of granting exclusive territories, Subway's franchise contracts allow competition within territories. Also, franchisees claim that they were being cheated by food suppliers, leading them to form their own food-buying coop.

In addition, Subway engages in dubious practices, such as renting space from landlords, and subletting to a Subway franchise, so that they can rapidly evict the franchisee in case of a dispute. In addition, it gets into a lot of disputes with these landlords, since it uses dummy companies that take out the lease, which then can renege on the obligation. Its royalty, 8 percent of gross sales, is the highest in the

[3]Kenneth Staff, the Whitewater special prosecutor, represented Meineke on the appeal.

industry. In addition, many franchisees were not advised of the provisions of the contracts before they entered into the franchise relationship, according to a congressional investigation. An internal Subway study found that less than 10 percent of Subway franchisees even bother to read the franchise contract. Thus, they are almost setting themselves up for exploitation [16].

Franchisors and franchisees often get into disputes over requirements that the franchisees buy materials from the franchisor. Franchisees often assert that this is a product-tying that is illegal under the antitrust laws [92]. In Queen City Pizza v. Domino's Pizza, 129 F.3d 724 (3rd Cir. 1997), the appeals court upheld a district court decision that refused to accept the theory of the plaintiffs, a group of Domino's franchisees, that the contractual terms, which required them to buy supplies, from Domino's constituted illegal tying. In rejecting this theory, the majority opinion cited theories from the Law and Economics literature, such as the argument that such tying prevents some franchisees from free-riding on the reputation of the chain by buying substandard ingredients [49]. This is an example of how academic theories and ideology can have real impact on the behavior of the courts.

Another interesting franchising case was a RICO class action against American Honda. We discuss this case, and some theory that may be relevant to it, in Section 19.3.1.

Franchising law is generally thought of as a growth area for attorneys. According to Kaufmann [116], there has been an explosion of franchising litigation in the last decade. In response to this, a group of large franchisors got together to set up a national mediation program. This program, the National Franchise Mediation Program (NFMP), has been such a success from the point of view of the franchisors (in that it has resolved a number of disputes) that all the major franchisors have joined. The goal of this program has been to resolve disputes while preserving the ongoing business relationship between franchisor and franchisee. It is run by the Center for Public Resources, a leading group advocating the use of alternative dispute resolution (ADR).[4] In some cases, franchise agreements compel the use of a two-step process of mediation, followed by arbitration if necessary.

As is the case in many other areas of contract law, franchisors are attempting to use mandatory arbitration clauses in franchise agreements to foreclose litigation. Some states have attempted to prevent the use of such clauses. For instance, New Jersey attempted to do so, with its Franchise Practices Act, but a federal judge ruled that the provision that prohibits mandatory arbitration was preempted by the Federal Arbitration Act, which prohibited states from outlawing mandatory arbitration clauses [159]. This was consistent with the Supreme Court's decision in Southland v. Keeting, 104 S. Ct. 852 (1994), which reached a similar conclusion about a California law. The politics of this are interesting. One could argue that the state legislatures are more responsive to locally-based franchisees than the multinational franchisors, and that the U.S. Congress is (relatively) more responsive to the multinationals. Thus the multinationals, who favor mandatory arbitration, win out in the end, and are able to use ADR to limit litigation. Nader and Smith [157] point out that ADR may favor corporate defendants against plaintiffs, because private judges are not able to compel discovery of damaging documents. For instance, if a franchisor plans to drive a franchisee out of business, the franchisee may not be able to recover the paper trail of such a plan. In addition, Nader and Smith object to ADR because it eliminates

[4]This organization's web site is at www.cpradr.org.

trial by jury, and juries are often more sympathetic to plaintiffs than judges are.

16.8 Organized Franchisees

In some areas of franchising, especially in the more established and more numerous ones, such as gasoline service stations and auto dealers, the franchisees have organized to promote their interests, often against those of the franchisor, and to deal with the regulatory environment. In many cases, they have been able to pass legislation in state legislatures to promote or protect their interests. Since franchise owners are local small businesses, they are sometimes able to press their case effectively against that of the multinational franchisor (e.g. Exxon or GM). The result is that the laws under which litigation operates are modified. Litigation is one governance mechanism, and organizing and lobbying another. Franchising often leads to conflict, and such conflict promotes organizing, as similarly situated parties band together in order to change the terms under which conflict is governed. In addition, market conditions affecting franchising are in constant flux, and franchises attempt to use political power to survive changes in market conditions. If the franchisees manage to get a law passed, sometimes the franchisors will challenge it in court.

Franchisees have been organizing to pass legislation for many years. Some economists (specifically those associated with the New Institutional Economics school and the Law and Economics school) are skeptical of the idea of "unequal bargaining power" in contracts. They argue, for instance, that contract terms that seem one-sided are not actually so. For instance, a requirement that franchisees invest a large amount of up-front capital that cannot be completely liquidated (that is, which is asset-specific) may act as a bond ensuring good performance by the franchisee [124]. Such a bond may efficiently select franchisees from the potential pool of investors. Some other scholars, however, are skeptical of this reasoning, arguing that information asymmetries between the parties may allow contracts to be formed that are unfair. Franchisors may exploit economies of scale in contracting and thereby gain advantage.

Whatever the outcome of such an academic discussion, the public, franchisees, and legislators are often persuaded that unfair contracting would often occur absent regulation, and are often willing to step in and pass legislation regulating franchise contracts and behavior of the parties to the relationship. They often see large franchisors as possessing more bargaining power in the formation of contracts than do franchisees. Thus we see a variety of regulatory regimes imposed on the franchisee-franchisor relationship. These include "dealer-day-in-court" legislation, the Petroleum Marketing Practices Act, and the Federal Trade Commission regulation of franchise offerings. One of the main subjects of such laws is dealer territories and protection from competition within such territories. Franchisors are often sued by franchisees for encroachment, the opening of a new location near that of the franchisee [236].

The Iowa Franchise Act, which some observers feel has changed the landscape of franchising, was initiated by two Iowa Kentucky Fried Chicken franchisees, Bob Schlutz and Bill Allen, in the early 1990s [3]. KFC had been acquired by PepsiCo (which has since spun it off), and KFC wanted to eliminate encroachment terms from the contracts with its franchisees. This angered the long-term franchisees, who were used to being protected from encroachment, and they contacted their legislators and other franchisees. They found that other franchisees were also concerned about encroachment, difficulty in transferring franchises, and parent companies' increasing practice of placing branded products in places like gas station convenience stores and grocery stores. They were also concerned about restrictions placed by franchisors on where franchisees could purchase their equipment and supplies.

Basically, the dispute was over the division of the profits from a piece of intellectual property, the KFC trademark, and its associated business methods, a brand/trademark that carried goodwill and a reputation for a certain level of quality. In looking for support in the Iowa state legislature, they were able to gain support from some Republicans. As, traditionally, the party of business and laissez-faire, Republicans might feel some conflict in loyalties, in that this was a dispute between businesses, but they sided with the local franchisees to a large enough extent to pass the bill. The Iowa Franchise Act gave franchisees the right to transfer their franchises to qualified parties, gave them the right of notice of termination, required a good business reason for termination, allowed franchisees to purchase from third parties supplies and equipment that met franchisor standards, gave franchisees the right of first refusal when opening a new outlet that encroached on an existing outlet of an existing franchisee, and guaranteed franchisees the right to associate with one another.

The bill had been opposed by the International Franchise Association, an association of large franchisors, who claiming that it (inefficiently) interfered with the freedom of contract. In addition, the large franchisors bankrolled a local group, the Iowa Coalition for Responsible Franchising, which, in 1995, did a study that found that that the law had discouraged the opening of new franchises and thereby hurt the state's economy [3].

In Holiday Inns Franchising v. Branstad, 29 F.3d 383 (8th Cir. 1994), McDonald's and Holiday Inns sued some of their franchisees the over the constitutionality of the

Iowa Franchise Act. McDonald's and Holiday Inns had been two of the most vocal opponents of the law prior to its enactment. The plaintiffs maintained that the Act was unconstitutional under the Iowa and United States Constitutions, and sued for declaratory relief. The State of Iowa and the Iowa Franchisees Association intervened in the lawsuits.

The Act regulated the transfer of franchises, mandating that the transfer be allowed if the new franchisee met the requirements of the franchisor at the time of transfer. Both the McDonald's franchise agreement and the Holiday Inn one required the franchisor's consent before transfer. The franchise terms were long in duration in both the Holiday Inn and the McDonald's agreements: 20 years.

In addition, the Act required that that existing franchisees be granted the right of first refusal over the establishment of new franchises within an "unreasonable proximity" of the existing ones (which was defined in a complex manner). Since McDonald's already had plans to develop a new franchise near that of the franchisee which it sued, it argued that the Act substantially modified its agreement with this franchisee (its agreement was permissive on doing so.) Holiday Inn, while it had no specific plans, argued that these restrictions violated terms in its contract with its defendant franchisee which said that the grant of franchise was non-exclusive.

The Act also required "good cause" for termination of a franchisee, cause based on a "legitimate business reason." Here, the parallel with employment law is clear.[5] The Act required advance notice of such a termination, between 30 and 90 days, in which time the franchisee would be given the opportunity to remedy the situation.

[5]Employment law, some argue, has been moving from an employment-at-will doctrine to a just-cause for termination doctrine; the expansion of due process here is similar to what Edelman [53] found in the employment context.

Holiday Inns argued that this provision should not replace the termination terms in its franchise agreement. Similar sections were present in the Act about franchise renewal, terms which McDonald's and Holiday Inns objected to, as contradicting existing language in their agreements.

The contract clause in the U.S. Constitution reads that "no state shall ... pass any ... Law impairing the Obligation of Contracts." The Iowa constitution contains a similar clause. The district court found that the Iowa Franchise Act was in fact unconstitutional with respect to existing contracts, and therefore found it unconstitutional when retroactively applied. The appeals court upheld this decision. However, the law continues to apply to new franchise contracts entered into in Iowa. According to some attorneys specializing in franchise law, this law is the strongest in the country [201].

The recent state of franchise law is described in Barkoff and Seldon [12], in a volume put out by the American Bar Association's Forum on Franchising. There are substantial battles going on in state legislatures between organized franchisors and franchisees. For instance, in Florida, franchisees have been pushing for a law similar to Iowa's, and franchisors are fighting its enactment [119]. Some of this is being driven by franchisees whose long-term contracts are near their end, and are worried about the terms under which they will be renewed (if at all). Franchisors are avoiding opening new franchises in Iowa in an attempt to discourage other states. (Fortunately for them, this is a market they can afford to avoid; if a similar law passes in a more populous state such as Florida, it would difficult to do this.)

16.8.1 The Decline of the Automobile Service Station

In New York State, service station owners are organized in the New York State Association of Service Stations and Repair Shops, which represents 3,500 such establishments in the urban areas of the state. These establishments have been embattled in recent years. The increasing amount of technology, including computer technology, found in automobiles has made it difficult for the small operator to have the equipment necessary to fix all car problems, and therefore dealer-based repair departments and other large repair outlets, such as those run by Goodyear, Firestone, and Sears, have taken up much of this work, as well as (often-franchised) repair shops specializing in such parts as brakes and mufflers. In addition, today's automobiles are simply better-made (due, largely, to the challenge of the Japanese), so they require less frequent repairs. Also, since today's consumers are more pressed for time, convenience stores may represent a more profitable use of the real estate near the pump than service facilities.

For instance, the number of service stations in New York State has diminished by 7,000 stations since 1977, increasingly replaced by convenience store-style gas stations (with no service component). Increasing numbers of these are corporate-owned, and competing directly with their franchisees. This creates a good deal of resentment and conflict. In New York State, the aforementioned association has sponsored a bill in the state legislature to restrict the entry of oil-company-owned outlets into the areas of franchised service stations. They managed to pass the state assembly with this bill (described on their Web page at http://www.albany.net/~gra/) Nationally, service station owners are organized in the Service Station Dealers of America and Allied Trades (Web page at http://www.ssda-at.org/). This latter group pushes for strengthening the Petroleum Marketing Practices Act (PMPA), pushing for changes in pricing rules, among other things.

There continues to be conflict between service station owners and large oil companies over attempts by the latter to close locations. For instance, after Shell and Texaco announced a joint venture to sell gas, Shell told some dealers that it was ending their franchises, saying that it did not want to pay for an upgrade of their tanks that was required by the Environmental Protection Agency. (The real reason may have been that it wanted to reduce competition with Texaco in particular areas.) In Kamel v. Shell, 1999 WL 413414 (9th Cir.), the court gave the plaintiff injunctive relief against Shell's action, finding that he had a reasonable chance of prevailing on the merits. Under the PMPA, franchisors are required to give notice to franchisees within 120 days of learning of an adverse event that could lead to termination of the franchise, but Shell (and everyone else) had known about the tank replacement requirement for much longer than that.

Ironically, litigation such as this may be pushing the large oil companies away from franchising even more than they would otherwise be, because corporate-owned stores can be opened and closed at will, without the risk of conflict or litigation. Rapidly changing market conditions in the oil industry may require such flexibility. On the other hand, franchises continue to have the advantage of putting much of the risk of a new outlet on the franchisee.

Because franchise legislation, and gas station franchise legislation in particular, is generally fought out at the state level, both oil company franchisors and gas stations tend to form state-level organizations. For instance, in Connecticut, the large oil companies, including Exxon, Mobil, and Shell, are organized in the Connecticut Petroleum Council, presumably so-named to increase the level of sympathy of state legislators and the public, even though all of these companies are not based in Connecticut, but simply do business there. The large oil companies have pricing differences in their wholesale prices between zones that result in significant differences in prices at the pump to consumers. This also tends to adversely affect the franchisee near a zone boundary who has the higher price.

The gas stations are represented by the Stamford branch of the Gasoline and Automotive Service Dealers of America. In 1998, the Connecticut legislature was considering at least three bills to deal with the pricing situation, which tends to anger consumers who find themselves needing to drive a few miles out of their way to get cheaper gas. One of these bills would allow the franchisees more freedom in choosing the distributor from which they buy their branded gasoline; another would place a limit on the price variation between zones; yet another would require the oil companies to disclose their pricing policies. The gas stations supported only the last of the three bills. The oil companies supported none of them. The rationale behind the oil companies zone pricing policies was hard for both the gas station owners and the state legislators to understand, but presumably was based on the oil companies' assessment of market conditions

In San Francisco, a bill requiring uniform pricing, allowing franchisees to buy from multiple sources, and requiring oil companies to give up company-owned stores (so-called "divorcement") was offered up to the Board of Supervisors, but was sent back to committee given opposition from Chevron, among others. This bill was motivated by public anger created by gas prices substantially higher than other parts of the state. Several members of San Francisco's business elite spoke out against the measure.

Chevron threatened to move its headquarters out of San Francisco if the measure passed [60, 90].

16.9 Examining A Sample of Contract Case Files

I examined a sample of unpublished "other" contract case files (nature of suit code = 190) taken from the Western District of Wisconsin, based in Madison. This consisted of the first 50 cases that were closed in 2000.

I found that most of these cases fell into one of several categories, although there were a few eclectic cases that did not. One category was disputes between a company and its former employees, usually over non-compete agreements that were alleged to have been violated. Another category consisted of disputes between a company and its franchises or dealers, typically over the latter's termination, although some involved disputes over the terms of franchising. Next, there were of disputes under the Fair Debt Collection Act, which concerned whether debt collectors were following proper procedure. There were also disputes over payment of amounts that were allegedly owed, as when the plaintiff provided goods and services to the defendant and is suing to obtain compensation. There were suits over the proper performance of contract terms, such as the shipment of goods that allegedly did not meet an agreed-upon specification. Finally, there were suits over complex deals gone awry; this category of suits involves the complex machinations of corporate law, involving sales of stock of various kinds, complex ownership arrangements, and representations made by various actors over the course of these deals. Often deals were high-stakes.

These suits over complex deals also tend to take up a good deal of the time of the court, if the size of the files is any indication, and the complexity of the judgments rendered. This illustrates the following general principle: types of cases are by no means equal in the amount of the resources of the court that they consume. Among these contract cases, the cases concerning the high-stakes deals are the most complex and time-consuming, while the Fair Debt Collection Act cases tend to be settled quickly, because they are low-stakes and typically involve relatively small amounts of money, and therefore attorneys do not spend much time on them.

First, let us consider three of the high-stakes cases as examples of this type. FMH, Inc. v. Gordon and Arnold (98-C-0886-C) concerned an investment in assisted living centers. Gordon and Arnold, Illinois investors, had formed a limited liability company (R.L.A. LLC) to operate some such centers in Wisconsin owned by the plaintiffs, using a bank loan that they personally guaranteed. They had promised to pay $2.68 million in installments to the plaintiffs. Instead, their partnership went bankrupt, and they defaulted. In their defense, they argued that representations had been made about the potential profitability of the centers that were not accurate. However, the judge found that the representations that been made by the *defendant's* agent, so that the plaintiffs could not be held accountable for these representations, and in any case, these initial representations could not be relevant to the operation of the business 18 months later. As a result, she found for the plaintiffs.

In Markes and Dresen v. Triangle Plastics, Inc. and James Blin (00-C-47-S), the plaintiffs sought a preliminary injunction preventing the defendants from disposing of the proceeds of the stock in a company (TriEnda) previously owned by the plaintiffs, and then determination of the amount to which they were owed. Both companies made plastic parts for other manufacturers. The two companies had merged because Triangle had had excess business that it could not satisfy, and TriEnda had excess production capacity, which it was not taking advantage of. The result was to transform two unprofitable companies into one profitable one. By the terms of the agreement, the plaintiffs retained an interest in any amount of proceeds that exceeded \$34,688,000. The estimate of this excess was based on the initial valuation of TriEnda, which had been computed by accountants hired by both parties while they were negotiating. The judge was unwilling to reject the expert testimony that the work of the accountants involved in the initial deal was competent, even though the parties each had an interest in doing so (although in different directions). He said "you dance with who you brung." He found for the plaintiffs in the amount of \$9,185,000; this was appealed.

In LSLG Associates, LLC v. Harish Puri and Puri Family Limited Partnership (PFLP) (99-C-0646-C), the plaintiffs had owned 49% percent of the stock in a company, TRP, that owned a television station, and the defendants had owned 51%. The plaintiffs lent \$500,000 to TRP. PRLP then agreed to buy out all the LSRP interest in TRP, including both the ownership share and the loan, for \$3,250,000. However, according to the complaint, PFLP did not complete the transaction. The case was settled through a consent judgment in which the defendants agreed to make installment payments to the plaintiff.

These cases all are of a similar character. In the course of doing business, business owners often engage in stock transfers, borrow money, and create complex corporate structures. Often, they are in search of liquidity (cash); for instance, although I am not certain, in the last case mentioned above, it appear likely that the \$500,000 loan was taken out because even though the defendants owned a controlling share in a television station, which can be a reliable source of cash flows, they may have needed a large infusion of money immediately for improvements, salaries, etc. All of the transactions that business people are continuously engaging in creates more possibilities for one of them to go awry. In Markes and Dresen v. Triangle Plastics, Inc. and James Blin, while the parties had agreed on a valuation for TriEnda initially, it was worth it for the plaintiffs to go to court, if they thought they might get a higher payoff.

These cases are also examples of how much of the work of the courts is in involved in entangling corporate disputes over ownership and bonds and the complex agreements companies form to handle these issues. All three of these disputes involved relatively small businesses–that is, there was no General Motors or Microsoft involved–but the amounts involved indicate that the parties involved are (at least sometimes) prosperous small or medium-sized businessmen. There are many such companies in the country, and projecting across all districts and over time, this would amount to a significant volume of litigation. Of course, there are some that argue that these are precisely the types of cases that the courts should be focusing on, in that that they are relatively high stakes, and by resolving them, the courts are helping in the day-to-day functioning of the economy.

The next group of cases involve franchising, dealers, or former employees that have gone out on their own. These cases are more numerous, in my sample of fifty, than the "business deal" cases described above. Macaulay's observation that the breakdown of long-term business relationships can lead to litigation appears to be as true as ever.

For instance, in Ikon Office Solutions v. A+ Imaging Solutions et al. (00-C-63-S), the plaintiff, a dealer in photocopiers, fax machines, and other office equipment, sued a company formed by a group of former employees. The defendants were accused of unfair competition, of stealing the plaintiff's customer list, misusing the plaintiff's goodwill, and violating restrictive covenants that they signed not to compete within a certain period after leaving employment. A consent agreement was reached in which the defendant agreed to pay $25,000 to the plaintiff, the defendant was enjoined through a certain date from contacting the plaintiff's customers, and the plaintiff was enjoined from contacting 194 existing customers of the defendant.

Huber v. Schamberger (00-C-0043-C) was a dispute over the termination of the defendant's beer distributorship. The defendant formerly distributed beer in Illinois, so the relationship was governed by the Illinois Beer Industry Fair Dealing Act. The plaintiff sought declaratory judgment that the termination was valid. The termination stemmed from a personality conflict between a new representative of the beef manufacturer, Huber, to the distributor, Schamberger. A number of former Huber employees testified for Schamberger that the new representative had been difficult to deal with. The result of the case appears to be that the dealership was reinstated on a trial basis. This is interesting, in that usually resorting to litigation would mean a permanent breakdown in a relationship. Ironically, if it becomes more acceptable to resort to litigation, than litigation may become less likely to permanently destroy relationships between firms and/or individuals.

In Ray Hudson Chevrolet v. General Motors (99-C-0518-S), the plaintiff, a Chevrolet and Nissan dealer, planned to add Kia models to its inventory. It sought permission from GM and Nissan to use the parts and service area of the dealership to service Kias, and obtained permission from Nissan but not from GM. It sued under a provision of the Wisconsin Motor Vehicle Dealership law, but lost the case. This was an interesting case in the era of "mega-dealerships;" it shows that the OEMs still retain some control over their dealers.

The following are examples of contract cases that allege poor performance. In Springs Window Fashions Division v. The Blind Maker (00-C-0598-S), the defendant was a maker and distributor of window treatments, including products purchased from the plaintiff. This case combined allegations of poor performance and unpaid bills; the plaintiff alleged that the defendant had not used its best efforts to promote and sell the plaintiff's products, as required by contract, and that it had an unpaid balance. In Reynolds Wheels International v. Willett America (99-C-228-C), the plaintiff sued for breach of warranty; it had purchased 15 inkjet printers from the defendant that it alleged did not perform up to warranty specifications.

There are also some Fair Debt Collection Practices Act cases. In Seifler v. Account Control Technology Inc. (00-C-641-C), the plaintiff alleged that the defendant had attempted to collect an debt (from 1973!) that had been discharged in bankruptcy. In Lawver v. Rausch, Sturm, Israel, and Hurvik, S.C. (99-C-0538-C), another Fair Debt case, the plaintiff said that the defendant, who was collecting for Sears, was trying to collect a debt that had been discharged in bankruptcy. The defendant maintained that Sears retained a security interest that had survived the bankruptcy. (Sears is known for being aggressive in trying to recoup losses from secured debt.)

