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JUDICIAL DECISIONMAKING IN FEDERAL PRODUCTS LIABILITY CASES, 1978-1997

*Theodore Eisenberg**

In 1992, Professor James Henderson and I wrote that, throughout the 1980s, a quiet, pro-defendant revolution in products liability had occurred.¹ That revolution was likely largely the product of a “widespread, independent shift in judicial attitudes.”² It was not discernable in cases tried before juries.³ The federal data used in that study were available through 1989. Also in 1992, using the same database, Professor Kevin Clermont and I wrote about the surprising relation between plaintiff win rates in judge and jury trials in products liability cases.⁴ Plaintiffs prevailed at a higher rate before judges than they did before juries. Comparable data are now available through fiscal 1997 and it is appropriate to reexamine time trends in products liability cases related to judicial decisionmaking.

Assessing judicial performance in products liability cases requires reference points. It is natural to compare plaintiff win rates and trial award levels in judge-tried cases with similar statistics in jury-tried cases, and to compare products liability case outcomes to outcomes of other classes of cases.

The results both confirm and extend prior findings. The striking difference in trial win rates between judge and jury trials continues. Plaintiffs prevail in over 40% of the judge trials and only about 30% of the jury trials. Trial award patterns confirm that higher stakes cases are routed to juries. But the time trend in award patterns between products liability cases and contracts cases is strikingly similar. If trial

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1. Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992) [hereinafter *Inside the Quiet Revolution*].

2. *Id.* at 734. For further support or acknowledgment of this thesis, see Kenneth J. Chesebro, *Galileo's Retort: Peter Huber's Junk Scholarship*, 42 AM. U. L. REV. 1637, 1717-18 (1993); Mark F. Grady, *Accident Law Seeks to Limit Insurance Effects*, 1 MICH. L. & POL'Y REV. 11, 33 (1996); Marc S. Moller & Paul Indig, *Products Liability Law Revisited: A Realistic Perspective*, 31 TORT & INS. L.J. 879, 880 (1996); Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303, 318-33 (1991).

3. Theodore Eisenberg & James A. Henderson, Jr., *Is the Quiet Revolution in Products Liability Reflected in Trial Outcomes?*, CORNELL L. FORUM, July 1990, at 2, 3.

4. Kevin M. Clermont & Theodore Eisenberg, *Trial by Jury or Judge: Transcending Empirism*, 77 CORNELL L. REV. 1124 (1992).

adjudicators are increasingly generous towards products liability plaintiffs, they are similarly inclined toward contract case plaintiffs. Among tried products liability cases, the time trend in awards of judge-tried cases is more similar than different from the trend in jury-tried cases. The distribution of trial awards has approximately the same shape, but jury awards tend to be higher.

Pretrial adjudication tells an especially telling story about judicial treatment of products liability cases. Most products cases are tried before juries so trial patterns can only reveal so much about judges' behavior. All products liability cases must survive pretrial judicial scrutiny. The time-trend here is strikingly anti-plaintiff. Of those cases that survive early pretrial skirmishing, and end in pretrial judgment, an increasing percentage is resulting in pretrial judgment in favor of defendants.

Part I of this article describes the data used. Part II presents the results.

I. THE DATA

Previous work discusses the methodology and sources used.⁵ Therefore, I only summarize the data here and note changes from the earlier data. The data consist of all federal district court cases terminated from 1978 to 1997. The Administrative Office of the United States Courts compiles the data and makes them publicly available through the Inter-university Consortium for Political and Social Research.⁶ The earlier study covered federal data for the fiscal years 1979 to 1987.⁷ Although the Administrative Office data are organized by fiscal years, I present them on a calendar year basis. This methodology facilitates comparison with other annual data, such as the consumer price index ("CPI").⁸ The calendar year 1978 data cover the

5. See *id.* at 1133-35; James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability*, 37 UCLA L. REV. 479, 499-503, 518-22 (1990) [hereinafter *The Quiet Revolution*].

6. See *The Quiet Revolution*, *supra* note 5, at 518-22. For a complete description of Administrative Office data, see INTER-UNIVERSITY CONSORTIUM FOR POLITICAL AND SOCIAL RESEARCH, FEDERAL COURT CASES: INTEGRATED DATA BASE, 1970-1997, ICPSR 8429 (1998) [hereinafter ICPSR]. For easy access to this database, see Theodore Eisenberg & Kevin M. Clermont, *Judicial Statistical Inquiry Form* (last modified Nov. 15, 1998) <<http://teddy.law.cornell.edu:8090/questata.htm>> (discussing Theodore Eisenberg & Kevin M. Clermont, *Courts in Cyberspace*, 46 J. LEGAL EDUC. 94 (1996)).