Chapter 17

Insurance Cases

17.1 Legal Background

Insurance policies are contracts regulated under state law. States typically have their own insurance law and regulations, and a state regulatory agency covering insurance. The federal government plays little role in private, individual-level insurance regulation.[1]

However, disputes over the coverage of insurance policies often find their way into federal court, mainly due to diversity jurisdiction. Most insurers, which sell products like automobile and homeowner's insurance, operate nationally or regionally. Thus, diversity of citizenship often exists between insurer and insured. In addition, many insurance cases are relatively high-stakes, so that they meet the minimal amount-in-dispute requirement of diversity jurisdiction. In all cases, these cases could have been filed in state court, since the governing law is always state law, but have been filed in

[1] The federal government does regulate private group pension and health insurance plans under ERISA; we have examined ERISA litigation in Chapter 8.

federal court for convenience or because of a legal strategy on the part of the plaintiff to choose the most favorable court ("forum shopping").

Insurance contract cases are actually odd beasts; although they are contract cases, they are often triggered by a tort. When they are not triggered by a tort, they are typically triggered by an accident in which no one is liable (such as a fire that is not caused by arson.) Analytically, therefore, insurance contract cases are closer to tort cases, such as product liability cases, than they are to other kinds of business contract cases, such as a standard business breach-of-contract where business A doesn't deliver the goods to business B. The only circumstance where insurance contract cases are closer to business contract cases is when the insurance contract involves the performance of a business task; e.g. insurance taken out by a film company that the film will be completed on time.

17.2 Examining the Insurance Caseload

Americans are prodigious consumers of insurance. The U.S. accounts for about 25 percent of the world economy, but it buys about a third of the world's insurance [154]. This large consumption is reflected in a large number of insurance cases being brought in both state and federal courts. As Figure 17.1 shows, there was steady growth in the federal insurance caseload from the early 1970s to about 1990, after which it plateaued. Figure 17.2shows that the share of all cases rose until about 1990, then fell slightly (although the curve is noisy).

Insurance cases have a relatively low plaintiff win rate compared to some other types of cases, as shown in Figure 17.3. As the figure shows, the win rate fell from the high 40s to the the low 40s, in the period between 1979 and 2001. This is, I believe, because plaintiffs are sometimes individuals, and sometimes insurance companies themselves. (Insurance companies can sue one another in disputes over who should cover a particular adverse event, or in disputes over reinsurance.) An examination of the plaintiff strings in cases where the defendant is a large insurer, such as Allstate, reveals plaintiffs that are mainly individuals, who generally do worse in court than do corporations. Since some of the plaintiffs are in fact insurers (and the most-frequently-occurring plaintiffs are all insurers, as we will see below), individuals most likely do worse than is indicated by Figure 17.3, although I have no direct proof of this.

Table 17.1 shows that the overwhelming share of insurance cases, 89.0 percent, are filed under diversity jurisdiction. This is because insurance law and regulation has been a role that has been mainly taken on by the states, so that these diversity cases involve parties in different states, with a federal court applying state law. Very small percentages of insurance cases involve a federal plaintiff or defendant. A relatively small percentage of cases, 8.6 percent, fall under "federal question;" meaning that they are brought as the result of a dispute regulated by federal law.

Table 17.2 shows that a majority, 61.6 percent, of insurance cases terminate as the result of a pretrial motion. Plaintiffs win only 35.9 percent of these cases; thus it is likely that most of these cases are successful dispositive motions by the defendant, such as motion to dismiss or a motion for summary judgment. These pretrial motions are depressing the overall plaintiff win rate. Since many of the plaintiffs are individuals, many, if not most, of these motions are probably made by corporate insurers against individual plaintiffs. Plaintiffs do better when a judge or jury renders a verdict;

they win 54.7 percent of the 11.6 percent of dispositions that are jury verdicts and 48.8 percent of the 7.3 percent of dispositions that result from court trials. Thus, although plaintiffs do somewhat better in front of juries, juries do not appear to be overly slanted to plaintiffs. There are also some default judgments, 7.3 percent of all dispositions; the plaintiff wins the overwhelming majority of these, 91.4 percent, as is usual. All other dispositions are less common.

Table 17.3 shows that insurance cases are somewhat higher-stakes than the average case. The median amount demanded among insurance cases, $105,600, is only slightly higher than the $103,000 demanded among all cases, but the median amount awarded, $75,000, is higher than the $40,000 for all cases.

Table 17.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, Insurance Cases, Aggregate for Terminations in SY 1986-2001

	% of All Cases		% of Adjudicated		Plaintiff Win Rate	
Jurisdiction	Insurance	All	Insurance	All	Insurance	All
U.S. Govt Plaintiff	0.4	13.6	0.7	27.4	70.9	90.4
U.S. Govt Defendant	1.9	5.3	2.2	5.9	32.8	21.5
Federal Question	8.6	48.1	7.8	42.3	37.6	44.8
Diversity	89.0	33.1	89.4	24.4	46.9	61.6

17.3 Insurance Company F2000 Cases

Insurance contract cases are the second most-common case type in the F2000 database, after non-specialized business contracts (which are called "other contracts" by the Administrative Office of the Federal Courts (AO), that is, contracts that do not fall into a specific category chosen by the AO, such as insurance contracts, marine contracts,

Figure 17.1: Insurance Cases Filed by SY, 1971-2001

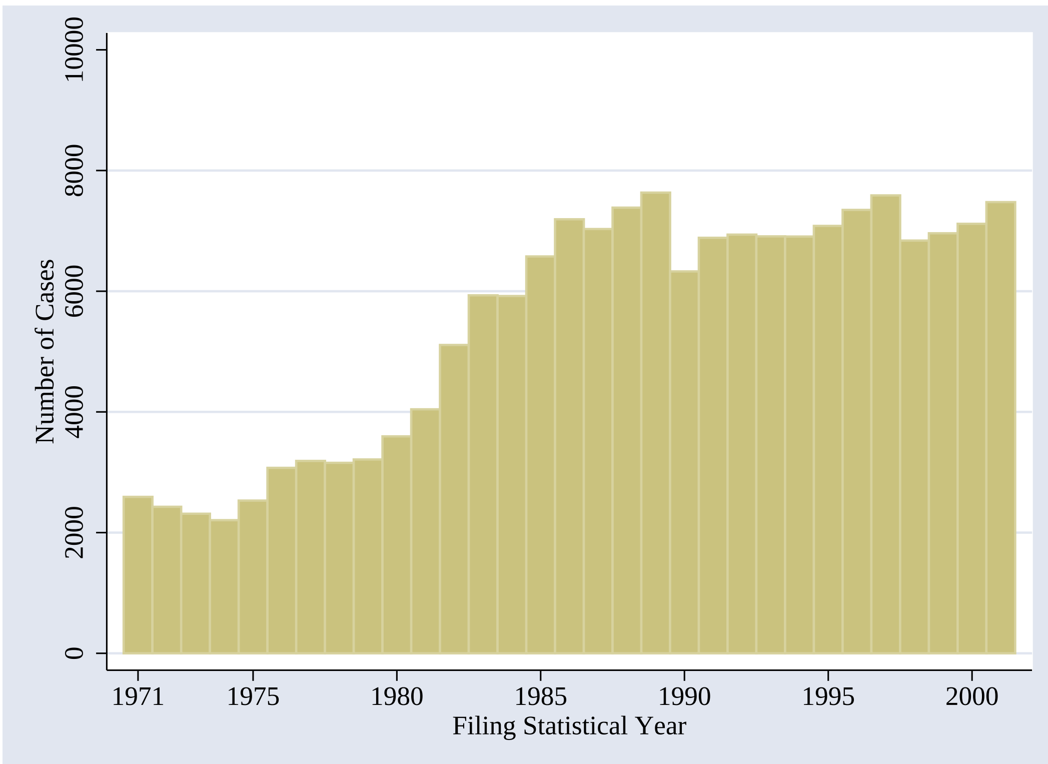


Figure 17.2: Insurance Cases Filed as a Share of Total Litigation, by SY, 1971-2001

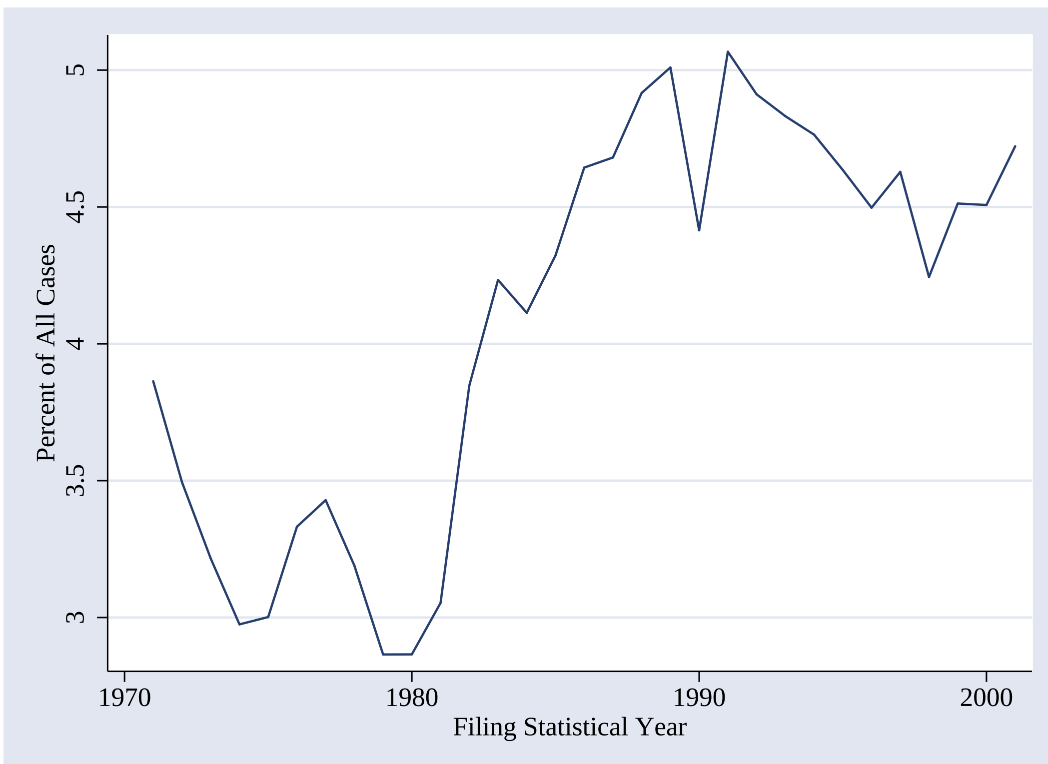


Figure 17.3: Percent of Adjudicated Insurance Cases Won by the Plaintiff, SY 1979-2001

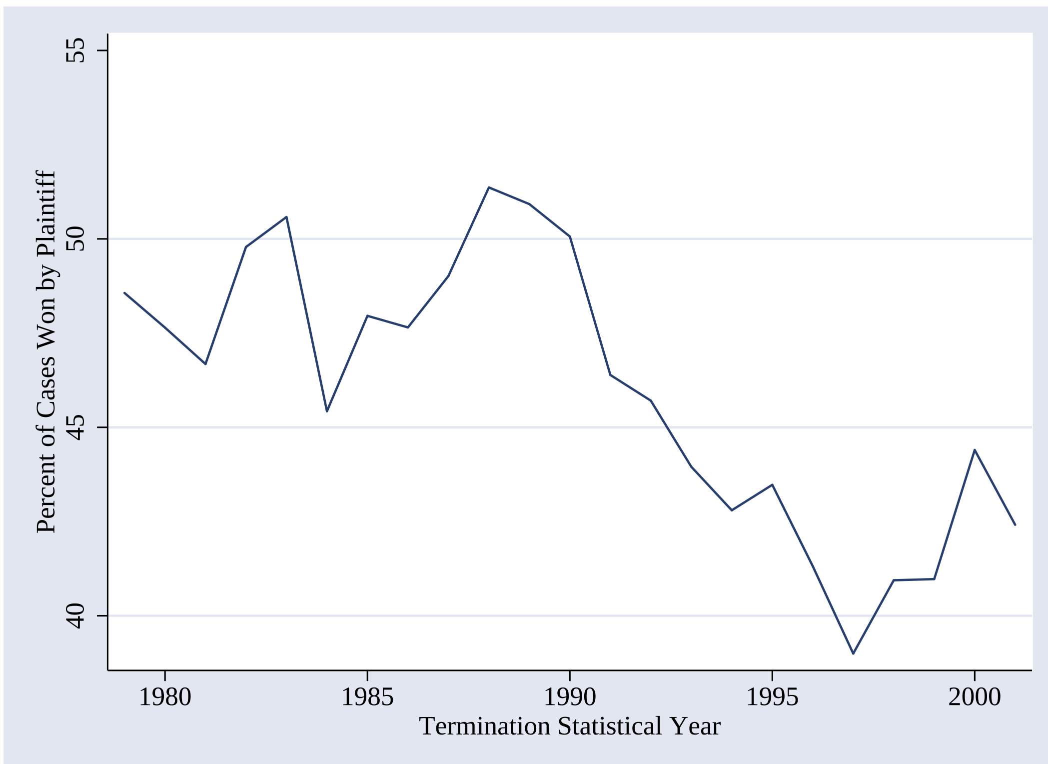


Table 17.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, Insurance Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Insurance	All	Insurance	All
Default Judgment	91.4	98.2	7.3	25.8
Consent Judgment	67.5	92.4	4.9	10.2
Judgment on Motion Before Trial	35.9	28.0	61.6	42.3
Judgment on Jury Verdict	54.7	46.6	11.6	7.7
Judgment on Directed Verdict	31.6	27.9	0.9	0.7
Judgment on Court Trial	48.8	48.5	7.3	5.1
All Other Dispositions	47.9	47.9	6.4	8.1
All Dispositions Combined	45.3	56.8	100.0	100.0
Consent & Default	81.9	96.6	12.2	36.1
All but Consent & Default	40.3	34.4	87.8	63.9

Table 17.3: Median Amounts Demanded and Median Judgments Received for Insurance Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate

	Insurance Cases	All Cases
Sample Size	164240	3894150
Median Amount Demanded	105.6	103.0
Sample Size (Amount Demanded)	62355	1434123
Median Amount Awarded	75.0	40.0
Sample Size (Amount Awarded)	10300	404512

or shareholder suits). Upon reflection, this is not surprising. Insurance companies, after all, are in the business of selling contracts; that is their primary business, selling contracts to insure, which is what policies are. The other part of their business is dealing with claims made under those policies. They are, in Galanter's [76] terms, the ultimate "repeat-players"; they sell so many similar contracts over time, devised by lawyers and financial people expert in the business, that they become extremely familiar with the types of claims made under the contract, and which claims lie on the border of being covered and not being covered. Some of these claims are litigated, especially if uncertainty about whether they are covered is high and the stakes are high (to justify the cost of the litigation for both parties).

On the other hand, many of the insurance companies' opponents in these lawsuits are "one-shotters", in Galanter's terms. They have had a serious accident or loss that has stakes large enough to be litigated, and may have not had such an event occur before. On the other hand, if the stakes are high, they may have an plaintiff attorney experienced in insurance cases on their side operating on a contingency fee basis, which levels the playing field to some extent.

The list of the top F2000 defendants in insurance contract cases is given in Table 17.4. A trade periodical, Corporate Legal Times, surveyed in-house legal departments at companies in 1995 and found that insurance companies dominated the list when the departments were ranked by number of attorneys [95]. Eight of the top twelve legal departments were those of insurance companies. Top-ranked Sears Roebuck had 666 attorneys, 572 of which worked for Allstate, a Sears subsidiary. 483 of these were claims attorneys. Generally speaking, a majority of the lawyers in an insurance company legal department are claims attorneys; this was the case at all the firms on the list except for Prudential. (Allstate was spun off from Sears later that year). These top legal departments are shown in Table 17.5. The list is dominated by insurance companies and the largest companies in the country, such as General Electric and Exxon (now Exxon Mobil).

Table 17.4: Top F2000 Insurance Defendants, SY 1971-1991

Company Name	Cases
Allstate Life Ins Co	3435
State Farm Life Ins Co	2464
Aetna Life and Casualty Co	1811
Travelers Corp	1728
Prudential Ins Co Amer	1624
Metropolitan Life Ins Co	1394
INA Corp	1063
USF&G Corp	859
St. Paul Cos. Ins.	856
Fireman's Fund Corp.	837

When one compares Tables 17.4 and 17.5, one finds there is no tight relationship between the order of the firms in the two tables, but this is to be expected, as the cases in our database represent an aggregate over a 20 year period, and the sizes of the legal departments are given at a single point in time. However, the dominance of insurance legal departments on a list of corporate legal departments is related to the large number of insurance contract cases in our database. Practically all insurance contract cases, by definition, involve an insurer, whereas a non-specialized business contract case can involve any kind of company or any individual.

Looking at the cases by economic sector within the F2000 database, we see that the two-digit sector representing insurance companies (Standard Industrial Code 63,

Table 17.5: Top 15 In-House Legal Departments, 1995

Company	Number of Attorneys
Allstate	666
Cigna	523
Liberty Mutual Group	513
State Farm	513
IBM	500
AT&T	485
General Electric	475
Prudential	468
Nationwide Mutual	465
Exxon	428
Travelers' Group	397
Aetna	368
General Motors	334
American International Group	300
Citicorp/Citibank	290

"Insurance Carriers"), is the most common SIC for both plaintiff and defendant in insurance contract cases, with 26,793 cases as plaintiff, and 12,402 cases as defendant. In both types of cases, SIC 64 ("Insurance Agents and Brokers") is the second most-common SIC, with 2,315 cases as defendant, and 876 as plaintiff. Insurers appear more frequently as defendant than plaintiff because they are typically sued when they deny coverage under a policy.

The most common plaintiffs, other than insurance companies and agents, are depository institutions (banks, credit unions, etc.), companies engaged in oil and gas extraction, non-depository credit institutions, general merchandise stores, and makers of industrial and commercial machinery, with 876, 175, 174, 172, and 171 cases respectively. However, this is vastly fewer cases then the insurance companies themselves, and in many of these cases an insurer is the defendant. This indicates that, of non-insurance litigants, insurance companies are engaged in the most litigation with financial institutions.

The most common defendants in insurance contract cases, other than insurance companies and agents, are general merchandise stores, makers of transportation equipment, depository institutions, oil and gas extraction companies, and industrial and commercial machinery makers, with 294, 229, 229, 197, and 162 cases respectively; most of the same SICs that are represented as plaintiffs. Again, the other party is quite often an insurance company.

17.3.1 F2000 Insurance Companies as Plaintiffs

In the F2000 database, Allstate is the plaintiff in a total of 1,606 insurance contract cases. A majority of these cases, 832, were dismissed, probably because they were settled. An additional 290 were judged on a pre-trial motion (such as a motion for summary judgment). Of the 429 cases that were reported as judged, Allstate won 326 of them, or 68.3 percent. This is somewhat lower than the overall win rate for F2000 plaintiffs, which was 79 percent, perhaps because Allstate is sometimes up against banks or other insurers with substantial resources. Of the 462 cases in which the nature of the judgment was reported, only 79 involved a monetary award to one party or the other.

One circumstance under which an insurance company can become a plaintiff arises when it tries to avoid providing coverage or a legal defense to an insured party. Typically, it does so by bringing an action for a declaratory judgment. An examination of the published cases indicates that Allstate prevails in the vast majority of such actions.

For instance, in Allstate v. Fox, 139 F.3d 911 (10th Cir. 1998), Allstate maintained (and sought declaratory judgment) that it did not have to extend coverage to Fox, because he had handed a baseball bat to someone who had used it to kill someone else (following a dispute and car chase). I interviewed attorney Steven E. Clark [36], who (along with attorney Mort G. Welch) represented the family of the murdered man. Clark said that his theory was that the act of handing the bat to the murderer could be viewed as negligence, and therefore insurable (as opposed to deliberate action, which is not). The action was brought because the insured party was not the murderer himself, but simply assisted by handing the bat over. The court found that since the killing was not an accident, and the policy only covered accidents (which are due to negligence of the insured), there was no coverage.

I also spoke to Welch [239]. He said that the courts are inconsistent on whether or not there is coverage for negligence for third parties that contribute to injurious acts (as, in this case, by giving them weapons, by negligent supervision of a minor (see in Allstate v. Steele below), etc.) This inconsistent behavior on the part of the courts was one of the reasons why they defended this case, hoping that the court would find that that the man who handed the bat to the murderer would be found negligent, and thus insurable.

I also interviewed attorney Gerald E. Durbin II [51], who represented Allstate in this case. He revealed some other details of the case. He noted that it was a case of "road rage" and the murderer and victim did not know each other. He also pointed out that Fox might have simply handed the bat over to use in self defense. The murderer went to prison, but Fox wasn't charged with a crime. Durbin noted that this case was, in his opinion, an attempt to shift blame onto a third party. In his view, this represented a tendency to seek someone to blame who has some resources to recover (here, an insurance policy).

Welch noted that insurance companies adapt their policies to the litigation environment. For instance, some lawyers have been arguing that their clients should be given coverage for acts that, although intentional in nature, lead to unintended consequences. Here, the subjective state of mind of the person committing the act is key. Allstate has attempted to limit such arguments by explicitly including a "reasonable person" doctrine into its policies. The policies say that it doesn't matter what the state of mind of the person committing the act is. What matters is what the expectation of a reasonable person would be (as to what the outcome would be).

I also discussed with Welch the genesis of volumes of litigation in the insurance area. He noted that there has been, in the 1990s, quite a bit of insurance litigation concerned with sexual abuse (see, for instance, Mueller [152]; Kisch [123]). He theorized that this was initially driven by the movement by victims of sexual abuse to name, and then often to confront (as part of the therapeutic process) and then sometimes to sue, the alleged perpetrators of the abuse. Ultimately, insurance companies become involved. After a while, this becomes an commonly-seen form of litigation, and victims of sexual abuse and their families are routinely referred to lawyers. Allstate v. Steele, below, is an example of such a case. My theory of the genesis of a new case type described in Section 4.9 would be applicable to this.

In Allstate v. Dunfee, 110 F.3d 67 (9th Cir. 1997), Allstate argued that it didn't have to defend or indemnify Dunfee, who was insured under a homeowner's policy, because Dunfee had shot another person, Mills. The district court, again, granted the judgment to Dunfee, and the appeals court affirmed. It is hard to understand why the Dunfee and Fox actions were even brought, because the insurance policy had a clear exception for willful actions that cause liability. The defendants believed that Allstate had created a "reasonable expectation" that events that occurred in the home (which this killing did) would be covered. The court didn't accept this.

There are quite a few more published cases in which Allstate attempts to avoid coverage of intentional criminal acts. For instance, in Allstate v. Steele, 74 F.3d 878 (8th Cir. 1996), the intentional act was a rape rather than a murder, and an additional twist was that the rape was committed by a minor against another minor, but again, Allstate prevailed. Here, Steele argued that she should have been able to recover because of the parents' negligent supervision of the minor, but the court did not agree with this argument. It viewed this argument as simply a way to get around that the behavior causing the action was intentional, not accidental, and therefore explicitly excluded from coverage by the policy in question (as in most coverage for liability).

Oddly, in these cases, both perpetrator and victim, or their next of kin, are defendants in a declaratory judgment lawsuit brought by the insurer, since both the perpetrator and the victim have an interest in seeing that the insurer pays out. These cases show us that even in cases which seem egregious and intentional, actions for coverage can still be brought, due to the fuzziness of the concepts in insurance law.

In Allstate v. Johnson, 94 F.3d 648 (8th Cir.1996), Allstate sought declaratory judgment that it would not have to defend and pay out to a policy holder whose policy had lapsed at 12:01 PM on a particular day, had gotten into an accident at 3:45 PM that same day, and had paid the premium after the accident. The district court granted the judgment to Allstate, and the appeals court affirmed. Again, it is hard to see why the policy holder even attempted to collect under these circumstances, and why these decisions were brought to court, or appealed. The answer may again be found in emotion and irrationality, or more charitably, in the desire of the aggrieved parties to "have their day in court," that is, a desire of parties for procedural justice even if what they feel is substantive justice is lacking [224]. Of course, for every case that we see like this that is fully litigated and published, there are probably a large number that are settled. By looking at published cases, we are likely to encounter some oddball cases.

Sometimes these declaratory judgment cases are less cut-and-dried and overlap with cultural issues. For instance, in Allstate v. Shelton, 105 F.3d 514 (9th Cir. 1997), Allstate sought a judgment that the uninsured motorist policy issued to Shelton did not cover Brittany Kohlbeck, the daughter of Shelton's girlfriend.

Brittany was hit by an uninsured motorist and subsequently died. At the time of the accident, Shelton and his child had been living with his girlfriend and all her children, including Brittany. The girlfriend became Shelton's wife, but not until after the accident. The policy covered Shelton and any "resident relative." The defendants argued that the meaning of "relative" should be extended to cover this living arrangement, but the courts did not accept this argument, and ruled for Allstate, relying on a dictionary definition of a relative as someone related by blood or marriage, which relationship did not exist at the time of the accident. This case illustrates that fuzzy language in contracts can lead to uncertainty, which leads to litigation. I would not be surprised if Allstate and other insurers modified its policy to more explicitly define "relative."

Sometimes the insurer may try to avoid covering a policyholder because it believes there has been fraud. For instance, in Allstate v. Shuler, 53 F.3d 331 (6th Cir. 1995), Allstate sought declaratory judgment that it did not have to cover the Shulers, who Allstate suspected had burned down their house for the homeowner's insurance money. After a trial, the court accepted Allstate's contention that there was arson, and the appeals court upheld this conclusion.

As noted in the section above on insurance company defendants, there are cases in which plaintiff and defendant are involved in a dispute as to who has to provide coverage. For instance, in Allstate v. Alamo Rent-a-Car, 165 F.3d 35 (9th Cir. 1998) the parties were involved in a dispute over the validity under Hawaii law of Alamo's "shifting clause", which shifted responsibility for insurance onto the renter's policy. The 9th Circuit found that this rested on an unresolved issue in Hawaii law, and certified the case to the Hawaii Supreme Court to decide the issue.

In Allstate v. Chubb, 141 F.3d 1173 (9th Cir. 1998), three insurers, Allstate, Chubb, and Fireman's Fund, were involved in a dispute over who would provide coverage. A Pete-Wilson-for-Governor volunteer had been involved in removing anti-abortion protesters from a church service sponsored by Wilson's campaign. They sued him, and the police, over the manner in which they had been removed. Chubb and Fireman's had insured the Wilson campaign, and Allstate had insured the volunteer. The dispute centered on whether or not the various policies covered the incident.

Insurance cases can arise as a result of many other types of legal action, since insurance companies typically offer liability insurance. For instance, in Allstate v. Occidental, 140 F. 3d 1, (1st Cir. 1998), Occidental had bought a liability insurance policy from Allstate. It subsequently suffered an unlawful discharge and sexual harassment verdict against it, and attempted to collect from Allstate. However, it waited until after the verdict was rendered to notify Allstate, almost three years after the initial lawsuit was filed. Allstate maintained that this violated a provision of the policy that required that it be given prompt notice (presumably so that its lawyers could be involved earlier on in the process). Allstate filed suit, seeking a declaratory judgment that it did not have to pay out under the policy. It won such a judgment from the district court, and the judgment was upheld. Seeking such a declaratory judgment places the insurance company in the role of plaintiff, but the effect is the same as if (in this case, for example) Occidental had sued Allstate to have the claim paid out.

Recently, insurance companies have begun to pursue doctors and other health-case providers for over-billing, and billing for procedures not actually performed. The Insurance Research Council, an industry group, claims that 40 percent of all auto accident claims involve some fraud [222]. Even if the actual number is half this (and one has a natural inclination to distrust numbers provided by actors that are not impartial), the number of potential disputes that this could generate is substantial. Allstate says that it is developing cases against doctors and clinics in many U.S. cities.

The insurance industry points out that doctors, lawyers, and patients have a common incentive to see that bills are inflated, because pain and suffering awards are typically based on a multiple of the medical bills, typically two or three times. Organizations of plaintiff attorneys and doctors claim that this litigation is a strategy is to restrain the pay-out of claims. Here, again, the stakes in any particular case for the insurer exceed that of the case itself. However, the pursuit of litigation can have a double effect on an insurer; while deterring fraud, it may also deter new business, since insurance customers do not want an insurer that makes a fuss over paying claims.

The use of litigation for over-billing represents a new, aggressive stance for the insurers, who include Allstate and State Farm. Previously, they would use allegations of over-billing in negotiations with claimants and their attorneys, or tried to deny the claims altogether. Large health-care organizations were found guilty of over-billing the Medicare and Medicaid programs, though, and this may have emboldened the private insurers (Treaster [222]). State action may have emboldened private action; we have seen this happen in antitrust as well.

17.4 Insurance Companies as Plaintiffs in RICO Cases

It is one of our central conclusions that changes in the social environment and new legal theories can create new types of lawsuits, and therefore new groups of cases. The Racketeer Influenced and Corrupt Organizations (RICO) statute allows plaintiffs to sue groups of people engaged in illegal activity, and recover treble damages.[2] This statute is very controversial. It has been used against diverse types of defendants, some of which were never considered by the lawmakers who wrote the statute, which was designed to fight organized crime.

Insurance companies have, in recent years, realized that the RICO statute is a powerful weapon against insurance fraud. In the past, civil RICO plaintiffs have waited until criminal RICO proceedings were over, figuring that they would be in a better position if they waited until a successful prosecution was concluded. But the

[2] I discuss RICO litigation in more detail in Chapter 19.

stakes to insurers are sufficiently high so that they are not waiting any longer[221].

Although the RICO statute was passed in 1970, it is only in recent years that it has come to be applied to insurance fraud. The framers of the RICO statute had organized crime and corrupt labor unions in mind when it was made into law, but it has been used, especially in recent years, against various collective criminal enterprises, especially those engaged in white-collar crime. The insurance industry seems to only have discovered the use of the RICO statute in the 1990s. However, once it was discovered that RICO could be used as a tool to fight groups of people committing insurance fraud, the insurance companies have pursued it with some fervor. This shows us that inventions of legal strategies can be quite valuable to companies, and once such strategies are developed, they spread like a social movement. Another reason that insurance companies have been using civil RICO is because it is increasingly difficult to get the attention of criminal prosecutors, who are busy with violent crimes and drug cases and for whom cases with only an economic impact may not be as high a priority [192].

Most large insurance companies have departments within them for investigating fraud. Sometimes these departments are actually mandated by state insurance law, in California, for example. For instance, Allstate has a 600-member department [192]. They are using sophisticated techniques, such using computers to search claims records to find claims that send up a red flag (e.g. minor accidents with major medical bills, or many claimants on the same grounds in the same city using the same doctors and lawyers). Industry associations have been developing such software, and distributing for free to member insurers [222].

The insurers have an incentive to sue, not only to recover damages, but to create a disincentive for others to perpetrate fraud. Thus we have a situation, which is common when large companies are litigants, where the stakes in any particular case go beyond the damages that can be recovered in that case. We have seen this, also, for instance, in copyright infringement cases. The plaintiffs in these cases (if they win) want to generate as much publicity as they can in order to discourage others.

Insurance companies sometimes use RICO and they sometimes use state-level anti-fraud statutes, depending on which statute is more favorable for a particular case, and which venue. For instance, California has an anti-fraud statute that, like RICO, allows for the recovery of treble damages.

Often, the RICO defendants are groups of fraudulent claimants, doctors, and lawyers. The lawyers allegedly help organize the claimants to engage in fraudulent activities (such staging auto accidents) and the doctors certify the claimants' injuries. In Illinois, one attorney settled with Allstate for over $3 million out of court, and actions continued against other defendants in the same suit. In Los Angeles, a judge awarded over $11 million to Allstate and State Farm in a similar case, which also involved staged accidents [192].

These RICO lawsuits do not only involve staged auto accidents. Increasingly, health insurance fraud is being targeted. For instance, in New York, Empire Blue Cross and Blue Shield sued a doctor and an acupuncturist for submitting claims under the doctor's name when only the acupuncturist was actually present during the treatment.

Occasionally, insurance companies will sue an employee or agent under RICO. One case concerned United Healthcare Corporation (UHC), which owned numerous HMOs. UHC was responsible for securing liability insurance for the HMOs, which it entrusted to the defendant, Benton. Benton instead pocketed the premium money, and was found liable under RICO.

Insurance companies have also been defendants under RICO. In one such suit, Forsyth v. Humana, 827 F. Supp. 1498 (D. Nev. 1993), Humana, a large health insurer, was sued for not passing along discounts that it had negotiated with hospitals. The plaintiffs, a group of policyholders, argued that Humana's advertising, in which it claimed that it would save money for policyholders, constituted fraudulent racketeering prohibited by RICO, in that it did not actually save the money for policyholders, but rather Humana pocketed a "kickback" (the discount) it had negotiated with the hospitals. The district court in Nevada, where the suit was filed, found that the RICO action was preempted by the McCarran-Ferguson Act, which leaves insurance regulation to the states, but the appeals court disagreed. The Supreme Court upheld the appeals court's decision, and found that RICO could be used [26].

RICO actions against insurers are not always brought by policyholders. Sometimes employees or agents of an insurer may bring such an action. For instance, Richard Sabo, an agent for Metropolitan Life, was fired by the company. He claimed that his firing was due to his refusal to participate in an illegal scheme in which agents "traded" insurance policies, in order to create new commissions. He also alleged that Metropolitan Life fraudulently misrepresented the nature of one kind of policy it offered. As a result of Sabo's action, insurance regulators in Pennsylvania ordered $1.5 million dollars in fines against the company. Sabo is working with attorneys to bring many consumer fraud cases against the insurance industry.

17.5 F2000 Insurance Companies as Defendants

Because of the large number of times that insurance companies appear as defendants, the insurance companies are large consumers of services from law firms. Because of the large amount of bargaining power that an insurance company can bring to a relationship with any particular firm, which is typically much smaller than it, insurance companies have been able to negotiate lower rates from law firms. So for instance, a partner at a law firm may bill an insurance company $130 per hour, while his colleagues in commercial law bill $250. Associates may be forced to defend insurance companies in relatively simple auto accident cases on a flat fee basis: for instance, $500 if the case is settled, $500 more if it is taken to arbitration, and $500 more for a trial. Insurance firms are using auditors to monitor the population of cases, keeping statistics on the average amount paid out after settlement or trial, the average age of the cases, etc. This activity is similar to the auditing that insurance companies perform on doctors at HMOs. It may result in more of a regularization and bureaucratization of the litigation process. And they are bringing more of the work in-house, although there are both advantages and disadvantages to this (in-house attorneys have no incentive to prolong cases or to do unnecessary work, but outside attorneys give the companies the ability to shop in the market for legal services [191]).

An examination of the published cases for the most common defendant in the database, Allstate, reveals that a large number of these cases result from claims in automobile accidents. This is not surprising because Allstate is one of the largest issuers of car insurance. Often we find another insurance company as one of the plaintiffs, especially if there is a dispute over who is liable and therefore which insurance company is responsible to pay for damages.

Allstate is the defendant in 3,435 cases in the database. Almost half of these cases, or 1829, were dismissed (presumably, almost all of these were settled). 322 were judged on a pretrial motion, and 157 had a jury verdict. Of the 630 cases in the database for which a judgment was reported, Allstate won 394, or 62.5 percent. There was a monetary award in only 153 of the cases, out of the 621 for which the nature of the judgment was reported.

Some of the cases against Allstate are class actions. For instance, in Locke v. Allstate Ins. Co., 1998 U.S. App. LEXIS 7816 (10th Cir.), the plaintiff maintained that Allstate had breached its insurance contract with her and other similarly-situated Oklahoma homeowner's policy owners by refusing to provide replacement-cost coverage under her policy. The policy had changed, but Locke claimed that she did not receive notice.

Insurance companies themselves buy insurance, called "reinsurance," from other companies. Sometimes the reinsurance contracts themselves lead to disputes. For instance, in Universal Reinsurance Corp. v. Allstate Ins. Co., 1994 U.S. App. LEXIS 4828 (7th Cir.), the parties disputed whether or not an arbitration clause in a reinsurance contract between them had been invoked in a timely manner.

17.6 Oil Companies as Insurance Plaintiffs

Companies engaged in oil and gas extraction are the third most common plaintiffs in insurance contract cases, with 175 cases. Oil and gas extraction is an inherently risky activity, and these companies regularly buy insurance. When there are accidents, they are often very serious, because the petroleum is flammable. Even if there is no injury or death, because of the high value of the petroleum that is extracted, accidents can be very costly. Therefore the stakes can be high, and therefore litigation is more likely in the event of a dispute. Typically the oil and gas company is the plaintiff in a situation in which an insurance company is unwilling to cover it for some liability.

For instance, in Enron Oil v. Walbrook Insurance, 132 F. 3d 526 (9th Cir. 1997), Enron sued a large number of insurance companies. Another oil company, Ashland Oil, had sued Enron because Enron had injected a substance into a pipeline carrying oil to Ashland's refinery, and Ashland alleged that this substance had caused damage, including explosions and malfunctions of the pipeline. Enron settled the case for $5 million prior to trial, and its primary liability insurer contributed $500,000 to the cost of the settlement. Its excess liability insurers refused to participate in the settlement. The excess liability insurers maintained that they were not obliged to provide coverage due to a "pollution" exception in their policies, and by public policy in Montana disallowing insurance policy coverage for intentional torts. The pollution exception excluded coverage for damage caused by pollution, seepage, or contamination. The appeals court found that coverage was not excluded.

Environmental regulation has created new expenses for those who despoil the environment, whether accidentally or intentionally. Because oil companies deal with potentially toxic petroleum and associated chemical products, they are more likely to run afoul of these laws than are companies engaged in cleaner businesses. Adverse environmental events can occur anywhere along the path that petroleum takes from being taken out of the ground to where it is delivered to the final customer. Because oil companies often have insurance against such environmental liabilities, these events often lead to disputes over insurance policies.

For instance, in West Bay Exploration v. International Surplus Lines Insurance, 1989 U.S. Dist LEXIS 17026, West Bay operated several oil wells in the northern part of the lower peninsula of Michigan. The Michigan Department of Natural Resources found that these wells were emitting toxic substances, and ordered that they be shut down and decontamination be undertaken, at West Bay's expense. The defendants were West Bay's insurance companies, and West Bay sought declaratory judgment that the companies should compensate West Bay for the damages. The owner of West Bay did not initially attempt to collect on these policies, since his insurance agent (who the court said represented him, not the companies) said that he wouldn't be covered and his premiums would likely rise if he filed a claim. The lawsuit, filed about two years after the contamination incident, was his first actual attempt to collect. The district court agreed with the insurance companies that the claim was submitted too late, not allowing the insurers to fully investigate it.

17.7 Insurance Contracts Viewed with the Adjacent Word-Pair Frequency Method

The adjacent word-pair frequency method revealed that almost all of the of the top plaintiffs and defendants in insurance cases are (not surprisingly) insurance companies. The top plaintiffs are shown in Tables 17.6 and 17.7; the top defendants, in Tables 17.8 and 17.9. Manual examination of the party strings reveals that the opposing party to an insurance company party is usually an individual, and sometimes a company. Many of the cases in which an insurer is the plaintiff are likely declaratory judgment cases, in which the insurer is trying to establish that it is not required to provide coverage for a particular adverse event.

Table 17.6: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Insurance Cases (Part 1 of 2)

1	State Farm	26	Hartford Fire Insurance
2	Allstate Insurance	27	City of ...
3	St Paul Fire and Marine	28	Essex Insurance
4	Prudential Insurance	29	John Hancock Mutual Insurance
5	Aetna Casualty	30	Safeco Insurance
6	Metropolitan Life	31	Transamerica Insurance
7	Liberty Mutual	32	Home Insurance
8	Aetna Life Insurance	33	New England Mutual
9	Provident Life	34	Cincinnati Insurance
10	Travelers Insurance	35	American Home Assurance
11	Safeco Insurance	36	Fireman's Fund
12	Golden Rule Insurance	37	Scottsdale Insurance
13	American States Insurance	38	New Hampshire Insurance
14	Nationwide Mutual Insurance	39	Ohio Casualty
15	National Union Fire Insurance	40	Travelers Indemnity
16	US Fidelity and Guaranty	41	Reliance Insurance
17	Auto Owners Insurance	42	Massachusetts Mutual
18	Equitable Life Insurance	43	Sphere Drake Insurance
19	National Union Fire Insurance	44	Guardian Life Insurance
20	Home Insurance	45	Home Indemnity Co.
21	Continental Insurance	46	American Home Assurance
22	Paul Revere Life Insurance	47	West American Insurance
23	Commercial Union Insurance	48	State Auto Insurance
24	New York Life	49	Hartford Accident
25	Continental Casualty	50	USF&G

Table 17.7: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, Insurance Cases (Part 2 of 2)

51	Continental Casualty
52	Hartford Insurance
53	Farmers Insurance
54	Royal Insurance
55	Principal Mutual
56	Great American Insurance
57	Sears Roebuck
58	General Accident
59	The Home Insurance
60	Old Republic Insurance
61	Lexington Insurance
62	Twin City Fire Insurance
63	Maryland Casualty
64	Federal Insurance
65	Western World Insurance
66	Zurich Insurance
67	Royal Insurance
68	Mutual Life Insurance
69	Sentry Insurance
70	Argonaut Insurance
71	Great West Life Insurance
72	United Pacific Insurance
73	North River Insurance

Table 17.8: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Insurance Cases (Part 1 of 2)

1	State Farm	24	John Hancock Mutual Insurance
2	Allstate Insurance	25	Home Insurance Company
3	St Paul Insurance	26	Fireman's Fund Insurance
4	Aetna Casualty	27	Safeco Insurance
5	Prudential Insurance	28	Continental Casualty
6	Liberty Mutual	29	US Fidelity and Guaranty
7	U S	30	Bankers Life
8	Aetna Life	31	Reliance Insurance
9	Provident Life	32	Travelers Indemnity
10	Unum Life	33	Hartford Insurance
11	Metropolitan Life	34	Guardian Life Insurance
12	Blue Cross	35	Golden Rule Insurance
13	Travelers Insurance	36	Auto Owners Insurance
14	Equitable Life	37	Continental Casualty
15	Paul Revere Life	38	New England Mutual
16	Mutual Of Omaha	39	American General Life
17	New York Life	40	J C Penney Life Insurance
18	Hartford Fire	41	Federal Insurance Co.
19	National Union Fire Insurance	42	Hartford Accident
20	Nationwide Mutual Insurance	43	Nationwide Insurance
21	Continental Insurance	44	Safeco Insurance
22	Commercial Union	45	American Home Assurance
23	Farmers Insurance	46	Great American Insurance

Table 17.9: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Insurance Cases (Part 2 of 2)

47	CNA Insurance
48	American Family Insurance
49	Maryland Casualty Co.
50	American States Insurance
51	Connecticut General Life Insurance
52	Sun Life Assurance
53	New Hampshire Insurance
54	Underwriters at Lloyd's of London
55	Commercial Union Insurance
56	Transamerica Insurance
57	Crown Life
58	Monumental Life
59	General Accident Fire and Life
60	Northwestern Mutual Insurance
61	Colonial Penn Insurance
62	Royal Insurance
63	USF&G Insurance
64	John Alden Life
65	Franklin Life
66	Old Republic Insurance
67	Monarch Life
68	Mutual Benefit Life
69	Home Indemnity Co.

Chapter 18

Shareholder Suits

18.1 Legal Background

As a result of widespread questionable practices in the sale and trading of securities in the early part of the 1900s, leading up to the Great Depression, Congress and many of the states passed laws regulating securities, and securities regulation is now extensive. The Securities Act of 1933 prohibited fraud in the sale of a security, and required companies selling securities to make specified financial disclosures. The Securities Exchange Act of 1934 established the Securities and Exchange Commission (SEC), with the mission of regulating the sale and trading of securities. There were also numerous later acts regulating the behavior of brokers and dealers in securities.

Public companies are required to make certain regular disclosures to the SEC, which are publicly posted. Accounting is required to be accurate. Trading on inside information became illegal, possibly punishable by imprisonment. It also became illegal to make fraudulent statements in connection with the sale of a security, or to withhold information that a buyer would need to exercise good judgment on the purchase of a security.

The SEC undertakes enforcement action in cases of insider trading, fraudulent accounting, and securities fraud. SEC enforcement actions occur both in federal court and administratively. However, SEC actions are not the subject of this chapter; rather, private actions by shareholders are. Investors that feel that they have been misled or that there has been a breach of fiduciary duty by corporate officers can sue these officers and the underwriters and accountants associated with the company in question, under the various securities acts.

A sharp increase in the number of shareholder lawsuits (see Section 18.2) in the 1980s and 1990s led a Republican Congress to pass the the Private Securities Litigation Reform Act of 1995, over a Clinton veto. This was a complex act with various provisions, but the net effect was to make the playing field less favorable to shareholder plaintiffs (and their attorneys) and more favorable to corporate officers, accountants, and underwriters. One of the most important aspects of the act was the creation of a "safe harbor" for forward-looking information published by a company. If such information is identified as forward-looking at the time of publication or oral communication, or the company did not know that it was false, the company and its officers are protected from private civil liability for (incorrect) reliance on such information. The complainant must show that the such statements were made with actual knowledge of their falsity, i.e. they were deliberate lies. However, forward-looking financial projections are not protected. Underwriters are only protected by the safe harbor insofar as their statements are "derived from" statements made by the company. The requirements for a pleading in a shareholder suit were also made unusually strong;

the pleading must contain alleged facts that lead to a strong conclusion that a defendant acted with a state of mind in which he made statements that he knew were untrue. If the pleading is not strong enough, discovery may not proceed, and the case will be dismissed before the plaintiffs can use company documents obtained through discovery to file an amended complaint.

18.2 Examining the Shareholder Caseload

As shown in Figure 18.1, the number of shareholder suits filed started at a modest level of about 50 per statistical year in the early 1970s, and then fell to almost none from the mid 1970s through the early 1980s. After that, the number of suits skyrocketed and has most recently been fluctuating between 400 and 500 per year. This number may also go up as a result of all the investors who were hurt in the so-called "dot-bomb" debacle in which the NASDAQ crashed and billions of dollars of market capitalization (paper value of companies) was lost. Even at its present level, the number of suits represent only a very small percentage of federal civil litigation.