7. See Clermont & Eisenberg, *supra* note 4, at 1133.

8. The district court data include the Administrative Office's general personal injury products liability category, as well as the more specialized personal injury products categories: airplane, marine, motor vehicle, contracts, and products liability. The general products liability is by far the largest.

last six months of that year. The 1997 data cover the first nine months of that year. Data for all other calendar years cover twelve months.

I group the Administrative Office's several different products liability categories into a single category.⁹ I exclude asbestos cases on the ground that they have become a world unto themselves. For some years, the number of asbestos cases filed exceeded filings for all other federal products liability cases combined.¹⁰

II. OUTCOMES INFLUENCED BY JUDGES AND A COMPARISON WITH JURIES

Judges can influence case processing in several ways. By pretrial dismissals or grants of judgment they can determine which side prevails. Of those cases that reach trial, many are tried before judges rather than juries. In bench trials, judges determine both the winner and the level of award. Even in jury trials, judges can exert substantial influence over the outcome through pretrial motions, evidentiary rulings, and post-judgment motions. I first present results pertaining to plaintiff trial win rates, then discuss trial award patterns, and conclude by reporting judicial treatment of cases adjudicated prior to trial.

A. Trial Win Rates

In 1992, using data through 1989, Professor Clermont and I showed the distinctive pattern of trial win rates in products liability cases. Despite widespread belief in juror sympathy for injured plaintiffs, we found that plaintiffs in products liability cases had significantly greater win rates in judge trials than in jury trials.¹¹ Table 1 demonstrates that this pattern continues. For the twenty-year period (with data on a half year for 1978 and nine months for 1997), plaintiffs' mean trial win rates in products liability judge trials were 43.8% compared to 30.6% in jury trials. The result is not a consequence of one or a few years. This pattern holds for eighteen of the twenty years studied and the difference is highly statistically significant.¹²

9. See Clermont & Eisenberg, *supra* note 4, at 1136 n.37.

10. See *Inside the Quiet Revolution*, *supra* note 1, at 734 n.6.

11. See Clermont & Eisenberg, *supra* note 4, at 1137.

12. Table 1 also shows that products liability cases join in the national long-term trend toward fewer trials. The absolute number of trials is quite consistently decreasing. The extremely low jury trial win rate in 1985 (11.0%) is a consequence of the consolidated Bendectin trial in the Southern District of Ohio, which resulted in a defeat for plaintiffs. See *Inside the Quiet Revolution*, *supra* note 1, at 743.

TABLE 1. PLAINTIFF TRIAL WIN RATES, FEDERAL COURT
JUDGE TRIALS AND JURY TRIALS, 1978-1997

Year	Judge trial win rate (%)	Number of judge trials	Jury trial win rate (%)	Number of jury trials	Combined win rate (%)	Total trials
1978	57.7	26	40.3	119	43.4	145
1979	39.0	41	35.6	250	36.1	291
1980	54.2	72	36.5	400	39.2	472
1981	42.6	122	38.9	428	39.6	550
1982	39.8	103	33.0	445	34.3	548
1983	37.4	115	35.0	457	35.5	572
1984	50.5	93	40.7	450	42.4	543
1985	38.2	89	11.0	1240	12.9	1329
1986	49.2	63	31.4	385	33.9	448
1987	55.9	59	34.7	337	37.9	396
1988	53.2	62	33.3	312	36.6	374
1989	44.4	45	36.3	322	37.3	367
1990	46.2	26	39.6	273	40.1	299
1991	24.3	37	35.3	278	34.0	315
1992	32.4	34	35.3	272	35.0	306
1993	45.9	37	30.0	237	32.1	274
1994	31.4	35	31.2	260	31.2	295
1995	39.4	33	29.3	229	30.5	262
1996	46.7	30	26.3	209	28.9	239
1997	44.4	18	31.3	163	32.6	181
Total	43.8	1140	30.6	7066	32.4	8206

As before, one should not interpret this substantial difference in trial win rates as evidence that judges favor products liability plaintiffs more than juries. The more sober explanation probably rests in the routing of cases between the two adjudicators. Plaintiffs, their lawyers, and most other observers of the legal system believe the jury to be more sympathetic to plaintiffs, on average, than the judge. Plaintiffs therefore route a weaker set of cases to juries. When juries turn out to process cases about the same as judges,¹³ plaintiffs achieve depressed win rates before juries.

B. Trial Award Trends

It is often noted that trial awards of one kind or another are increasing or otherwise changing over time. So, for example, one might note, as shown below, that the mean and median award in tried products liability cases has increased over time. But how should such an increase be interpreted? The increase might reveal something about the processing of products liability cases by juries or by judges. Or the increase might mean that products liability cases reflect larger trends that transcend particular case categories. Without a useful baseline it is impossible to know.

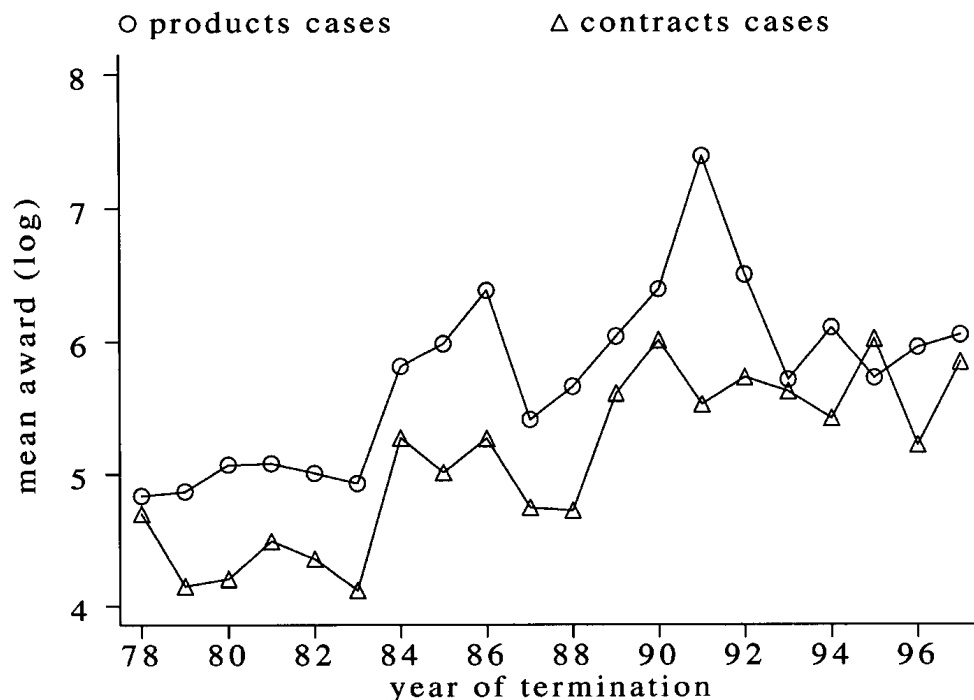
13. See Clermont & Eisenberg, *supra* note 4, at 1152-53.

1. Comparing Award Levels in Products Liability Trials and Contracts Trials

To compare award trends in products liability cases with background activity levels in the legal system, I compare products liability cases with contracts actions. For purposes of comparison, this study uses a 25% random sample of federal contracts actions¹⁴ for the same time period from 1978 through 1997.

Figure 1 presents the mean award for plaintiffs in cases tried to judgment. One line represents the mean award in all products liability trials. The second line represents the mean award in a 25% sample of the largest general category of contracts cases. The contracts case sample includes awards in 2,576 plaintiff trial victories. The products liability case sample includes awards in 3,093 plaintiff trial victories. Dollar amounts are adjusted to 1997 dollars and are stated in terms of logs.

FIGURE 1. MEAN TRIAL AWARDS, CONTRACTS AND PRODUCTS LIABILITY CASES, 1978-1997



14. I use the most general and largest Administrative Office contracts category, "other contract actions" (code 190). ICPSR, *supra* note 6.

The figure reveals three noteworthy patterns. First, products liability trials involve higher mean awards than contract trials. In almost every year, the mean products case trial award exceeds the mean contracts case trial award. Since the case categories are so different, this result simply tells us that the damages in products cases tend to be higher. Whether they are artificially inflated by sympathetic adjudicators is not revealed by the case category comparison.

Second, the time trend for the two case categories is strikingly similar. Within a one-year lag or lead period, the awards generally follow the same trend. Most noticeable is an increase from the early to mid-1980s, a peak in the late 1980s and early 1990s, and a decline in the mid-1990s. These fluctuations occur against a background of generally increasing awards in both classes of cases. A plot of median rather than mean awards tells essentially the same story.

The contract cases line serves as an important reference point. If one saw only the products liability time trend, it would be difficult to resist the temptation to speculate that adjudicators, mostly juries,¹⁵ somehow became more generous in the early 1990s, following and preceding periods of more temperate awards. Furthermore, despite questionable evidence of systematic juror sympathy to plaintiffs,¹⁶ juries would be regarded as having become increasingly sympathetic to plaintiffs because of the generally increased trend in mean products case awards.

But the presence of the contracts case reference point suggests an alternative class of explanations. Looking at the figure, it is even more difficult to resist the speculation that whatever forces drive the time trend in products awards probably drive the trend in contracts cases as well. It could be reactions to inflation patterns, to external economic conditions, or something else. The important point is that the time trend in products liability cases is anything but distinctive. It seems to be associated with products cases being embedded in a larger legal system.