Figure 18.2 shows that in the 1970s and early 1980s, these suits never represented more than one-tenth of one percent of all civil litigation, and currently they represent only about one-quarter of one percent of all civil litigation. However, this almost certainly understates their importance, in that the defendant in these lawsuits are always public companies that stand to pay large settlements if they are found to have misled investors. This is a good illustration of the general principle that the raw count of the number of lawsuits is not the relevant factor in determining their impact on society, since lawsuits can vary enormously in terms of what is at stake. Much greater resources are typically brought to bear on high-stakes litigation (and as we will see, shareholder suits are much higher-stakes than average), which is one reason why shareholder suits have drawn a lot of attention despite their modest number. Another reason is that they tend to be concentrated in high-tech industries, and the public and the press finds this sexy. A third reason is that powerful actors (prominent companies and their executives) tend to be targeted, and they are in a position to draw attention to these suits. Along with all this public attention has come controversy, and debates between the lawyers bringing the suits and the typically conservative, laissez-faire-oriented academics, policy advocates, and policymakers that oppose them.

Figure 18.3 shows that the number of shareholder suits won by the plaintiff fell somewhat between the early 1980s and 2001; win rates were mainly in the 40-50 percent range in the early part of the period and fell to the 30-40 percent range. Thus it has never been particularly easy to win these suits, and the decline in the win rate coincided with the large increase in the number of suits. It may be worth it for plaintiffs to gamble on bringing one of these suits, because they are relatively high stakes, and plaintiffs have much to gain (recovery of at least some of the value of lost investments), while what they have to lose primarily are legal fees (which of course may be substantial, especially since these cases are often complex and hard to prove).

Table 18.1 shows that no shareholder suits involve federal parties, because the federal government doesn't run private companies or invest in them. Most shareholder suits– 67 percent– are filed under diversity jurisdiction. The remaining 33 percent are brought as a federal question. When diversity jurisdiction is used, state securities law is primarily being used (in the view of the attorney for the plaintiff). When it is a federal question, federal securities law is primarily being used. Both state and federal law govern securities transactions, which makes for a complex legal landscape.

As Table 18.2 shows, most– 57.5 percent– of shareholder suits are resolved by a pretrial motion. Plaintiffs do not fare well here; they only win 19.9 percent of these cases, which means that most of these are successful plaintiff motions, like motions to dismiss or motions for summary judgment. Plaintiffs do better after trials; when a decision is rendered after a trial before a judge (such a decision constitutes 9.7 percent of all dispositions), plaintiffs win 52.2 percent of the time; they do better in the 6.8 percent of dispositions involving a jury trial, in which they win 60.0 percent of the time. Thus. the system appears to be weeding out the cases that judges find to be of less merit earlier in the process, and the trials are competitive. At the other extreme, plaintiffs win 96.8 percent of the 9.1 percent of dispositions that are default judgments, and 76.2 percent of the 6.1 percent of dispositions that are consent judgments.

As Table 18.3 demonstrates, shareholder suits, as we might expect, are considerably higher-stakes than the average case, which is one reason why they get more public attention, despite their small numbers. The median amount demanded in a shareholder case is $257,900, as opposed to $103,000 in all cases. The discrepancy is higher when you examine awards; in shareholder cases, the median amount awarded (when there is an award) is $217,500, while the corresponding figure for all cases is only $40,000.

Figure 18.1: Shareholder Suits Filed, SY 1971-2001

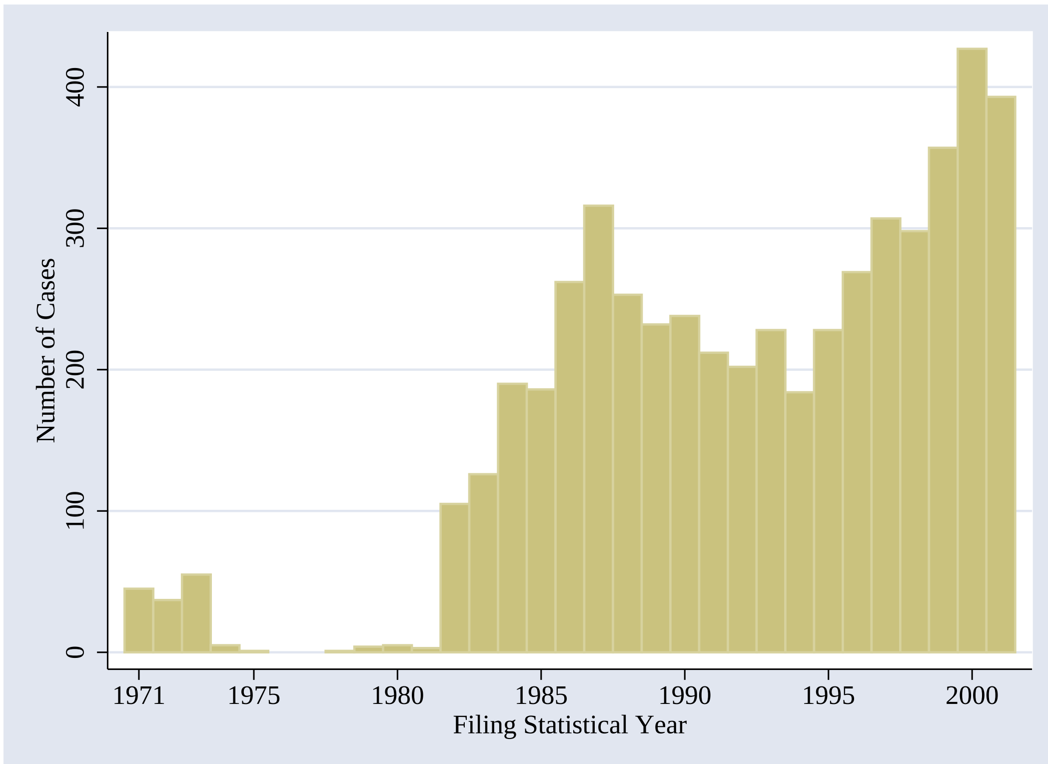


Table 18.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, Shareholder Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		% Adjudicated		Plaintiff Win Rate	
Jurisdiction	Shareholder	All	Shareholder	All	Shareholder	All
U.S. Govt Plaintiff	0.0	13.6	0.0	27.4	0.0	90.4
U.S. Govt Defendant	0.0	5.3	0.0	5.9	0.0	21.5
Federal Question	33.0	48.1	33.6	42.3	34.3	44.8
Diversity	67.0	33.1	66.4	24.4	42.5	61.6

Figure 18.2: Shareholder Suits Filed as a Share of All Litigation, SY 1971-2001

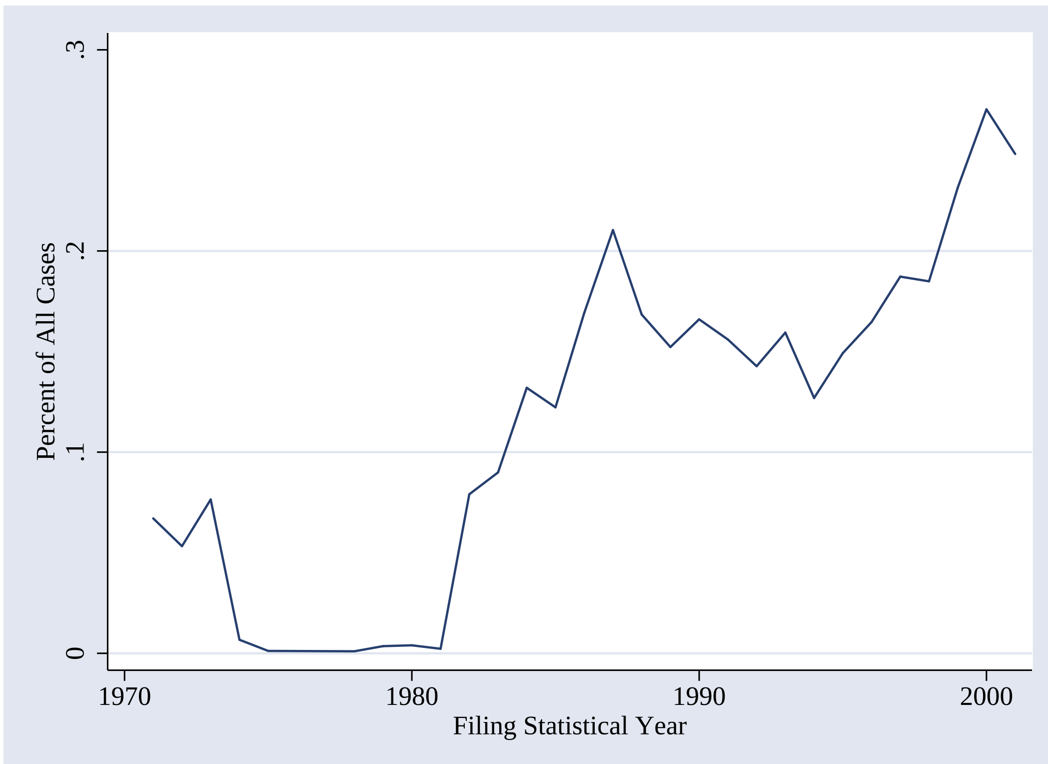


Figure 18.3: Percent of Adjudicated Shareholder Cases Won by the Plaintiff, SY 1979-2001

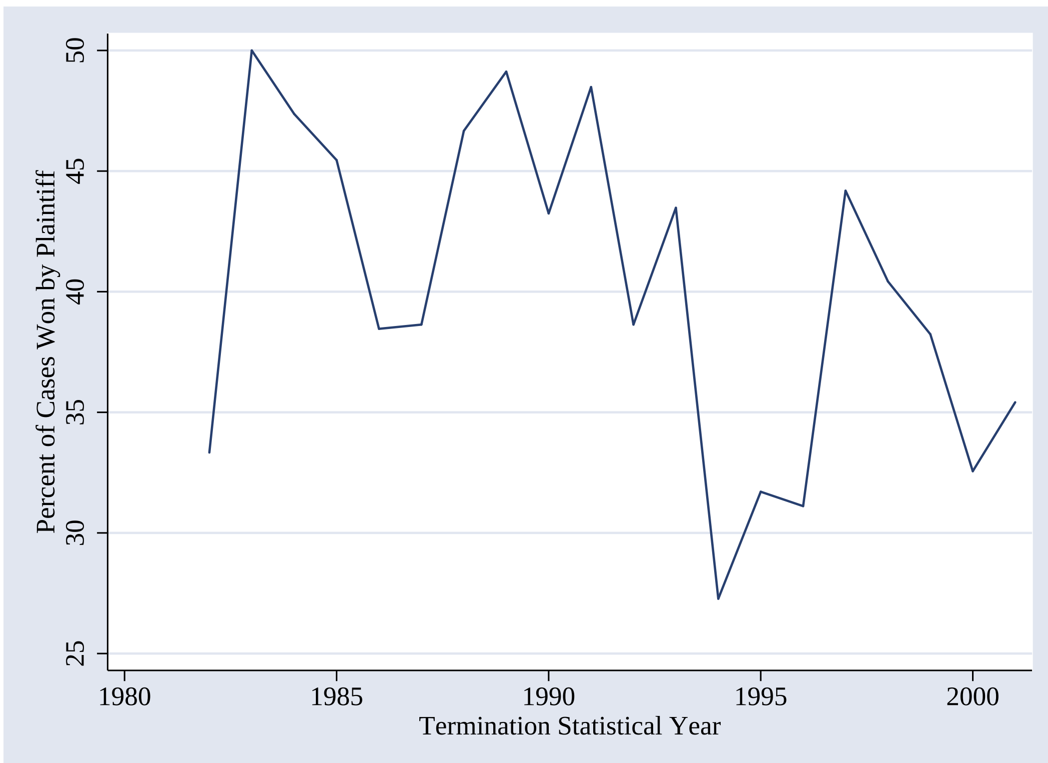


Table 18.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, Shareholder Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	Shareholder	All	Shareholder	All
Default Judgment	96.8	98.2	9.1	25.8
Consent Judgment	76.2	92.4	6.1	10.2
Judgment on Motion Before Trial	19.9	28.0	57.5	42.3
Judgment on Jury Verdict	60.0	46.6	5.8	7.7
Judgment on Directed Verdict	37.5	27.9	1.2	0.7
Judgment on Court Trial	52.2	48.5	9.7	5.1
All Other Dispositions	50.7	47.9	10.6	8.1
All Dispositions Combined	39.3	56.8	100.0	100.0
Consent & Default	88.6	96.6	15.2	36.1
All but Consent & Default	30.4	34.4	84.8	63.9

Table 18.3: Median Amounts Demanded and Median Judgments Received for Shareholder Cases and All Cases in Thousands of 2001 Dollars, 1971-2001 Aggregate

	Shareholder Cases	All Cases
Sample Size	4699	3894150
Median Amount Demanded	257.9	103.0
Sample Size (Amount Demanded)	1460	1434123
Median Amount Awarded	217.5	40.0
Sample Size (Amount Awarded)	259	404512

18.3 Understanding the Recent Explosion in Shareholder Litigation

As we have seen above, there was a large increase starting in the early 1980s in the number of shareholder suits filed. As some observers have pointed out (e.g. Seligman [197]), the proper metric of activity in this area is not the number of suits filed, because there may be multiple suits filed against the same company. Seligman and others point out that the volume of securities litigation, no matter how you count it, is minuscule compared to the number of companies operating in the United States, which is in the millions (although most of these companies are very small).

Clearly, though, the focus on high-tech firms by a relatively small number of firms specializing in suing them, as we will see below, is a new phenomenon. Application of the single word frequency method to these cases yielded the following results. The plaintiffs were overwhelmingly individuals, with some institutional investors represented. However, many of these individuals were lead plaintiffs in class actions orchestrated by law firms specializing in shareholder suits. In such suits, the class is composed of all people who owned stock in the company during a certain period in which alleged acts of malfeasance occurred. This is referred to as the "class period."

We may see a shift toward institutional investors since the Private Securities Litigation Reform Act of 1995 mandates a lead plaintiff be the shareholder who has the largest stake in the outcome of the litigation, and this is likely to be an institutional investor. In addition, the lead plaintiff selects the attorneys, so attorneys initiating a case may lose control of it if they do not work with the lead plaintiff. We see the presence of institutional lead plaintiffs, already, in the presence of the word "capital" in the name of the plaintiff in 12 cases, and the word "holdings" in 5. The provision of such a lead plaintiff was a response to perceptions of "lawyer-led" litigation, with lawyers maintaining stables of "professional" plaintiffs, some of whom were alleged to have bought stock in the sued companies for the purpose of bringing suit [64].

Milberg Weiss, the best known of the firms specializing in shareholder class actions, itself filed 193 cases between 1988 and 1995 [189]. This period constitutes approximately the first six years of a period of large numbers of initial public offerings (IPOs), many of which were associated with high-tech and many of which had high stock price volatility. This IPO boom constituted a change in how business operates in America, which, along with the legal innovations pioneered by firms like Milberg Weiss, has generated the volume of litigation that we observe.

Milberg Weiss was one of the firms involved in litigation against officers and professionals (such as accountants and lawyers) involved in the failures of savings and loans as a result of their crisis in the 1980s [237]. Much of this litigation alleged violations of RICO. This made Milberg Weiss more aware of the fiduciary responsibilities of such defendants and may have inspired more activity in the area of shareholder suits, although the firm had been pursuing the latter types of suits as well all along. Thus, the S&L crisis may have played an indirect role in producing a higher volume of shareholder suits. Typically, accountants and lawyers are accused of "aiding and abetting" malfeasance and are alleged to also be liable. However, a Supreme Court decision in Central Bank v. First Interstate Bank, 511 U.S. 164 (1994), found that "aiding and abetting" did not lead to liability under the Securities Exchange Act of 1934 [99]. This may reduce professionals' exposure.

Ironically, the movement toward accountability from public institutions of the

Reagan-Bush era, which seems to have carried over to the Clinton era (note the "hard-headed" moves toward demanding fixed, measurable outcomes from police, schools, and non-profits from all sides of the political spectrum, and the rhetoric of "personal responsibility") can itself lead to lawsuits. It is not simply bad luck if a stock's price falls; it must be someone's fault.

In 1996, Milberg Weiss represented the plaintiffs in 57 percent of shareholder suits in the country. Milberg Weiss has racked up a total of 2 billion dollars in settlements, and has pocketed a share of these settlements, up to 30 percent, as its contingent fee. Defendants have included prominent companies like America Online, which paid a $35 million settlement, a share of which was split between Milberg Weiss and other plaintiff attorneys. In addition, Milberg Weiss tends to use part of the proceeds from its class actions to fund future ones, a pattern that is typical of law firms that engage in class actions. Bill Lerach, the senior partner of the firm, and the most publicly-visible figure, is hated by many high-tech executives [55].

The Milberg Weiss web site (www.milberg.com) lists current shareholder suit class actions that it has filed and the reasons for their filing. When I checked the site[1] it listed over 60 "recently filed" actions, most of which were against technology-based companies, many of which are quite prominent. Many of the actions involved allegations of overly optimistic statements or accounting fraud that inflated stock prices, enabling insiders to take profits, or of incompetence and/or fraud that led to sudden drops in the stock price. Some of the actions name company executives, accounting firms or underwriters (brokerage firms underwriting stock issues) as co-defendants.[2]

[1] On 7/29/99.

[2] Executives have an incentive to commit accounting fraud because executive bonuses are often

Often, firms engage in complex financial manipulations, which plaintiffs then attempt to characterize as encouraging or abetting fraud. The financial relationships with franchisees that Boston Chicken maintained are an example of this, as alleged in Genna v. Boston Chicken.[3] In this case, the plaintiffs alleged that Boston Chicken used the franchises to make its financial situation look better than it actually was.

In another case, Sapir v. Delphi Joint Ventures,[4] the investment firm Hambrecht and Quist (perhaps the best-known venture capital firm in Silicon Valley) and the accounting firm Ernst and Young were both named as co-defendants. This concerned a firm named BMJ Medical Management, which was a company that had made an IPO and then had gone bankrupt, and which (according to the complaint) the Wall Street Journal had named the worst performing IPO of the year in 1998. Some of BMJ's directors were also named as co-defendants. BMJ had been in the business of acquiring medical practices (of physicians providing musculoskeletal and orthopedic care) and managing them. This activity was troubled, however; BMJ had been sued by some of the doctors in the medical groups that it had acquired and managed. Since BMJ was bankrupt, it was not named as a defendant. The defendants were accused of endorsing BMJ's allegedly fraudulent representations about its financial condition and prospects

On Milberg's web site, Lerach writes that there is a major decline in the quality of financial reporting by companies. Lerach's piece cites some research that says that companies making IPOs tend to exaggerate their pre-IPO performance, and those that exaggerate it the most tend to have the worst post-IPO performance.

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tied to quarterly results.

[3]Dist. CO, case no. 97-WM-1435, complaint posted on securities.stanford.edu.

[4]Dist. FL (S), case no. 99-CV-08086, posted on securities.stanford.edu.

Milberg Weiss maintains a web site (securities.milberg.com) that gives access to documents filed in cases, pursuant to a local rule of the federal district court of the Northern District of California. There is also an opposing web site maintained at Stanford (securities.stanford.edu) that gives the opposing point of view (and is supported by large high-tech companies, such as Apple, Netscape, and Sun), and also contains the filings. This latter site also contains a running total of the percentage of cases that allege improper insider trading and the percentage that allege accounting fraud. On the day I viewed the site,[5] they were 55 and 59 percent, respectively.

Clearly this is a situation in which an entrepreneurial law firm has carved out a niche for itself, and has made a significant impact on the number of suits filed. This reminds us that law is a creative field, and new theories and tactics– we can think of them as "legal technologies" or legal innovation– can transform an arena of action. Of course, the environment must be right, and Milberg Weiss has exploited an environment of extreme excitement and volatility surrounding technology stocks. We saw a similar situation with respect to class-action employment suits brought against grocery and department stores in Section 6.4.2.

The public policy discussion tends to focus on the negative aspects of such legal innovations that lead to new groups of suits. The greed of the plaintiff bar, the supposed speciousness of the allegations, and the waste of resources spent in legal proceedings are usually focused on by critics. On the other hand, the suits may make corporate agents more honest, which they have not always been known for. Such honesty can reduce the principal-agent problems that exist in most publicly-held companies.

[5] July 29, 1999

Because many of these cases are class actions, any particular firm is not likely to be subjected to very many cases as defendant, since all the grievances of the individual shareholders can be subsumed into the class action. Thus, we don't see large counts of cases for individual defendants in our database. In fact, when we do see multiple filings, these are typically consolidated into a single class action by the court system.

Applying the single word frequency method, we find that the top two most frequently occurring words were "Centennial," which appears 21 times, and "PLC," which appears 17 times. The cases with the word "Centennial" in them all refer to a firm named Centennial Technologies, which is a maker of add-in cards for computers, based in Massachusetts. The suits against Centennial, all brought in 1997, alleged that the company's chairman inflated sales reports above their true value; they were settled [22]. The suits with the word "PLC" in them all (but one) refer to PLC Systems, which is a Massachusetts company that makes high-technology medical devices. PLC Systems' future depended on FDA approval of a laser that it had developed to treat heart disease. Shareholders charged that the company had withheld information from them that was relevant to the FDA approval process. The suits were filed after the company failed to win approval for its laser, which led to a sharp drop in its stock price. It later did win approval.

This latter illustrates how many cases get started. A precipitous drop in a stock price usually indicates some unanticipated bad news for company. (If the news had been anticipated, the price would have already been adjusted.) This leads to a phone call from a stockbroker to a lawyer. The lawyer investigates and determines whether he thinks there are grounds for a suit (in that this bad information had been known to insiders at the company and should have been disclosed to the public). Shareholders are located to participate in a class action, and the suit is subsequently filed [55]. Shareholders can often be convinced to participate, because they have been burned, and often distrust insiders, anyway. We can expect the number of these suits to grow with the technology sector as a whole.

There is a widespread perception in the investor community, and on the part of many students of corporate governance, that companies are not responsible to their shareholders. It is felt that companies are actually controlled by their management rather than by their shareholders, and boards of directors largely exist to rubber-stamp managers' decisions. For instance, there are few controls on executive pay, which is often not tied to performance. Shareholders have, like other organizational actors, in Hirschman's terms [106], the options of "exit" (that is, selling their stock), "voice" (communicating their concerns to management), or loyalty (keeping quiet, holding onto their stock, in an expression of confidence with management). Litigation represents a fourth strategy which we might call "recovery" in which shareholders sue to recover value that they believe was fraudulently taken from them. In addition, the prospect of litigation may have unobservable "shadow" effects; that is, managers may be less likely to act fraudulently if they see others being punished for it, much as companies may not discriminate on the basis of race or sex if they see other companies punished for such activity. Such a shadow effect of shareholder suits has the potential to be the second strong force (after "exit") disciplining managers.

If these shadow effects exist in the shareholder domain, they may not have been operating very strongly in the late 1990s, during the technology boom. Two related phenomena emerged during this period that promised to create a new congregation of shareholder cases. The first phenomenon was the speculative bubble in technology stocks. During this bubble, the value of Internet-related stocks vastly increased, to the point that valuations were not being based on anything real, like actual cash flows coming into companies, but on pure speculation about the future. When the bubble burst in 2000 and the NASDAQ, on which many technology stocks are traded, collapsed, recriminations were inevitable, and some of these recriminations led naturally to litigation. A bubble is based partly on the confidence of investors themselves, and partly on the statements of company managers, stock analysts, and underwriters; everyone is telling one another the same thing–"this is the next big thing!"–and there are few "bears" to be found. However, when people start to worry that stocks are vastly overvalued, there can be a panic, which leads to the collapse of the market.

The second phenomenon was a group of blatant examples of corporate fraud, typically with respect to accounting. The two best-known cases were those involving Enron and Worldcom, the first of which also bankrupted the large accounting firm Arthur Anderson. The two phenomena are related because there may have been firms that engaged in both "creative accounting," much of which was out-and-out lying, and also exaggerations of prospective valuation brought about by the speculative bubble. The general "get-rich-quick" environment that was prevalent during the 1990s probably encouraged such creative accounting, with firms struggling to get actual balance sheets to match expectations. What is surprising about all this is the relative absence of sober heads during the period of the bubble; instead you had a lot of people saying that the Internet was going to destroy all traditional "brick-and-mortar" retail commerce, and that there was going to be a very rapid social transition from interactions mediated in physical space (i.e. face-to-face) to interactions mediated in "virtual" space, that is, across computer networks.

The sudden collapse of these high expectations leads to a backlash, and in American society, such a backlash typically leads to litigation, and often to a movement for legal and regulatory change. After the Enron and Worldcom scandals, a good deal of pressure fell on Congress and the SEC to do something about the problems of fraudulent auditing and excessive cosiness between companies and their (allegedly independent) auditors, and Congress responded by passing the Sarbanes-Oxley Act of 2002 to regulate the behavior of auditors.

18.4 Legislative Activity Concerning Securities Litigation and RICO

Because of the significant number of cases that have been brought under RICO for securities fraud, securities firms sought relief from RICO provisions in allegations of fraud. In 1995, they obtained such relief. Congress enacted the Private Securities Litigation Reform Act, which exempted defendants from civil RICO in cases that are based on securities fraud, whether in written, mail or wire form. This was justified on the grounds that there already were significant statutory barriers against securities fraud, by, among others, Securities and Exchange Commission chair Arthur Leavitt [28]. After the federal law was made more restrictive by this act, more securities fraud cases were filed in state court, as opposed to federal court [96].

The movement to state court caused potential defendants, including public companies, especially in high-tech, and brokerage houses, to return to Congress, to obtain passage of a second law, the Securities Litigation Uniform Standards Act of 1998, which largely removed state courts from a role in securities litigation, precluding state involvement if nationally-traded securities are involved. Virtually all shares of large public companies are nationally-traded. This latter bill was supported by the SEC, with the caveat that the standard of recklessness be preserved for cases now exclusively heard in federal court.

All this legislative activity would lead one to believe that the level of cases in the federal courts would be curtailed. Clearly this had been the intention of Congress in enacting these laws. However, there was some evidence that this was not result, as federal stockholder lawsuits in 1998 exceeded pre-1995 levels. Of course, lawsuits might have increased even more if it had not been for the enactment of these laws. However, more strenuous requirements for the success of a lawsuit may not lead to a decline in filings, because law firms may file more cases if a larger fraction of them are dismissed or lose a summary judgment. Firms specializing in class actions may view their cases as a portfolio, and want to have a broad portfolio in order to minimize risk. Of course, there is a limit to this, because there is a cost to filing a complaint.

The lead plaintiff provision has not had the effect it intended either. Congress intended the lead plaintiff to most likely be the shareholder with the largest financial interest in the case (usually the one with the largest investment in the defendant company's stock during the class period). The idea was that the lead plaintiff would select counsel. In practice, counsel (mainly, Milberg Weiss) have been organizing groups of plaintiffs with substantial interests, and then filing motions for the group to become the lead plaintiff. In this way, counsel remains in the driver's seat, or at least a powerful collaborator. In addition, institutional investors have not become involved on a large scale, partly (it is suggested) because they don't want to assume fiduciary responsibilities toward other investors, partly because any one investment is a small part of their portfolio and they would prefer to devote resources toward making investment decisions as opposed to pursuing litigation, and partly because they don't want to open themselves up to discovery as a result of litigation [158].

As the 1995 law illustrates, legislative action does not always have the intended consequences. Thus, even though affected parties are able to lobby Congress to change the law, with an eye to reducing the volume of litigation, their adversaries tend to be creative and find ways to frustrate their purposes. This is what we are seeing here. In addition, it illustrates how a social change– here legislative– tends to increase uncertainty. Uncertainty is increased in the period immediately following enactment of a reform, because the courts have not settled on their interpretation. Due to this uncertainty, some cases may not be settled, since attorneys on each side have not had enough experience to determine what they are worth. This contrasts with a situation, such as personal injury, in which attorneys have a great deal of experience with what cases are worth, and therefore cases are settled rapidly.

In addition, there was disagreement between various appeals courts about the extent to which the law (after these changes) requires the plaintiffs to prove fraud. In 1999, the Ninth Circuit Court of Appeals, which covers a nine-state Western region including California, found that plaintiffs need to show that defendants intended to commit fraud, not simply that they acted recklessly. This decision differed from that of other appeals courts based in New York and Philadelphia. The 1995 law requires that shareholders state particular facts that indicated that companies had an intention to act fraudulently [144].

18.5 Examining the Shareholder Caseload using the Adjacent-Word-Pair Frequency Method

Table 18.4 shows the top defendants in shareholder suits as detected by the adjacent-word-pair frequency method. Most of these companies are technology companies, many of them relatively small, or, to a lesser extent, underwriters of stock issues. This fits in with the impression that much of the action in shareholder suits, which has mostly occurred during the last fifteen or twenty years, involves relatively-new, relatively-small technology-based companies whose stock performance did not satisfy investors and who some investors (or their lawyers) felt that a case could be made that management had misled investors. Manual examination of the party strings indicates that almost all of the listed plaintiffs are individual investors (although many of these cases are class actions). One case against Citrix Systems (number 4 on the list) may be typical; it sought damages on behalf of individuals who invested in the company during a particular period during 1999 and 2000 who, the suit alleged, were misled by inaccurate financial statements issued by the company [210]. We have already discussed the cases against PLC Systems (number 5 on the list) and Centennial Technologies (number 8) above.

Table 18.4: Most Frequently Occurring Adjacent Word Pairs in Defendant String, Shareholder Cases

1	New Era	22	Carematrix Corporation
2	PLC Systems	23	Bank of ..
3	Vari-L	24	Raytheon Company
4	Citrix Systems	25	Stone Webster
5	ICG Communications	26	Radica Games
6	Summit Technology	27	Systemsoft Corp.
7	Lernout and Hauspie	28	Qwest Communications
8	Centennial Technologies	29	Waste Management
9	Boston Scientific	30	Xcelera.Com
10	Parametric Technologies	31	E F Hutton
11	Prudential Bache	32	Smith Barney
12	Merrill Lynch	33	Heartland High Yield Funds
13	Focus Enhancements	34	Shearson Lehman
14	Bankamerica Corp	35	Lucent Technologies
15	Hibbard Brown	36	Ford Motor
16	Robotic Vision	37	Avid Technology
17	Dean Witter	38	BMC Software
18	Computervision Corp.	39	Media Logic
19	Allaire Corporation	40	Future Healthcare
20	Firstworld Communications	41	CVS Corporation
21	Rite Aid	42	Pinnacle Holdings

Chapter 19

RICO Cases

19.1 Legal Background

The Racketeer Influenced and Corrupt Organizations Act (RICO) was passed in 1970 to target the activities of organized crime, and the infiltration of organized crime into businesses and labor unions. The idea was to penalize, and exact stronger penalties for, a pattern of illegal activities which was stronger what the penalty would be if you summed the penalties for each individual crime. A pattern of illegal activity was defined as two or more instances of crimes such as bribery, extortion, mail fraud, etc. While it was at first applied primarily against such traditional instances of organized crime such as the Mafia, in more recent years it has turned into a weapon against white collar crime. There have been legal challenges to the latter use, but the Supreme Court has ruled that the statute is sufficiently general to cover more mainstream lawbreakers. There are both civil and criminal versions of RICO. Civil plaintiffs in RICO can recover triple damages, legal fees, and costs; they need to show that they were damaged as a result of the illegal activity. Thus, adding a civil RICO charge to a complaint can make that complaint potentially more powerful. Criminal RICO calls for penalties including fines, imprisonment, and forfeiture of illegally-gotten goods. In this chapter, we are concerned only with civil RICO.

19.2 Examining the Civil RICO Caseload

Although the RICO Act was passed in 1970, it was not until statistical year 1986 that a significant number of civil RICO cases were recorded.There were five cases recorded in the database prior to 1986; one in 1982, two each in 1984 and 1985. This skyrocketed to 589 in 1986, after the Supreme Court's 1985 decision in Sedima, S.P.R.L v. Imrex Co. that civil RICO was as applicable to "legitimate" businesses as to organized crime. As a result, there was much pressure on Congress to reform civil RICO, because of the perception that a set of relatively minor offenses could be greatly amplified in their consequences as a result of RICO. However, reform failed, because of the Reagan administration and the business community's refusal to accept a Congressional compromise [19].

As Figure 19.1 shows, the RICO case count reached a peak in 1990, and then has trended downward. This pattern fits the theory and model laid out in Section 4.10, if one assumes little growth in the underlying population of potential RICO cases. The initial spurt was due, on this account, to a backlog of potential cases; after this worked its way through the system, cases began to fall off to their natural level (and would be expected to rise again if the potential population of RICO cases also rose, although other factors will affect this as well, such as plaintiffs' potential for winning based on their observation of previous cases, and potential defendants modification of their behavior; see below).

Figure 19.2 shows that civil RICO's share of all cases peaked in 1990 at about 0.75 percent and has since fallen to 0.4 percent. Thus civil RICO cases represent a minuscule share of the overall caseload. However, like shareholder cases, they provoke a disproportionate amount of public attention, because of the association with organized crime and because the use of RICO in civil matters has been controversial when applied outside of what the public thinks of as"traditional" organized crime (although the Enrons of this world may play a role in altering this perception).

Figure 19.3 shows that the plaintiff win rate in civil RICO cases has not been particularly high. It rose in the 1980s from about 27 to about 45 percent, and fell back down to about 25 percent by 2001. This may be because RICO cases require that a pattern of illegal activity be proved, and are therefore by their very nature harder to prove than simpler cases. Note a decline in the win rate may discourage filing of new cases, and therefore explain some of the declines in Figures 19.1 and 19.1, because such information undoubtedly is transmitted (albeit in a noisy, anecdotal, non-systematic form) to the community of plaintiff attorneys working in this area.

Table shows that the overwhelming majority– 90.2 percent– of civil RICO cases have a recorded jurisdiction of "federal question," because RICO is a federal statute (although there are similar state laws, called "little RICO" statutes). A small percentage of cases– 9.0 percent– are recorded as diversity jurisdiction, but this is likely due to the attorneys selecting this on the case intake form (civil cover sheet) when "federal question" was also applicable.[1] There may be also a problem in that the

[1] The form instructions tell attorneys to let federal question "trump" diversity, but some attorneys do not read the instructions correctly.

particular group of cases that are classified as civil RICO by attorneys could also be listed under one of the offenses of which the RICO charge is comprised. Conversely, there likely are be RICO cases that are not classified as such. Thus, this group of cases imperfectly selects the population of RICO cases. In fact, it is impossible to define which cases are primarily RICO cases, and which should best be classified under one of the underlying illegal acts.

As Table 19.3 shows, a majority– 64.4 percent– of civil RICO cases are settled by a pretrial motion. A small percentage of these– 14.2 percent– are won by the plaintiff. Thus, these are mainly successful dispositive motions from the defendant, such as motions to dismiss or motions for summary judgment. The success rate of these motions provides further evidence that many of these cases are difficult to prove or lacking in merit. It may be the case that attorneys are willing to bring more marginal cases in the RICO area because of the possibility of treble damages; as we will see, the stakes in RICO cases are substantially higher than among all cases, which is another reason why they get so much attention.

The next most common disposition is a default judgment, at 11.2 percent, followed by a consent judgment, at 6.7 percent. Both of these have high plaintiff win rates, of 95.6 and 92.0 percent respectively Thus it appears that most cases are rejected by the court, but many of those that do make it through are the “slam dunks” of default and consent judgments. Pretrial motions, default judgments, and consent judgments together account for 82.3 percent of cases The 6.0 percent of cases that result in jury trials have a plaintiff win rate of 57.0 percent. Thus, there are very few civil RICO cases that are competitive. This contradicts the Priest/Klein theory, which says that most cases should be competitive. It appears that civil RICO is more like the lottery;

lots of cases are filed, with the hope of a big payoff, but that payoff is relatively unlikely.

This becomes even more clear when Table 19.3 is examined. This table shows that civil RICO cases are much higher stakes than average, over ten times as high. The median amount demanded in a civil RICO case is a whopping $1,130,000, as opposed to $103,000 among all cases, and the median amount awarded is $424,000, as opposed to $40,000 in all cases. However, only 787 cases had a recorded award, as opposed to 4,452 with a recorded demand, a ratio of about 18 percent. Because of the potentially high payoff, plaintiffs and their attorneys may file civil RICO cases despite a relatively low chance of winning.

Table 19.1: Total Cases, Adjudicated Cases, and Plaintiff Win Rates by Jurisdiction, RICO Cases, Aggregate for Terminations in SY 1986-2001

	% All Cases		% Adjudicated Cases		Plaintiff Win Rate	
Jurisdiction	RICO	All	RICO	All	RICO	All
U.S. Govt Plaintiff	0.8	13.6	1.1	27.4	46.4	90.4
U.S. Govt Defendant	0.0	5.3	0.0	5.9	0.0	21.5
Federal Question	90.2	48.1	89.8	42.3	33.5	44.8
Diversity	9.0	33.1	9.2	24.4	40.4	61.6

19.3 Examining RICO Cases Using the Adjacent-Word-Pair Frequency Method

As we have seen, RICO charges come up frequently. To cite some instances, they are made in many contract cases, in franchising cases, in insurance cases, and in shareholder suits. The top plaintiffs as found by the adjacent-pair frequency method

Figure 19.1: RICO Cases Filed, SY 1986-2001

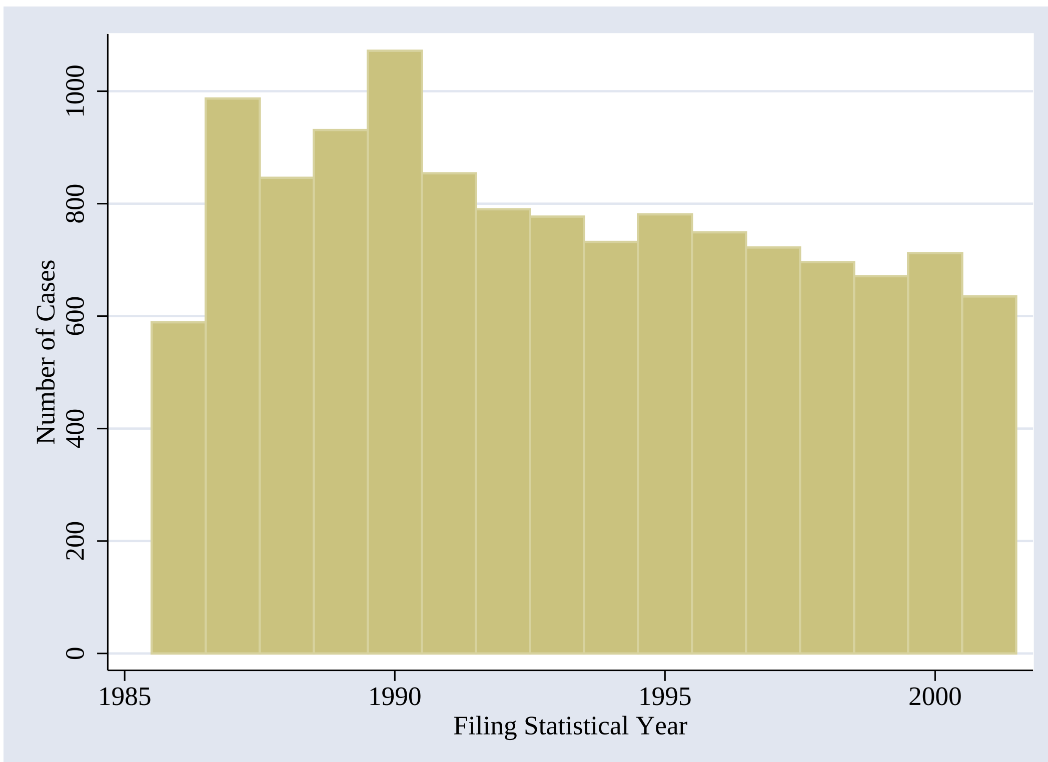

Figure 19.2: RICO Cases Filed as a Percentage of All Cases Filed, SY 1986-2001

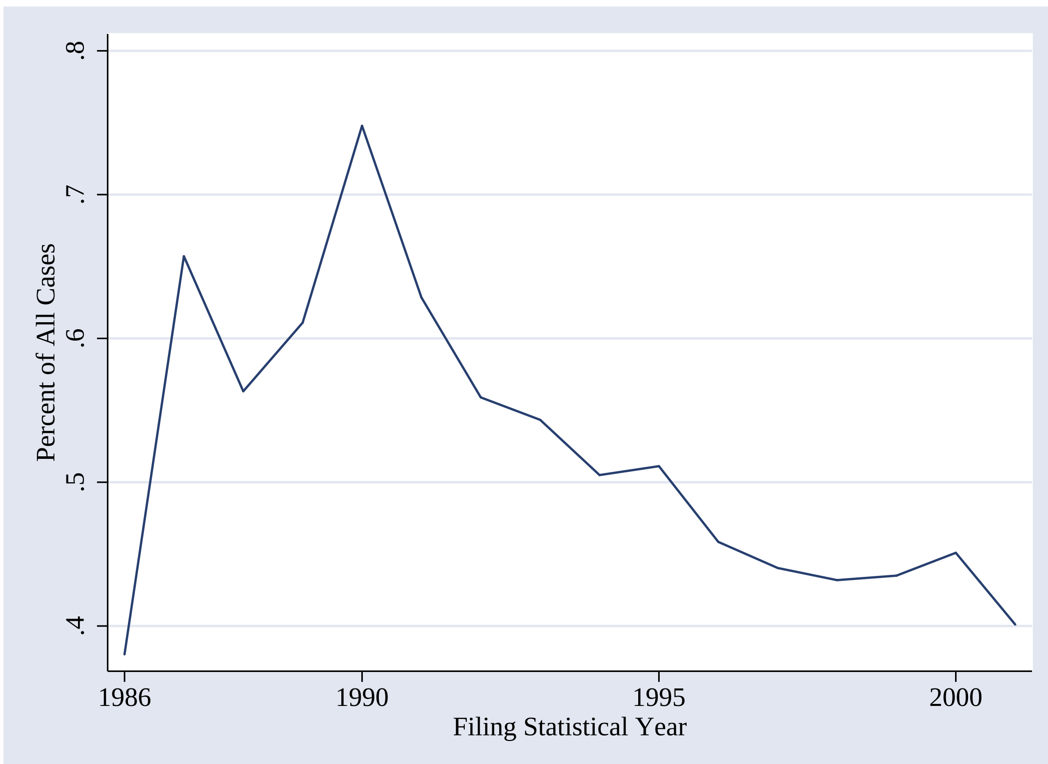

Figure 19.3: Percentage of Adjudicated RICO Cases Won by the Plaintiff, SY 1986-2001

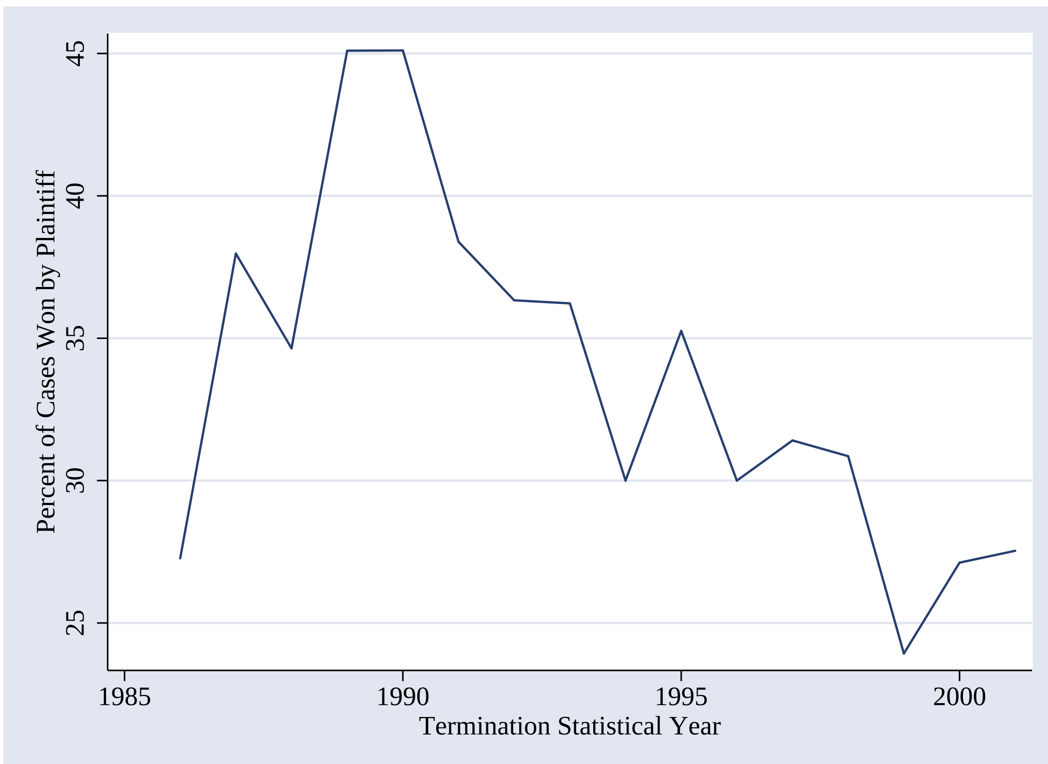

Table 19.2: Plaintiff Win Rates and Adjudicated Cases by Disposition, RICO Cases, Aggregate for Terminations in SY 1986-2001

	Plaintiff Win Rate		Share of Dispositions	
Disposition	RICO	All	RICO	All
Default Judgment	95.6	98.2	11.2	25.8
Consent Judgment	92.0	92.4	6.7	10.2
Judgment on Motion Before Trial	14.2	28.0	64.4	42.3
Judgment on Jury Verdict	57.0	46.6	6.0	7.7
Judgment on Directed Verdict	44.4	27.9	0.3	0.7
Judgment on Court Trial	66.7	48.5	2.4	5.1
All Other Dispositions	34.9	47.9	9.0	8.1
All Dispositions Combined	34.3	56.8	100.0	100.0
Consent & Default	94.2	96.6	17.9	36.1
All but Consent & Default	21.3	34.4	82.1	63.9

Table 19.3: Median Amounts Demanded and Median Judgments Received for RICO Cases and All Cases, 1000s of 2001 Dollars, 1971-2001 Aggregate

	RICO Cases	All Cases
Sample Size	11936	3894150
Median Amount Demanded	1130.0	103.0
Sample Size (Amount Demanded)	4452	1434123
Median Amount Awarded	424.0	40.0
Sample Size (Amount Awarded)	787	404512

are shown in Table 19.4; the top defendants in Table 19.5. Notable plaintiffs include government entities and insurance companies. The Resolution Trust Corporation, which was set up to clean up after the savings-and-loan mess, is a frequent plaintiff. The defendant table includes many brokerage houses, insurance companies, and other financial companies, such as banks. However, there is also representation by a wide range of firms from across the economy, as well as by individuals, as both plaintiff and defendant. In addition, manual examination of the party strings indicates that both the plaintiff and the defendant are almost always private parties, not government entities.

Given that RICO lawsuits can stem from a wide range of illegal activities, it is not surprising that the defendants are in a wide range of industries, albeit with something of a focus on the financial industries, given the levels of financial hanky-panky that has been going on in recent years (e.g. Enron, Worldcom, etc.)

Which code is used in the filing is determined by how the plaintiff's attorney fills out the cover sheet when filing the case. It may be that many attorneys add a civil RICO allegation to their complaint in order to extract a settlement, because civil RICO offers treble damages. It may be that the attorney lists the case under RICO rather than some more garden-variety case type, such as breach-of-contract or fraud, in order to emphasize the gravity of the case, and perhaps to increase the bargaining power of the plaintiff. It may also be a way to get the case into federal as opposed to state court, if that is perceived as a more desirable forum.

Let us consider Prudential as an example of a large financial company which has been the target of RICO litigation. Most of the Prudential cases were against Prudential Securities or Prudential Bache Securities. From an examination of the published cases against Prudential, it appears that securities offerings sometimes result in civil RICO cases. An example of such a case is Washington National Ins. Co. v. Morgan Stanley and Co (1999 U.S. Dist. LEXIS 10042) in which a large number of brokerage firms, including Prudential, were listed as defendants, the plaintiff had been one of a number of companies that had bought some municipal bonds from Nebraska. The proceeds of the bonds had been invested (without the knowledge of the municipal bonds' owners) in junk bonds. The bottom fell out of the junk bond market in 1989. This resulted in defaults, and the consequent lawsuits. Many lawsuits were brought against the brokerage firms as a result of this activity, and most of them were consolidated into a class action, then were settled; Washington National was one of the companies that did not accept the settlement.

Prudential Securities was also involved in another venture that led to a class action with RICO allegations and a settlement. In the 1980s, Prudential Securities engaged in an allegedly fraudulent sale of 700 limited partnerships to a group of investors. A limited partnership can be used as an investment vehicle. This resulted in a number of suits filed, which were consolidated in In Re Prudential Securities Incorporated Limited Partnerships Litigation (985 F. Supp. 410 (Dist NY (S) 1997)). The plaintiffs alleged that the partnerships were marketed as safe, conservative investments, but were in fact risky. The settlement provided for a fund of $300 million to be paid out to class members. In addition, some other defendants-various companies involved in leasing aircraft-reached their own substantial settlement with the class.

19.3.1 RICO in Franchising: The Honda Class Action

The RICO class action against American Honda is interesting to us because it involves dealership relations (and because American Honda is top defendant on our list). Instead of the usual situations, that we have seen elsewhere, in which lawsuits are brought by individual dealers or former dealers whose relations with the manufacturer have broken down, or in which lawsuits brought by manufacturers against dealers for poor performance, here we see a group of dealers acting against the manufacturer due to allegations of an illegal conspiracy by the manufacturer and some dealers (which the plaintiffs attempted to exclude from the plaintiff class) who either were alleged to have participated in the conspiracy or were alleged to have paid bribes to Honda executives. The class action was listed as In Re Honda American Motor Inc. Dealership Relations Litigation, 168 F.R.D. 535 (Dist MD 1996).

The lawsuit alleged that, during the 1980s and early 1990s, Honda executives required kickbacks from Honda dealers in the form of either concealed partial ownership or cash payments in order to obtain allocations of vehicles or new dealerships. After a successful criminal prosecution of former Honda executives, a number of which had pled guilty, which in turn had stemmed from a civil lawsuit, a wave of civil lawsuits were filed by Honda dealers against Honda.[2] These were consolidated into the RICO class action, which was against American Honda, its Japanese parent company, a law firm that had allegedly assisted in the conspiracy, and various dealers who were said to have participated in the conspiracy. During this period, a Honda dealership was a very desirable commodity, since certain Honda models were among the most popular cars and, in certain years, the Accord was the most popular model, creating shortages

[2]This is another example of how successful state action can lead to private action.

at times.

Since the fact that kickbacks were made was conclusively established by the criminal prosecutions, the civil cases focused on establishing the liability of the Honda companies for the actions of their executives. Evidence was introduced that high-ranking Honda executives had been presented with evidence of the kickbacks and had done little about it. Honda maintained that the offenders were middle managers who had tried hard to conceal their activity from higher-ups. Honda attempted to use attorney-client privilege to protect its legal files from scrutiny, but was unsuccessful, and these files revealed substantial evidence that high Honda officials knew of the extortion. Ultimately, the class action was settled by Honda by what was believed to be the largest amount in the civil RICO action to that date: $329 million, which was paid out to the "clean dealers," the plaintiffs [13]. The presiding judge in the case, J. Frederick Motz of the District of Maryland, remarked during the opening arguments, "although I don't believe in civil RICO, if there ever was a case, this is it."

The RICO case against Honda makes the case that relations between firms are not governed by the minimization of total costs, including transaction costs, but are substantially governed by power relations. It appears, at least on the surface of it, that Honda executives had been abusing substantial power that they held. If Honda had been acting to minimize total costs, it would have not engaged in this sort of organized crime, because of the adverse affects it had on the markets for Honda cars, by distorting the market by allocating cars to dealers on a basis other than demand. It is possible, however, that Honda was insufficiently responsive to shareholders (this could be in part because it is a Japanese company, and Japanese companies are not known for being responsive to shareholders) that effectively the company was being run, in part, as a racket by its executives. On this scenario, the executives didn't care (primarily) about how the company did (as long as it made enough money to avoid insolvency), but rather cared primarily about how much money they could get out of their situation. This would be a case not merely of power but of a failure of a principal-agent relationship, which can occur if the firm lacks the proper structures to ensure accountability.

If it is the case, however, that power plays a substantial role in franchisee-franchisor relations, this accounts for this case as well as a good deal of the franchisor-franchisee litigation that we have seen elsewhere. On this account, contracting is basically unfair between the two parties because of asymmetry of power, and the abuses of power that occur in these relationships leads to litigation. This certainly seems to fit the above story, and the story of the Subway franchisees that was discussed in Section 16.7. Institutional economics refers to such abuses of the franchising relationship as "hold-ups." A hold-up which is a term for the unfair advantage one party can take of another when two parties have made an asset-specific investment in one another. The term "hold-up" is used by Klein and others; another way to describe this is "opportunistic behavior," a term used by Williamson.

This tends to ruin the reputation of the party acting abusively, but one can imagine situations where the markets for a product are growing so rapidly that reputational concerns are put on the back burner. This potentially fits the situation in both the Subway and the Honda cases. In the Honda case, the hold-up is the extortion of a share of the profits made as a result of heavy demand for vehicles. Klein discusses hold-ups in his article on contracting in imperfect market conditions [124]. He argues that firms sometimes require the posting of bonds to insure against such hold-ups, but one would suspect that such bonds are usually extracted from the franchisee, not the franchisor, which indicates an asymmetry of power. The Subway and Honda cases indicate that possibilities for hold-up exist that are just as strong in the other direction.

Table 19.4: Most Frequently Occurring Adjacent Word Pairs in Plaintiff String, RICO Cases

1	City of ...	8	Resolution Trust (Corp.)	15	Merrill Lynch
2	United States	9	Raymark Industries	16	Stewart Title
3	Bank of ...	10	State Farm	17	Board of ...
4	Northwest Airlines	11	St Paul Insurance	18	Allstate Insurance
5	Aetna Life	12	Aetna Casualty	19	General Electric
6	Airlines Reporting	13	Trans World Airlines		
7	Blue Cross	14	State of ...		

Table 19.5: Most Frequently Occurring Adjacent Word Pairs in Defendant String, RICO Cases

1	American Honda	36	Sears Roebuck
2	State of ...	37	W R Grace
3	Merrill Lynch	38	William J Brown
4	Bank of ...	39	Bell Atlantic
5	Philip Morris	40	General Motors
6	City of ...	41	American General Inc.
7	Ford Motor	42	Harbor Lawn Memorial Park
8	U S	43	Source Perrier
9	Prudential Bache (Securities)	44	Entre Computer
10	Shearson Lehman (Brothers)	45	Allstate Insurance
11	State Farm	46	Outdoor World
12	Marlin Properties	47	Henson Transport
13	WMX Technologies	48	North American Inc.
14	A O Smith	49	ADM Investor Service
15	Kidder Peabody	50	First Union Corp.
16	Bank for Savings	51	Chase Manhattan
17	Metropolitan Life	52	American Tobacco
18	Mastercard International	53	Hibbard Brown
19	E F Hutton	54	Refco Capital
20	Paine Webber	55	Westinghouse Electric
21	AT&T	56	Cedar Hill Cemetary
22	Visa International	57	General Electric
23	Dean Witter	58	Donaldson Lufkin
24	Fleet Bank	59	Ambase Corporation
25	Price Waterhouse	60	American Express
26	E I Du Pont	61	Suzuki Motors
27	County of ...	62	GB Foods Corporation
28	Center Art Galleries	63	First American Bank
29	Marine Midland Bank	64	Columbia HCA
30	HSBC USA	65	Republic New York
31	Allstate Insurance	66	Beech Nut Nutrition
32	Dow Chemical	67	Smithkline Beecham
33	Consolidated Pennsylvania Coal	68	Prudential Insurance
34	Wells Fargo Bank	69	First Interstate Bank
35	Pacific Mutual		

Chapter 20

Conclusion

This thesis leads to several major conclusions. It finds that litigation is a highly uneven phenomenon on a number of dimensions, which I list below. It finds little support for any simple theories that predict plaintiff win rates based on simple views of utility maximization. It also finds little support for the idea that Americans are becoming more litigious (as I have noted earlier, it is difficult to even see how one would address this question), instead finding that the caseloads for particular types of cases wax and wane as a result of changes that are often particular to any individual case type. I have gone into detail on this in the chapters on the individual case types.

In particular, I find that:

Federal civil litigation is a highly uneven phenomenon. By this, I mean that certain types of cases are much more prevalent than others. It is uneven over at least three dimensions: by case type, by involved parties, over time, and by case importance.

For instance, certain case types, such as employment discrimination and contract cases, are much more prevalent in the case load than certain others, for instance, RICO cases or shareholder cases. This shifts over time as different phenomena become more or less important in society, as the economy and the country's demographics change, and as the law and the activities of lawyers and judge change.

Within any given case type, the parties are uneven in terms of what individuals, companies and industries are involved. For every one of the fourteen case types that have been studied in this thesis, I found some individual litigants and some types of litigants that were much more prevalent than others. Detailed accounts of this have been given in the fourteen chapters which have described each of these case types in turn. I review some examples of this as follows.

Among ERISA cases, there are many cases against small construction companies that have not paid required contributions into union pension and benefit funds. There are also many cases against HMOs concerning the denial of benefits.

Employers, such as grocery stores (e.g. Publix) or department stores (e.g. Sears), that employ large numbers of women–many of whom are in relatively low-level positions–have been the targets of employment discrimination litigation. Much of this litigation has been composed of class actions. Other major defendants in employment discrimination include companies that are large, unionized, and either regulated monopolies or close to the government in other ways (e.g. government contractors). This may be due to a larger-than-usual number of minority or women employees, or due to their quasi-governmental or union status. Government and unions provide an environment which is more supportive to the filing of such lawsuits. Notable defendants of this type include the U.S. Postal Service, Amtrak, and AT&T.

Large manufacturing employers (such as General Motors) have been the focus of a good deal of labor-management litigation, in part because of the size of their unions.

Some of this litigation was due to the downsizing that occurred in manufacturing employment in the 1980s Some activist unions are over-represented in labor-management litigation, because they use lawsuits as one of their organizing weapons against employers. Most notable for doing so is the United Food and Commercial Workers (UFCW).

In antitrust, I found that monopolistic industries that sell goods to the consumer, either directly or indirectly, have often been the targets of litigation, much more so than other industries. Companies that produce consumer goods or goods that directly affect consumer prices tend to be more likely to be the target of antitrust litigation. Much of this is due to the oligopolies that have developed in part because of large investments in brands by companies, and the political salience of consumer products. Historically, this litigation has included manufacturers of plumbing supplies, oil companies, the airlines, corn syrup manufacturers, soft drink manufacturers. Companies that have reached monopoly status have also been targets: telephone companies such as AT&T, cable companies, oil companies, and computer companies such as IBM, and now Microsoft

In contract cases, there are many cases against stockbrokers and other salesmen who have, it is alleged, solicited customers of their former employer in violation of a non-compete agreement that they signed while an employee. Because of the ever-increasing importance of franchising in the economy, franchising cases are common among contract cases, and this means that major franchisors– such as hotel and restaurant chains– are frequent litigants.Very large companies (e.g. Ford) are highly represented in contract litigation, because of the large number of transactions and contracts they are involved in.

Insurance companies (not surprisingly!) dominate insurance contract litigation.

Cases have heterogeneous causes, and these causes vary by case type. Litigation can therefore cannot be understood as a unitary phenomenon. Rather, it is the aggregate of many different types of cases, each with their own logic. For instance, as we saw above, ERISA litigation is characterized in part by disputes with insurers and HMOs over the scope of benefits, and by disputes between union pension funds and (usually small) contractors regarding payments into these funds. In antitrust litigation, as we saw above, the states and the federal government often take the lead, and often go after companies which market to consumers or affect consumers or other important political constituencies. Private plaintiffs then "pile on," if the government succeeds. Thus, litigation in each of these two areas– and all others–reflects social conditions and the particular dominant actors; there is no logic describing all litigation.

Many companies and organizations act as "private attorneys general" to enforce the law in areas of direct economic interest to them. Companies and organizations use the courts in their private policing activity. These activities generate large volumes of cases in a steady flow, many of which are in the intellectual property domain. For instance, as we have seen, Coca-Cola works to prevent establishments from passing off other cola drinks as Coke. McDonald's pursues companies that attempt to use trademarks that are similar to its own. Disney pursues people who use its copyrighted characters without permission. Luxury goods manufacturers, such as Ralph Lauren and Vuitton, go after people who create "knock-off" versions of their merchandise. The music performance rights societies (BMI, ASCAP, and SESAC) pursue establishments that play music publicly without obtaining the required licenses. The motion picture industry trade association (the MPAA) pursues people who make pirate copies of videotapes. Quality Inns sues small hotel operators that use trademarks and trade dress similar to its own (many of these operators are immigrants from India.) Allstate and other insurers use RICO to pursue groups of doctors and motorists who attempt insurance fraud.

Federal civil litigation is also uneven over time. Some case types become more important over time in terms of their share of the overall case load, and some less. For instance, with the decline of the labor movement, we have seen a decline in the number of cases filed under the Labor-Management Relations Act. At the same time, we have seen an increase in the number of employment discrimination cases, as workers, often unable to turn to internal, institutional mechanisms to settle disputes with their employer, turn to the courts. Many can do so because most workers are members of a protected category under the discrimination laws. In addition, there is probably less formal (as opposed to de facto) tolerance of discrimination now than in any time in history. This was reflected in the Civil Rights Act of 1991, which created conditions more favorable to plaintiffs, and allowed discrimination cases to surpass contract cases as the most frequent case type in the caseload.

The temporal unevenness of the caseload is also reflected in the emergence of new case types, both temporary and permanent. For instance, civil RICO cases, which emerged as the result of a new legal theory and as the result of court decisions supporting that theory in the 1980s, have become a permanent fixture of the case load. Another example is the large number of shareholder cases that have been brought against mainly high-tech companies since the 1980s. This also seem likely to be permanent, unless there is a major reform in the law which precludes them.

On the other hand, some "case congregations" (in Galanter's terms) come and go. For instance, there was a group of foreclosure cases that came about because of a collapse in the real estate market in Houston in the 1980s due to a major downturn in the domestic oil industry. When the market recovered, these cases disappeared. Another example would be the cases brought by the Resolution Trust Corporation, which was created to clean up the mess created by the savings and loan crisis. When the RTC finished its business, these cases went away.

Federal civil litigation is also uneven in terms of the importance of individual cases and the burden they place on the courts. One case might be filed one day and closed the next; another one might take ten years and have a bulky file, full of briefs, motions, and evidence. In Section 4.8, I documented the uneven nature of the case files in this respect, examining PACER records for three different case types. We also have seen throughout this study that case types vary widely in their median stakes; for instance, antitrust and shareholder suits tend to be high-stakes, and tend to get a lot of attention because of this, despite their relatively small number. On the other hand, Fair Debt Collection Practices Act cases are frequently found in the contract caseload, but they are typically very low stakes. Each such case does not consume much of the resources of the courts or of attorneys, but in aggregate, they are a significant factor. It is simplistic to look simply to the raw count of the number of cases that are filed, as is commonly done; one must look in more detail to determine what is consuming the energy of the legal system (e.g. one must look at docket lengths, the length and complexity of the briefs and evidence, the number of months that a case lasts, etc.)

Federal civil litigation is also uneven by plaintiff win rate. Contrary to the simple economic theory advanced by Priest and Klein [178] (which theorizes that in cases in which the stakes are symmetric between the parties, each side should win about half of adjudicated cases), the plaintiff win rate varies substantially by case type. Some of this is no doubt due to asymmetric stakes between the parties, but much is most likely due to other factors. Such other factors might include: the distribution of case dispositions for that case type, the types of actors involved (for instance, if they are rich or poor individuals, or large or small corporations), the unpredictable behavior of judges and juries, and the desire of one or both of the parties for procedural justice as well as substantive results [224]. When normative considerations play a major role– for instance, in employment discrimination, franchising, and antitrust cases– desire on the part of the "weaker" party for procedural justice ("a day in court") may play some role in depressing plaintiff win rates. In addition, weaker parties generally turn to lawyers with fewer resources and these lawyers may be disadvantaged when they go up against large law firms representing large companies. The bar in any area tends to be divided between large, corporate-oriented law firms and small firms consisting of a solo practitioner or a small group of lawyers. We have seen that F2000 companies usually win their cases, and they often employ these large corporate firms.

Viewed with hindsight, many published lawsuits appear to have little chance of success on the part of the losing plaintiff. This may be due to the hindsight, or it may be due to the selection bias associated with published cases. It may also be due to a departure from rationality based on cash-based utility. As mentioned above, litigants may be seeking their day in court; it may be a victory just to meet their opponent in court, on formally equal ground, even if they do not win. The behavioral economics literature provides some evidence that people will be willing to punish themselves financially in order to punish others for the violation of norms, as they see it. In my opinion, this is particularly evident in some (but by no means all) employment discrimination cases, in which a case may be brought that is unlikely to succeed simply because the plaintiff feels that she has been treated unfairly. However, from my examination of case files, emotions and animosity also pop up frequently in disputes that one might imagine should be as more purely based on business, such as franchising and patent litigation. Franchisees can get angry if they feel they have not been treated fairly by franchisors, and patent holders can get angry at infringers, especially when the companies in question are small and compete in a specialized market. These emotions can prolong disputes significantly beyond what a model of the litigation process based on cold-blooded, cash-based rationality would predict.

Litigation is in large point a result of the adversarial system favored by Americans in resolving disputes, and the high uncertainties associated with this system. Kagan [114] characterized the American system of civil justice as "adversarial legalism." In this system, lawyers play the lead role, and judges and juries are highly independent and given a fair amount of latitude, introducing much uncertainty into outcomes. This uncertainty may play a role in why we found so many published cases that did not, in hindsight, appear to have a great chance of success for their plaintiffs; the plaintiffs may have brought the cases in hopes of getting the right jury or judge. In contrast, in the continental European system, judges play a much larger, more active role–they often question witnesses, for instance–and their decisions are made more consistent through a system of bureaucratic control. Thus, there is less uncertainty and matters are settled more expeditiously.

The latter type of system is also found in the U.S., in the administrative agencies such as OSHA, NLRB, or EEOC. We have seen that the number of federal lawsuits associated with these areas of the law is much lower than it would be if all matters were handled by the courts. Since railroad injuries (unlike almost all other occupational injuries) were never brought under the jurisdiction of OSHA, we still see a substantial number of court cases concerning them, in the FELA caseload.

Litigation reflects underlying economic patterns and social practices. I have shown how the litigation patterns of a large company (Ford) reflect the patterns of transactions and contracts in which it is engaged. I have also shown how the litigation patterns of a large insurance company (Allstate) reflect the types of policies that it writes; the policies exist in the "shadow" both of the market (which functions imperfectly) and the law; part of the law is the insurers' experience in court.

Much litigation results from practices developed by litigants and law firms. For instance, in labor-management relations, coal companies developed a practice of suing for injunctive relief against strikes and pickets of the United Mine Workers, in reaction to the practice of holding wildcat strikes. The United Food and Commercial Workers developed a practice of suing employers over health and safety complaints, over wage and hour complaints, over pension issues, and over labor-management issues. These lawsuits were used in part as an organizing tool by a militant union, and were part of an overall organizing strategy. In manufacturing, a large number of lawsuits resulted from downsizing, and the arrangements that were made to deal with it.

We have see how filing certain types of suits can itself become a practice of particular law firms. These practices stem from underlying social patterns, such as the behavior of officers of new companies (in the case of shareholder suits) or the human resource practices of labor-intensive retail operations (in the case of employment discrimination suits). Grocery chains tend to be alike, as do new high-tech firms, due to institutional isomorphism [48]. Thus, for example, if a law firm sues one grocery chain, it can use what it has learned in order to sue another one, which is likely to have similar practices, and thus reaps economies of scale. We have seen that the firm of Milberg Weiss specializes in class-action shareholder suits, especially against high-tech firms. We have also seen that the firm of Saperstein Goldstein specializes in class-action employment discrimination suits, especially against grocery stores and other retail establishments.

Volumes of litigation are (obviously!) affected by significant changes in social and economic organization. These are various, and include economic and technological changes, changes in macroeconomic conditions, political changes, legislative changes, judicial activity, and legal innovation.

The emergence of the HMO (an example of a change in socioeconomic organization) as a force in the organization of health care has led to various consequences. The practice of drug price discrimination in favor of HMOs, with their large amounts of buying power, has led to antitrust litigation against drug companies practicing such discrimination. HMOs have frequently denied care that patients and their lawyers felt was necessary; this has led to a number of lawsuits, although HMOs often have protection against lawsuits under ERISA. This latter protection has led to a movement to change the law, as well as a movement to create mechanisms to appeal the denial of care.

Temporary shifts in macroeconomic conditions can lead to temporary groups of lawsuits such as the foreclosure suits in Texas in the mid-1980s due to the collapse of the real-estate market there, which in turn was caused by a downtown in the fortunes of the oil industry.

The decline of the union movement has led to a decline in labor-management suits and in occupational safety and health suits. This has resulted in a move away from labor law and toward employment law.

The growth of the computer industry and the creation of a mass computer software market has created new opportunities for piracy and thus a new group of copyright lawsuits. The increasing importance of intellectual property in the overall economy is likely to lead to an overall increase in suits in this area.

The political environment can have an impact on the number of lawsuits brought in various areas. In this study, this has been most notable in employment discrimination and antitrust. In both of these case types, the government plays a leading role in bringing cases, and both case types declined during the Reagan administration as a result of the views of that administration. This contrasted with the activist political environment of the early 1970s, which was not fully restored under Clinton.

Legislative change can have a major impact on the volumes of lawsuits brought in particular areas. For instance, the Civil Rights Act of 1991, which allowed for punitive damages and jury trials for the first time, undoubtedly was a cause of the surge of discrimination lawsuits since. Yet legislation does not always have the consequences intended by its authors. For instance, during the 1990s, reforms by Congress intended to reduce the number of shareholder suits brought did not have their intended effect. Attorneys found ways to bring the suits anyway.

Of course, ultimately, legislation is the source of most lawsuits, since, obviously, legislation, along with changes in constitutional and common law, and new legal theories, provides the grounds for lawsuits. For instance, the franchising lawsuits often are in part the result of the laws passed to regulate franchising by the states and by Congress.

In an ever-more-prosperous society (as measured in terms of per capita GDP), there is an increase in the demand for justice, as justice becomes a “commodity” that more people can afford. The expansion of plaintiff rights by the Civil Rights Act of 1991 can be viewed as an example of this, as is the Americans with Disabilities Act (ADA). The ADA became possible in part because society could afford the accommodations that it mandates; the much-poorer American society of say, 1920, might not have been able to afford it. As society becomes more prosperous, Americans demand what Friedman calls “total justice” [71], which is the extension of justice into domains in which they previously might have fatalistically accepted outcomes that were perceived as non-just.

Various appellate court decisions, especially those of the Supreme Court, have a major affect on subsequent volumes of litigation. These decisions tend to come down quite frequently, so the underlying legal environment is constantly shifting. For instance, the decision by the courts that the Iowa Franchise act did not (retroactively) affect existing franchise contracts certainly affected the volume of franchising cases brought in that state.

As we have seen, innovation on the part of attorneys in crafting new kinds of cases plays an important role in creating new volumes of litigation, but it must be coupled with social trends that enable such innovation. For instance, as we have seen, the explosion of initial public offerings (IPOs) in the last decade has led to the large number of class action lawsuits against companies. These companies are mainly new ones, and mainly in high-technology industries.

The movement for the rights of the victims of sexual abuse has led to a new type of tort, where victims attempt to recover from their alleged victimizer. Sexual abuse has of course been there all along, and perhaps there has not been an increase in its incidence. What has changed is the social awareness of it, and the removal of the taboo about talking about it (perhaps because of the movement from a repressed, Protestant-based culture to the "Oprah" culture). This in turn has led to a number of insurance lawsuits, as the insurance companies of the alleged perpetrator become involved.

The use of the RICO statute against groups that commit insurance fraud was pioneered by insurance companies and their attorneys, and has become a regular feature of such litigation. In part, the firms are acting as private attorneys general where the state lacks the interest (due to other priorities) or capacity to prosecute such cases.

Long-term relations that involve asset-specific relations are more likely to lead to litigation, when they break down. We have seen this in our discussions of employment litigation and of franchising litigation. Long-term employment relations lead to complex histories which, usually upon their breakdown, can lead to allegations of unfair treatment of various kinds, which accounts for the volumes of litigation that we see under labor relations legislation, civil rights litigation, occupational safety and health legislation, and the Fair Labor Standards Act, which regulates wages and hours. Despite the movement to spot market relations in other areas of the economy, the employment relation remains a useful one to firms, in reducing uncertainty and transaction costs, and to employees, in creating a stable life. Thus we can expect, in our individualistic society, to continue to see large volumes of employment litigation, especially if there is movement from an "employment-at-will" doctrine to a "just-cause dismissal" doctrine.

Like employment, franchising offers various governance and financial inducements to participants in the relation. And like employment, it often leads to allegations of unfair treatment upon its breakdown. These allegations often involve breach of contract (poor performance by one party or the other), illegal tying relationships (for instance, requiring franchisees to buy supplies from the franchisor), territorial disputes, disputes over downsizing and conversion to corporate ownership, and disputes over finances. We have seen numerous cases, especially involving franchised car dealers, gas stations, and fast food restaurants. While employment is a stable relation involving most workers, and thus employment cases can be expected to grow along with the workforce, franchising is growing even more rapidly, so we can expect to see continued growth in these types of cases. Employment and franchising have both been affected by the diffusion of norms of due process [53].

Litigation tends to create groups of litigants that become political actors. Litigation is a costly activity, for all the parties involved (plaintiff, defendant, court/government[1]), and therefore creates a negative feedback loop; it creates incentives in the social system on the part of the affected actors to reduce its volumes whenever they increase. Much of this action may be defensive; that is, actors do not engage in acts that would otherwise provoke litigation. This is the point made by such critics as Howard [109].

The best-known lobbying activity by the corporate class in the area of litigation has been efforts toward tort reform, which is in the general interest of business. Consumer organizations typically oppose tort reform. Business efforts have included

[1]The only party lacking *some* interest in limiting litigation is the attorneys; however, no one wants to limit *their own* access to the courts.

efforts to promote alternative dispute resolution. However, companies are also active legislatively in many specific areas of law, which are of particular interest to particular industries that are involved in each area. Generally, the ability of actors to organize is related to the costs and benefits of organizing for each actor, the possibilities for free-riding, the number of actors, and the economic and political power of the group, among other factors. Corporate actors are usually much better organized than individuals; civil rights may be an exception.

Companies that are repeat-players in a particular kind of litigation usually lobby to change the law that regulates that litigation. For instance, we have seen that both the performance rights societies (including BMI and ASCAP) and the movie studies (through their trade association, the MPAA) are active lobbyists around copyright law, and were instrumental in its most recent modifications. The association of restaurants was active in attempting to broaden the exemptions from royalties for playing music in public. The public role in such reform was comparatively minimal.

Franchisors and franchisees both have active organizations that attempt to affect state and federal legislation; some of these organizations are general, and some are of particular kinds of franchisees or franchisors (e.g. gas station owners). Franchisees have been repeatedly effective in getting legislation to protect their interests, both general legislation and legislation regulating particular groups of franchisors. Both large employers and large franchisors have been pushing to replace litigation with mandatory binding arbitration.

Companies that have been the targets of shareholder lawsuits have pushed for reform of the laws that allow such lawsuits. They have succeed in obtaining two reforms; an exemption from RICO charges, and a requirement that lead plaintiffs hold significant numbers of shares and take an actual role in the litigation. The firm that files many of these lawsuits (Milberg Weiss) lacked sufficient clout to fight these reforms, since the reforms were supported by a large number of high technology business leaders, who had a lot of clout at the time due in part to the prestige of their industry and the perception by policy-makers that the industry was critical to the nation's economic future. And the shareholders themselves, like the public, were too large and diffuse a group to lobby effectively.

Interest groups representing segments of the public are also sometimes effective in obtaining legislative change. The expansion of plaintiffs rights by the Civil Rights Act of 1991 is one of the most notable recent examples. This led to a large increase in the numbers of employment discrimination lawsuits filed.

There is a large perceived imbalance of power in many federal civil cases, with a large business often up against an individual or small business. Business experiences a high win rate in a wide variety of cases, although its win rate varies by case type. Large numbers of cases are settled, however, before they are disposed of, so these settlements may mitigate against the high win rate. The high win rate may result from a good deal of experience in dealing with cases of a particular type, that is, Galanter's "repeat-player" effect. It may also be due to sympathetic judges or highly competent attorneys. It may also be due to attorneys that are willing to bend (or break) the rules.

It must be kept in mind that litigation is not necessarily a bad thing; *some litigation is necessary.* This observation is akin to Durkheim's famous observation that the optimal amount of crime in a society is not zero, because such a society would also have too little deviance. It is true that in much litigation, the litigants would rather not be involved in the case. It is not a good outcome when a franchise or employment relation, or any other social relation, breaks down and ends up in court. Usually, the parties would have preferred it if the relationship had continued or had ended on an amiable basis. However, the courts provide a necessary avenue for litigants who are seeking justice. It would be even worse if relations broke down and the aggrieved party had no options other than (private) violence. In addition, the possibility of litigation itself transforms social institutions in ways that have positive features, through "shadow effects." For instance, the possibility that an employee may sue if he or she is treated unfairly, or discriminated against, makes firms more likely not to engage in such behavior in the first place. History has shown that employers have ample tastes for such discrimination, so it is likely that such incentives are needed. Market incentives against such problems tend to be too weak, in part due to information problems. In addition, markets do not perfectly reward merit; injustice continues to be prevalent. We have not reached some Valhalla, where everyone is treated well and gets what they deserve.

Similarly, incentives are needed for fair, honest dealing by such powerful corporate agents as franchisors and corporate officers that represent the state of corporate affairs to the shareholding public. Incentives are needed so companies recognize the rights of their employees to organize and bargain collectively in good faith. Incentives are needed for trade unions to represent their members well. Incentives are needed so that companies protect the health and safety of their workers. Incentives are needed so that companies do not overwork their workers and operate sweatshops. Litigation, and the possibility of litigation, provides such incentives.

It is often suggested by corporate lobbyists and their allies that lawsuits need to be curtailed. It is rarely suggested (at least not by their lobbyists) that corporations and other powerful agents need to be more honest, accountable, law-abiding and competent. If they were, they might not get sued as often. Conservatives often seem to want unfettered individualism when it comes to competitive markets, but dislike this individualism when it asserts itself in court. But you cannot have one without the other; liberal rights regimes and liberal market policies have co-evolved in the Anglo-American world.

We have seen, also, that litigation is part of everyday business in many industries. Business often acts as the plaintiff; the scenario of an individual suing a large company does not fit many cases. In insurance, disputes are part of the landscape because the boundaries of insurance policies are never completely clear. In intellectual property, the boundaries between what is protected and what is not is similarly unclear. In addition, companies that own intellectual property (which is non-tangible and is purely a creation of the state), and associations that represent intellectual property, often aggressively pursue those that they feel have violated their property rights. By doing so, they discourage other violators and protect their rights. There will always be those who try to violate such rights, and thus there will always be some such litigation.

Antitrust law is itself highly compatible with market ideology, since it punishes monopolists and preserves the competitive market. Yet, there have been many conservative critics of antitrust law, who maintain that the state will often only make things worse, and that monopolies will collapse on their . Again, it is a question of incentives. It is clear that attempts to illegally fix prices have occurred repeatedly; only by identifying and punishing such attempts do we protect competition, at least on a common, more liberal view.

There are several strategies that could be employed to reduce litigation. First of all, it is clear from the present study that if one wants to limit litigation, it is critical that those entities that are producing more than their share of litigation be focused on. This should be done on a case-type basis; for instance, insurance companies are involved in much insurance litigation, and media companies in copyright litigation. There should also be an attempt made to determine what companies, industries, and case types are producing the most complex and drawn out cases. Such a state policy one might term "targeted engagement," in that it identifies the industries and other actors that are responsible for the lion's share of litigation and then engages with these entities to develop governance reforms that respect the rights of all the parties involved and yet reduce litigation. There are many precedents for this, mainly in the domain of regulation; for instance, OSHA engages with the construction industry, EPA with the petrochemical industry, and and MSHA with the mining industry. Reforms that clarify the law and contracts in specific areas, such as insurance, franchising, and intellectual property–an attempt to make the law more consistent across jurisdiction–would undoubtedly reduce litigation as well.

Within the the existing caseload, an effort might be made to identify those cases that are beginning to take up a good deal of the energy of the court, as measured by the number of items in the docket, complexity of the evidence, and length of time has already taken up, and make efforts to move these cases to settlement. We have seen that certain cases take up much more time than others. However, these are typically the relatively complex, high-stakes cases that federal judges may tend to view as one of the most interesting aspects of their job, so it may be hard to get (the highly autonomous) federal courts to move in this direction.

A second policy that would go a long way toward reducing the burden on the courts would be the simplification of the rules governing jurisdiction and the choice of forum. Even a cursory examination of the case files reveals that a substantial share of the business of the courts is taken up with such matters.

Thirdly, placing more statutes under the initial jurisdiction of administrative agencies would be an obvious way to reduce the federal court caseload. Low-dollar-amount intellectual property disputes, such as small-time video piracy or trademark piracy, would be one target. However, this would be highly controversial, because there would be a reduction in the amount of formal due process that would available to parties to such a dispute, and because it would be alleged that the administrative agency so created would be "captured" by the industries that it mainly serves (for instance, in the case of copyright, the "content" industries.)

To sum up, litigation can not be understood as a unitary phenomenon, the result of some American propensity toward "litigiousness." Rather, it is a common American response–or rather, *the* common American response–to governance problems that crop up in a wide variety of domains, as well as a reflection of the social patterns causing these problems. Each of these domains–for instance, employment discrimination or antitrust–has its own logic, which must be elucidated. In this thesis, I have described the logic underlying the caseload in each of fourteen different federal civil case types. I hope I have made some contribution to an emerging understanding of litigation as a complex, multi-layered phenomenon with diverse and shifting causes and components.

Bibliography

[1] Fox, Disney, Universal sue China firms over pirated films. *AFP*, July 14, 2003.

[2] US film studios win landmark piracy case in Shanghai. *AFP*, August 8, 2003.

[3] Robin Lee Allen. NRN 50: The franchisees: American food industries. *Nation's Restaurant News*, January 1, 1998.

[4] No comment. *The American Lawyer*, page 78, March 1994.

[5] Scott Andron. Food Lion back in courtroom. *News and Record*, page B1, February 15, 1998.

[6] Jorge Aquino. For Lucky, turning down the heat paid off. *The Recorder*, page 1, January 7, 1994.

[7] First charges filed in carpet inquiry. *Associated Press*, June 8, 1995.

[8] Microsoft wins Connecticut antitrust case. *Associated Press*, July 2, 1999.

[9] EBay must pay $35 million in patent case. *Associated Press*, May 28, 2003.

[10] Senate bill blocks weight-related lawsuits. *Associated Press*, July 18, 2003.

[11] Ray August. Mythical kingdom of lawyers: America doesn't have 70 percent of the earth's lawyers. *ABA Journal*, 78:72–74, September 1992.

[12] Rupert M. Barkoff and Andrew C. Selden, editors. *Fundamentals of Franchising.* American Bar Association, Chicago, 1997.

[13] Michael M. Baylson and Melissa H. Maxman. Honda settles class action aspect of dealership RICO litigation for record 329 million. *Civil RICO Report*, November 25, 1998.

[14] Lucian Arye Bebchuk. Litigation and settlement under imperfect information. *RAND Journal of Economics*, 18:404–415, 1984.

[15] Lucian Arye Bebchuk. Suing solely to extract a settlement offer. National Bureau of Economic Research, Working Paper No. 2161, 1987.

[16] Richard Behar. Why Subway is the biggest problem in franchising. *Fortune*, March 16, 1998.

[17] Lisa Belkin. Now, it's remember the oil bust! *New York Times*, August 22, 1989.

[18] Kenneth N. Bickers. Transformations in the governance of the American telecommunications industry, 1876-1984. In John L. Campbell, J. Rogers Hollingsworth, and Leon L. Lindberg, editors, *The Governance of the American Economy*, pages 77–107. Cambridge University Press, Cambridge, 1991.

[19] G. Robert Blakey. RICO's triple damage threat: The public's secret weapon v. boesky. *The New York Times*, page 3, December 7, 1986.

[20] Coke settles battle over bid for Dr. Pepper. *Bloomberg Business News*, May 18, 1995.

[21] Coke expands its lead in U.S. *Bloomberg Business News*, February 13, 1999.

[22] Centennial settles last shareholder lawsuit. *Boston Herald*, page 25, June 20, 1997.

[23] Samuel Bowles and Herbert Gintis. Is equality passé? *Boston Review*, December/January 1998.

[24] Shelly Branch. What blacks think of corporate america. *Fortune*, page 140, July 6, 1998.

[25] Else Brenner. Reality of GM closing for good sets in. *New York Times*, June 16, 1996.

[26] Steven Brostoff. Supreme court to test RICO's reach for insurance fraud. *National Underwriter*, page 3, June 29, 1998.

[27] Warren Brown. GM shuffles its dealers' cards; automaker seeks to cut outlets from 8,400 to 6,700 and strengthen brand identity. *Washington Post*, page B01, October 17, 1995.

[28] David A. Brownlee and Kenneth M. Argentieri. The RICO amendment of the Private Securities Litigation Reform Act: Why it applies retroactively. *Civil Rico Report*, December 25, 1996.

[29] Bill Bryson. *Made in America*. Secker and Warburg, London, 1994.

[30] Thomas F. Burke. *Lawyers, lawsuits, and legal rights: the battle over litigation in American Society.* University of California Press, Berkeley CA, 2002.

[31] Mary Anne Case. Disaggregating gender from sex and sexual orientation: The effeminate man in the law and feminist jurisprudence. *Yale Law Journal*, October 1995.

[32] Center for Public Resources. Employment ADR: A dispute resolution program for corporate employers, 1998. http://www.cpradr.org/empdispu.htm.

[33] James Chandler. Telephone interview with author, April 22, 1999.

[34] Kalyan Chatterjee and Larry Samuelson. Bargaining with two-sided incomplete information: An infinite horizon model with alternating offers. *Review of Economic Studies*, 54:175–192, 1987.

[35] James F. Childress. An ethical defense of federal funding for human embryonic stem cell research. *Yale Journal of Health Policy, Law and Ethics*, 2:157ff, 2001.

[36] Steven E. Clark. Telephone interview with author, Sept 23, 1999.

[37] Carl Von Clausewitz. *On War.* Knopf, New York, 1993.

[38] Kevin M. Clermont and Theodore Eisenberg. Trial by jury or judge: Transcending empiricism. *Cornell Law Review*, 77:1165–66, 1992.

[39] Kevin M. Clermont and Theodore Eisenberg. Litigation realities. *Cornell Law Review*, 88:199ff., November 2002.

[40] Congressional Budget Office. What accounts for the decline in manufacturing employment?, February 18, 2004.

[41] Robert Cooter and Daniel Rubinfeld. Economic analysis of legal disputes and their resolution. *Journal of Economic Literature*, 27:1067, 1989.

[42] Robert Cooter and Thomas S. Ulen. *Law and Economics*. Scott Foresman, Glenview, Ill., 1988.

[43] Glen Creno. Wal-Mart's superstores face battle. *Arizona Republic*, page D1, May 7, 1998.

[44] Frank B. Cross. The first thing we do, let's kill all the economists: An empirical evaluation of the effect of lawyers on the United States economy and political system. *Texas Law Review*, 70:645, 1992.

[45] Frank B. Cross. Law and economic growth. *Texas Law Review*, 80:1737, 2002.

[46] Andrew F. Daughety and Jennifer F. Reinganum. On the determination of roles in bargaining models: Settlement negotiations with two-sided asymmetric information. University of Iowa Department of Economics, Working Paper 92-26, 1992.

[47] Carol J. DeFrances and Steven K. Smith. Special report, civil justice survey of state courts 1992, contract cases in large counties. U.S. Department of Justice, Bureau of Justice Statistics, 1992.

[48] P. J. DiMaggio and W.W. Powell. The iron cage revisited: Institutional isomorphism and collective rationality in organizational fields. In *The New Institutionalism in Organizational Analysis*, pages 63–82. University of Chicago Press, Chicago, 1991.

[49] Shannon P. Duffy. Circuit refuses to revisit antitrust suit against pizza giant. *Legal Intelligencer*, page 5, October 28, 1997.

[50] Terence Dunworth and Joel Rogers. Corporations in court: Big business litigation in U.S. federal courts, 1971-1991. *Law and Social Inquiry*, 21:497–592, 1996.

[51] Gerald E. Durbin. Telephone interview with author, September 23, 1999.

[52] Emile Durkheim. *The Division of Labor in Society*. The Free Press, New York, 1947.

[53] Lauren Edelman. Legal environments and organizational governance: The expansion of due process in the american workplace. *American Journal of Sociology*, 95:1401–1440, 1990.

[54] Lauren Edelman and Mark Suchman. The legal environments of organizations. *Annual Review of Sociology*, 23:479–515, 1997.

[55] Dan Egbert. Waging a new war. *TECHCapital*, February 24, 1999.

[56] Barbara Ehrenreich. Two-tiered morality. *New York Times*, page 15, June 30, 2002.

[57] Theodore Eisenberg and Margo Schlanger. The reliability of the administrative office of the U.S. courts database: An initial empirical analysis. *Notre Dame Law Review*, 78:1455, 2003.

[58] David M. Engel. The oven bird's song: Insiders, outsiders, and personal injuries in an American community. *Law and Society Review*, 18(4):551–582, 1984.

[59] Charles R. Epp. Do lawyers impair economic growth? *Law and Social Inquiry*, 17:585, 1992.

[60] Edward Epstein. S.F. move to cut price of gas fails. *San Francisco Chronicle*, page A1, June 9, 1998.

[61] Daphne Eviatar. Is ligitation a blight, or built in? *The New York Times*, page B7, November 23, 2002.

[62] Kevin Farrell. The children's hour. *Restaurant Business Magazine*, page 80, November 1990.

[63] William L.F. Felstiner, Richard L. Abel, and Austin Sarat. The emergence and transformation of disputes: Naming, blaming, claiming ... *Law and Society Review*, 15:631ff, 1980.

[64] Jill E. Fisch. Class action reform: Lessons from securities litigation. *Arizona Law Review*, 39:533, 1996.

[65] Elliott S. Fisher, John E. Wennberg, Therese A. Stukeland Jonathan S. Skinner, Sandra M. Sharp, Jean L. Freeman, and Alan M. Gittelsohn. Associations among hospital capacity, utilization, and mortality of u.s. medicare beneficiaries, controlling for sociodemographic factors. *Health Services Research*, 34(6):1351–62, February 2000.

[66] Michael Fix and Raymond Struyk, editors. *Clear and Convincing Evidence: Measurement of Discrimination in America*. Urban Institute Press, Washington, D.C., 1992.

[67] John J. Flynn. Which past is prolog? the future of private antitrust enforcement. In Theodore P. Kovaleff, editor, *The Antitrust Impulse: An Economic, Historical, and Legal Analysis.* ME Sharpe, Armonk, NY, 1994.

[68] Inter-University Consortium for Political and Social Research. Federal court cases, Integrated data base, ICPSR study #8429, 2001.

[69] Gary M. Fournier and Thomas W. Zuehlke. Litigation and settlement: An empirical approach. *The Review of Economics and Statistics*, 71(2):189–195, 1989.

[70] Michael Freedman. Zapper war: TV producers in quest to outlaw device that allows consumers to skip ads. *Forbes*, 2002.

[71] Lawrence M. Friedman. *Total Justice.* Russell Sage Foundation, New York, 1985.

[72] Lawrence M. Friedman. Litigation and society. *Annual Review of Sociology*, 15:17–29, 1989.

[73] Lawrence M. Friedman and Robert V. Percival. A tale of two courts: Litigation in Alameda and San Benito counties. *Law and Society Review*, 10:267ff., 1976.

[74] Tad Friend. Copy cats. *The New Yorker*, page 51, September 14, 1998.

[75] Steven Fromm. Generation versus generation. *Connecticut Law Tribune*, page 1, October 28, 1996.

[76] Marc Galanter. Why the haves come out ahead: Speculations on the limits of legal change. *Law and Society Review*, 9:95–160, 1974.

[77] Marc Galanter. Reading the landscape of disputes: What we know and don't know (and think we know) about our allegedly contentious and litigious society. *UCLA Law Review*, 31:4–71, 1983.

[78] Marc Galanter. The life and times of the big six; or, the federal courts since the good old days. *Wisconsin Law Review*, page 921, November/December 1988.

[79] Marc Galanter. Case congregations and their careers. *Law and Society Review*, 24:371–396, 1990.

[80] Marc Galanter. Contract in court; or almost everything you may or may not want to know about contract litigation. *Wisconsin Law Review*, page 577ff, 2001.

[81] Marc Galanter, Stewart Macaulay, Thomas Palay, and Joel Rogers. The transformation of American business disputing: A sketch of the Wisconsin project. Disputes Processing Research Program, University of Wisconsin-Madison Law School, Working Paper 10-6, March 1991.

[82] Marc Galanter and Thomas Palay. *Tournament of Lawyers: The Transformation of the Big Law Firm.* University of Chicago Press, Chicago, 1991.

[83] Marc Galanter and Joel Rogers. The transformation of American business disputing: Some preliminary observations. Disputes Processing Research Program, University of Wisconsin-Madison Law School, Working Paper 10-3, April 1991.

[84] Hans Gerth and C. Wright Mills, editors. *From Max Weber: Essays in Sociology.* Galaxy Books, New York, 1946 [1958].

[85] William Glaberson. Lawyers contend with state and federal efforts to restrict their rising power. *New York Times*, page A16, August 5, 1999.

[86] William Glaberson. State courts sweeping away laws curbing suits for injury. *New York Times*, page 1, July 16, 1999.

[87] Stuart Glascock. Caldera advances case against Microsoft. *TechWeb News*, July 12, 1999.

[88] Jonathan D. Glater. You're trademarked. *New York Times*, page 2, March 21, 2004.

[89] Adin C. Goldberg. Top eight issues affecting HR: Special report on employment law. *HR Focus*, 74(12), December 1997.

[90] Rachel Gordon. Supervisors back down on bill to cut gas prices. *San Francisco Examiner*, page A5, June 9, 1998.

[91] Steven Greenhouse. Overweight, but ready to fight: Obese people are taking their bias claims to court. *New York Times*, page 1, August 4, 2003.

[92] Warren S. Grimes. Perspectives on franchising: When do franchisors have market power? antitrust remedies for franchisor opportunism. *Antitrust Law Journal*, 65:105, 1996.

[93] Samuel R. Gross and Kent D. Syverud. Getting to no: A study of settlement negotiations and the selection of cases for trial. *Michigan Law Review*, 90:369ff, 1991.

[94] Eileen P. Gunn. A new legal target: The millennium bug. *Fortune*, April 27, 1998.

[95] Zan Hale. Want a job? call an insurance company; insurers dominate the list again. *Corporate Legal Times*, page 1, August 1995.

[96] Walter Hamilton. Stock-fraud suits increase despite '95 law. *Los Angeles Times*, page D1, July 1, 1998.

[97] Milton Handler. Symposium: Anticipating antitrust's centennial: Foreword. *California Law Review*, 75:787ff, May 1987.

[98] Nicole Harris and Mike France. Franchisees get feisty. *Business Week*, page 65, February 2, 1997.

[99] Melissa Harrison. The assault on the liability of outside professionals: Are lawyers and accountants off the hook? *University of Cincinnati Law Review*, 65:473, 1997.

[100] Jr. Harry Kalvan and Hans Zeisel. *The American Jury*. University of Chicago Press, Chicago, 1971.

[101] Constance L. Hays. Cola war II: The bottler battle. *New York Times*, August 14, 1998.

[102] Jon Healey. Record labels again sue creator of Morpheus software. *Los Angeles Times*, page 2, June 3, 2003.

[103] John P. Heinz and Edward O. Laumann. *Chicago Lawyers: The Social Structure of the Bar*. Russell Sage Foundation, New York, 1982.

[104] Michael A. Heller and Rebecca S. Eisenberg. Can patents deter innovation? the anticommons in biomedical research. *Science*, 280, May 1, 1998.

[105] Deborah R. Hensler. Trends in tort litigation: Findings from the institute for civil justice's research. *Ohio State Law Journal*, 48:479, 1987.

[106] Albert O. Hirschman. *Exit, Voice, and Loyalty: Responses to Decline in Firms, Organizations, and States.* Harvard University Press, Cambridge, Mass., 1970.

[107] Steven A. Holmes. Lawyers expect ambiguities in new rights law to bring years of lawsuits. *The New York Times*, page A20, 1991.

[108] Gary Hoover, Alta Campbell, and Patrick J. Spain. *Hoover's Handbook of American Business.* The Reference Press, Austin, Texas, 1994.

[109] Philip K. Howard. *The Death of Common Sense : how law is suffocating America.* Random House, New York, 1994.

[110] Philip K. Howard. *The Lost Art of Drawing the Line : how fairness went too far.* Random House, New York, 2001.

[111] Manley R. Irwin. The telecommunications industry. In Walter Adams, editor, *The Structure of American Industry.* Macmillan, New York, 1990.

[112] Bruce Japsen. Abbott, three other firms settle drug price suit. *Chicago Tribune*, July 15, 1998.

[113] Christine Jolls, Cass R. Sunstein, and Richard H. Thaler. A behavorial approach to law and economics. In Cass R. Sunstein, editor, *Behavorial Law and Economics*, pages 13–58. Cambridge University Press, Cambridge, 2000.

[114] Robert A. Kagan. *Adversarial Legalism: The American Way of Law*. Harvard University Press, Cambridge, Mass., 2001.

[115] Louis Kaplow and Steven Shavell. Economic analysis of law. Harvard Law School, John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 251, 1999.

[116] David J. Kaufmann. State bar's new committee; mediation update. *New York Law Journal*, May 30, 1996.

[117] Tina Kelley. Earning it: When overtime doesn't feel so fine. *New York Times*, page 10, May 31, 1998.

[118] Spencer Kelly. California refiners appeal unocal 'clean fuels' patent victory. *Oxy-Fuel News*, March 15, 1999.

[119] John Kennedy. Capital sees fast-food fight; restaurant companies are pitted against individual franchisees on matters of contracts and territories. *Orlando Sentinel*, February 27, 1994.

[120] Lane Kenworthy, Stewart Macaulay, and Joel Rogers. 'The more things change': Business litigation and governance in the american automobile industry. *Law and Social Inquiry*, 21(3):631–678, Summer 1996.

[121] Lijoong Kim and Jaehong Kim. Lawsuit as a signaling game under asymmetric information: A continuum types model. Institute of Economic Research, Hitotsubashi University (Japan), Working Paper number a401, December 2000.

[122] Wayne King. A rising tide of foreclosures. *New York Times*, page 4, October 20, 1985.

[123] Wendy J. Kisch. From the couch to the bench: How should the legal system respond to recovered memories of childhood sexual abuse? *American University Journal of Gender and Law*, 5:207, 1996.

[124] Benjamin Klein. Transaction cost determinants of 'unfair' contractual arrangements. *American Economic Review*, 70(2):356–362, 1980.

[125] Benjamin Klein and Keith Leffler. The role of market forces in assuring contractual performance. *Journal of Political Economy*, 89:615–41, 1981.

[126] Harriet F. Klein. Mandatory arbitration for employment disputes; concept deserves wider acceptance. *New Jersey Lawyer*, July 15, 1996.

[127] John F. Koten. Mixing with Coke over trademarks always a fizzle: Coca-Colaadds a little life in court to those failing to serve the real thing. *Wall Street Journal*, page 1, March 9, 1978.

[128] Herbert M. Kritzer. Adjudication to settlement: Shading in the gray. *Judicature*, 70:161, 1986.

[129] Alan B. Krueger. Ownership, agency, and wages: An examination of franchising in the fast food industry. *The Quarterly Journal of Economics*, 106:1, 1991.

[130] Robert V. Kuenzel. Alternative dispute resolution: Why all the fuss? *Compensation and Benefits Review*, July 17, 1996.

[131] Brad Kuhn. Publix's diversity on trial. *Orlando Sentinel Tribune*, page B1, January 26, 1996.

[132] Robert Langer. Developments in antitrust law. *Connecticut Law Journal*, page 11, December 27, 1993.

[133] David Laufer. The safe way to terminate a franchise. *Practical Lawyer*, March 1995.

[134] Tamar Lewin. Decision for Sears in sex bias lawsuit is upheld. *New York Times*, page 9, January 16, 1988.

[135] Diane Lewis. At Amtrak, harassment and questions on promotions mar minority track record. *Boston Globe*, page E1, March 2, 1997.

[136] Jessica Litman. *Digital Copyright: Protecting Intellectual Property on the Internet*. Prometheus Books, Amherst NY, 2001.

[137] Steve Lohr. Microsoft's top lawyer sets retirement. *New York Times*, page 3, November 22, 2001.

[138] Carol J. Loomis. A.T.&T. in the throes of 'equal employment'. *Fortune*, page 45, January 15, 1979.

[139] Stewart Macaulay. Non-contractual relations and business: A preliminary study. *American Sociological Review*, 28:55–69, 1963.

[140] Stewart Macaulay. Memo to the Business Disputing Group, University of Wisconsin. 1989.

[141] Stewart Macaulay. Long-term continuing relations: the American experience regulating dealerships and franchises. Disputes Processing Research Program, University of Wisconsin-Madison Law School, Working Paper 10-1, 1990.

[142] Ian R. Macneil. Reflections on relational contract. *Journal of Institutional and Theoretical Economics*, 141:541, 1985.

[143] Stephen P. Magee, William A. Brock, and Leslie Young, editors. *Black Hole Tariffs and Endogenous Policy Theory.* Cambridge University Press, Cambridge, 1989.

[144] Davan Maharaj and Henry Weinstein. Ruling tightens standard in investors' fraud suits. *Los Angeles Times*, page C1, July 3, 1999.

[145] Robert E. Martin. Franchising and risk management. *American Economic Review*, 78:954–968, 1988.

[146] Regina Fazio Maruca. Says who? *Harvard Business Review*, November/December 1997.

[147] Gerald Marwell and Pamela Oliver. *The Critical Mass in Social Action: A Micro-Social Theory.* Cambridge University Press, Cambridge, England, 1993.

[148] Wayne V. McIntosh. 150 years of litigation and dispute settlement; a court tale. *Law and Society Review*, 15:238ff, 1981.

[149] John D. McKinnon. Retailers beware. *Florida Trend*, page 20, June 1, 1996.

[150] Michael J. Meurer. Symposium on intellectual property, digital technology, and electronic commerce: Business method patents and bioinformatics: Business

method patents and patent floods. *Washington University Journal of Law and Policy*, 8:309, 2002.

[151] W. John Moore. Payday for lawyers. *National Journal*, June 20, 1998.

[152] Carolyn L. Mueller. Ohio homeowners beware: Your homeowner's insurance premium may be subsidizing child sexual abuse. *Dayton Law Review*, 20:341, 1994.

[153] Frank Munger. Law, change, and litigation: A critical examination of an empirical research tradition. *Law and Society Review*, 22:57, 1988.

[154] Cullen Murphy. Looking for trouble. *The Atlantic Monthly*, 293(1):193–194, January/February 2004.

[155] Kevin M. Murphy. The allocation of talent: Implications for growth. *Quarterly Journal of Economics*, 103:503, 1991.

[156] William P. Murphy. Sidetracking the FELA: The railroads' property damage claims. *Minnesota Law Review*, February 1985.

[157] Ralph Nader and Wesley Smith. *No Contest: Corporate Lawyers and the Perversion of Justice in America*. Random House, New York, 1996.

[158] Reliance National. Securities laws and corporate governance: The advent of a meltdown?: Panel discussion and Q&A. Stanford Law School Securities Class Action Clearinghouse, May 13, 1999.

[159] Federal opinions approved for publication Dec. 11 to 18, 1997. *New Jersey Law Journal*, December 22, 1997.

[160] Coca-Cola company sued by Atlas Syrup concern. *New York Times*, page 65, May 16, 1972.

[161] Plumbing concerns agree to pay claim. *New York Times*, July 5, 1972.

[162] Corporation affairs: Canfield charges Coca-Cola violations. *New York Times*, page 71, December 22, 1977.

[163] Douglass C. North. *Structure and Change in Economic History.* Norton, New York, 1981.

[164] Mancur Olson. *The Logic of Collective Action.* Harvard University Press, Cambridge, MA, 1976.

[165] Walter K. Olson. *The Litigation Explosion: What Happened when America Unleashed the Lawsuit.* Dutton, New York, 1991.

[166] Walter K. Olson. *The Excuse Factory: How Employment Law is Paralyzing the American Workplace.* Free Press, New York, 1997.

[167] China, the WTO, and IP rights. *Patent Cafe (www.cafezine.com)*, November 20, 2001.

[168] Robert Pear. Hands tied, judges rue law that limits HMO liability. *New York Times*, page A1, July 11, 1998.

[169] Charles Perrow. *Normal Accidents: Living with High-Risk Technologies.* Basic Books, New York, 1984.

[170] Jerry J. Phillips. FELA revisited. *Maryland Law Review*, Fall 1993.

[171] Benjamin Pimentel. Inventors patent ideas to pre-empt their rivals: Companies then must buy rights to the devices. *San Francisco Chronicle*, page E1, June 9, 2003.

[172] Ivan P. L. P'ng. Strategic behavior in suit, settlement, and trial. *Bell Journal of Economics*, 14:839–550, 1983.

[173] Michael E. Porter. *The Competitive Advantage of Nations*. Free Press, New York, 1990.

[174] Michael E. Porter. Wisconsin: Profile of the state economy. Harvard Business School, 2002.

[175] Richard A. Posner. *The Federal Courts: Challenge and Reform*. Harvard University Press, Cambridge, Mass, 1996.

[176] President of the United States. *Economic Report of the President Transmitted to the Congress*. U.S. Government Publications Office, Washington, DC, 1998.

[177] Info Press. *Franchise Annual*. Info Press, Lewiston NY, 1995.

[178] George Priest and Benjamin Klein. The selection of disputes for litigation. *Journal of Legal Studies*, 13(1), 1984.

[179] Scarlet Pruitt. RIAA suffers a setback in piracy battle. *IDG News Service*, August 11, 2003.

[180] Rebecca Quick and Ken Bensinger. Faked out: Look-alike designer merchandise fools online shoppers. *Chicago Tribune*, June 19, 1999.

[181] Richard C. Reuben. In pursuit of health: With more patients suing HMOs for denial of treatment, lawyers are exploring new ground in going up against the managed-care giants. *ABA Journal*, 82:54, October 1996.

[182] George Ritzer. *The McDonaldization of Society : An Investigation into the Changing Character of Contemporary Social Life.* Pine Forge Press, Thousand Oaks, Calif., 1996.

[183] William Roberts. Amtrak hit with another discrimination suit; 14 angry employees seek $100 million. *Journal of Commerce*, page 12a, August 21, 1998.

[184] Sara Robinson. Microsoft and Calera settle antitrust suit. *New York Times*, page C2, January 11, 2000.

[185] David Rubenstein. Knockoffs are generic for McDonald's general counsel. *Corporate Legal Times*, page 13, March 1994.

[186] David Rubenstein. Gray goods market protected by supreme court decision. *Corporate Legal Times*, page 30, July 1998.

[187] David Rubenstein. Patent law overhaul appeals to general counsels. *Corporate Legal Times*, page 27, July 1998.

[188] David Rubenstein. Playboy wins record copyright-infringement case. *Corporate Legal Times*, page 28, June 1998.

[189] Nancy Rutter. Bill Lerach thinks of himself as Robin Hood in a class action suit. *Forbes*, page 116, October 9, 1995.

[190] Stephen W. Salant. Litigation of settlement demands questioned by Bayesian defendants. California Institute of Technology, Working Paper No. 816, March 1984.

[191] Hope Viner Samborn. No-frills approach proving costly: Insurers' demands to economize are too much for some defense firms. *ABA Journal*, March 1998.

[192] Hope Viner Samborn. Relying on RICO: Using civil racketeering laws, insurers collect big damages from attorneys and others who aid fraud. *ABA Journal*, May 1998.

[193] Cadillac leads GM move to fewer dealers. *San Diego Union Tribune*, pages NC–2, February 28, 1998.

[194] Susan Saulny. In courtroom, laughter at fox and a victory for Al Franken. *New York Times*, page B1, August 23, 2003.

[195] David A. Schkade and Cass R. Sunstein. Judging by where you sit. *The New York Times*, June 11, 2003.

[196] Urs Schweizer. Litigation and settlement under two-divided incomplete information. *Review of Economic Studies*, 56(2):163–77, 1989.

[197] Joel Seligman. The merits do matter: A comment on Professor Grundfest's 'private rights of action under the federal securities laws: The commission's authority'. *Harvard Law Review*, 108:748, 1994.

[198] Andrew E. Serwer. Trouble in franchise nation. *Fortune*, page 115, March 6, 1995.

[199] Eileen Shanahan. U.S. charges automakers plot to delay fume curbs. *New York Times*, page 1, January 11, 1969.

[200] Scott Shane and Chester Spell. Factors for new franchise success. *Sloan Management Review*, 39(3):43, 1998.

[201] Mitchell S. Shapiro. Federal appeals court rules retroactive infringement of Iowa franchise act on contracts is unconstitutional. *Legal Opinion Letter*, August 26, 1994.

[202] Steven Shavell. Economic analysis of law. *NBER Reporter*, Spring 1999.

[203] Douglas P. Shuit. A look ahead. *Los Angeles Times*, page B1, April 20, 1998.

[204] Peter Siegelman. Another look at employment discrimination litigation: A reply to Epp. American Bar Foundation, Working Paper 9005, 1990.

[205] Peter Siegelman and John J. Donohue III. Studying the iceberg from its tip: A comparison of published and unpublished employment discrimination cases. *Law and Society Review*, 24(5):1133–1170, 1990.

[206] Peter Siegelman and John J. Donohue III. Law and macroeconomics: Employment discrimination litigation over the business cycle, 1991.

[207] Herbert Simon. *Administrative Behavior: A Study of Decision-Making Processes in Administrative Organization.* Free Press, New York, 1976.

[208] John T. Slania. Exchange of ideas: Mind games: Patent lawyer is at center of intellectual property storm. *Crain's Chicago Business*, page 15, September 16, 2002.

[209] Adam Smith. *An Inquiry Into the Nature And Causes of the Wealth Of Nations*. Modern Library, New York, 1994.

[210] Citrix named in shareholder suit. *The South Florida Business Journal*, July 12, 2000.

[211] I.M. Stackel. Naples man wins copyright suit against music giant EMI. *Naples Daily News*, March 4, 2001.

[212] Gary Stix. Deep-sixing the submarine patent: Will a pending trial curb a purportedly abusive practice? *Scientific American*, page 32, August 2002.

[213] Gary Stix. Make your own rules: Patents let private parties take the law into their own hands. *Scientific American*, page 36, May 2003.

[214] Paul A. Strassmann. Hard data (at last) on year 2000 costs. *Computerworld*, May 18, 1998.

[215] David Streitfeld. Making bad names for themselves; firms preempt critics with nasty domains. *The Washington Post*, page A1, September 8, 2000.

[216] Cost of accommodation falls at Sears, but what about the 'hidden' costs?'. *Successful Job Accommodations Strategies*, April 1996.

[217] James Surowiecki. Patent bending. *The New Yorker*, page 36, July 14 and 21, 2003.

[218] Richard Sweeney. Telephone interview with author, June 22, 1999.

[219] John J. Tharp. Comment: Raising rivals' costs: Of bottlenecks, bottled wine, and bottled soda. *Northwestern University Law Review*, Fall 1990.

[220] Lester Thurow. Building wealth. *Atlantic Monthly*, pages 57–69, June 1999.

[221] Joseph B. Treaster. Crackdown on accidents that aren't so accidental; big auto insurers go on the offensive as big time fraud gains sophistication. *New York Times*, page D1, November 13, 1996.

[222] Joseph B. Treaster. Trying to stem auto accident fraud. *New York Times*, page D2, August 24, 1998.

[223] David M. Trubek, Austin Sarat, William L. F. Felstiner, Herbert M. Kritzer, and Joel B. Grossman. The costs of ordinary litigation. *UCLA Law Review*, 31:86ff, 1983.

[224] Tom R. Tyler. *Why People Obey the Law.* Yale University Press, New Haven, Conn., 1990.

[225] United States Census Bureau. *County Business Patterns.* U.S. Government Publications Office, Washington, DC, 1996.

[226] United States Census Bureau. *Statistical Abstract of the United States.* U.S. Government Publications Office, Washington, DC, 1998.

[227] United States Department of Commerce. *Franchising in the Economy, 1986-88.* U.S. Government Publications Office, Washington, DC, 1989.

[228] United States House of Representatives. Hearing of the Courts and Intellectual Property Subcommittee of the House Judiciary Committee.

[229] UPI. Plumbing concerns settle U.S. charge. *New York Times*, page 74, April 16, 1971.

[230] UPI. Harris says that coca-cola overcharges by 3 cents. *New York Times*, page 27, January 22, 1972.

[231] UPI. Antitrust suit is filed against Coca-Cola of N.Y. *New York Times*, page 54, February 7, 1974.

[232] Jon Van. E-commerce patent threat; firms claim broad coverage, then sue; targets often pay to avoid fight. *Chicago Tribune*, page 1, January 13, 2003.

[233] Alex Veiga. File sharing dips after threat to sue. *Associated Press*, July 14, 2003.

[234] Michael A. Verespej. Today's union leaders: 'we want manufacturing back, that is America's survival'. *Industry Week*, page 28, July 25, 1993.

[235] W. Kip Viscusi. Product and occupational liability. *The Journal of Economic Perspectives*, 5(3):71–91, Summer 1991.

[236] Bob Van Voris. Problems on his plate are whoppers. *New York Law Journal*, October 6, 1997.

[237] Donna K. H. Walters. New liability twist has lawyers, accountants scurrying. *Los Angeles Times*, page D1, March 29, 1992.

[238] Paul Weiler. *Governing the Workplace: The Future of Labor and Employment Law.* Harvard University Press, Cambridge, Mass., 1990.

[239] Mort G. Welch. Telephone interview with author, September 23, 1999.

[240] Oliver Williamson. *The Economic Institutions of Capitalism.* Free Press, New York, 1985.

[241] B. Dan Wood. Does politics make a difference at the EEOC? *American Journal of Political Science*, 2(34):503–530, 1990.

[242] Bernice Yeung. Patent fight pending. *SF Weekly*, December 6, 2000.

[243] Joseph A. Yorick. Note: Compulsory patent licensing for efficient use of inventions. *University of Illinois Law Review*, 1275, 2001.

[244] Matthew Zeidenberg. Kill the king: Monopolies, alliances, and litigation in the american computer industry. Master's thesis, University of Wisconsin-Madison, 1996.