Third, in recent years, the difference between mean awards in products and contracts trials has been shrinking. In 1993, 1994, 1995, and 1997, that difference is at historically low levels. So, relative to the presumably sober area of contract adjudication, awards in products liability cases may in fact be falling rather than increasing.

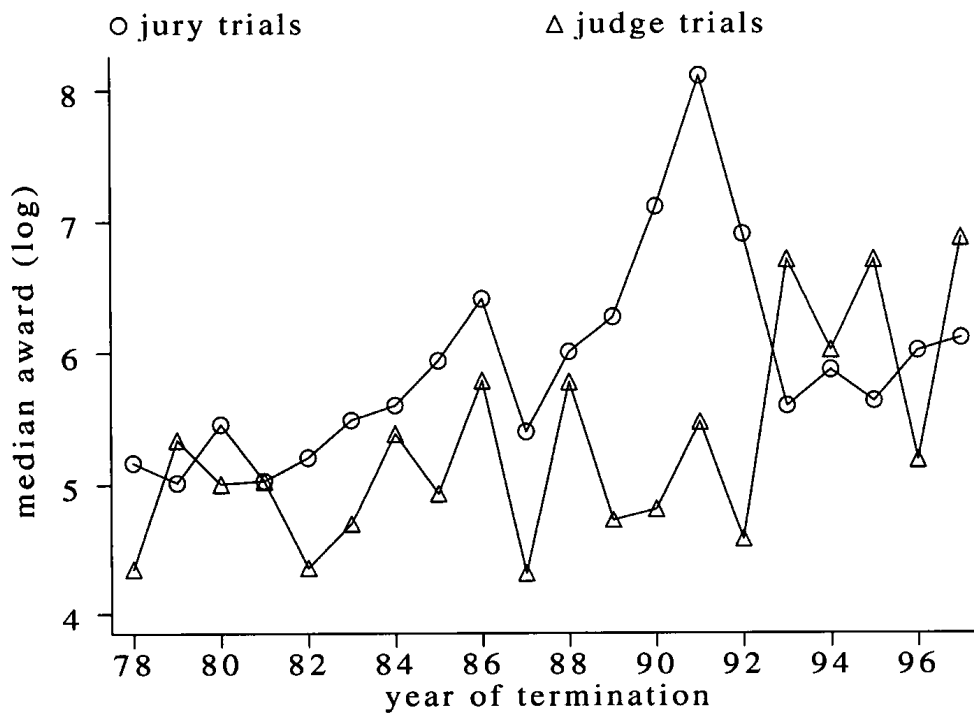
15. See Clermont & Eisenberg, *supra* note 4, at 1141 (finding that 88% of federal products liability cases are tried to juries).

16. See *id.* at 1152; Valerie Hans, *The Illusions and Realities of Jurors' Treatment of Corporate Defendants*, 48 DEPAUL L. REV. 327, 352-53 (1998).

2. Comparing Award Levels in Judge Trials and Jury Trials

Contracts cases and products cases follow the same trends. What about jury-tried cases and judge-tried cases? Figure 2 shows, for each year, the median award (in logs) in products liability judge trials and the median award in products liability jury trials. Because there are so few judge-tried products liability cases, the judge line is noisier. In general, the trends are similar through about 1990. But in the early 1990s, jury awards peaked and judge awards stayed more level. By the mid-1990s, strikingly, the median judge award exceeded the mean jury award (both in logs) in three of four years. Figure 2 also shows that, at least before the 1990s, median awards in jury-tried cases are higher than awards in judge-tried cases. This is consistent with high-stakes cases tending to be routed towards juries but the effect is fading in recent years.

FIGURE 2. MEDIAN AWARD IN FEDERAL PRODUCTS LIABILITY TRIALS, 1978-1997



A cautionary note about making too much of the relation between judge and jury trial awards is in order, and especially the trend towards judge awards exceeding jury awards after 1992. The judge trials data are based on a small number of awards. Table 1 shows that the

total number of products liability judge trials from 1993 through 1997 was 153. Plaintiffs win only about one-third of the trials. So the awards data for judges are based on about fifty trials. But the results remain striking. For the entire period after 1992 taken as a whole, both the mean and median judge trial award have exceeded the mean and median jury trial award. The differences are not statistically significant but they are in a surprising direction.

It is difficult to tell from Figure 2 whether the noisier judge line reflects systematically different variation than the jury line. In fact, although the mean and median jury award is higher, the variation in awards is no greater in jury-tried cases than in judge-tried cases. The first two rows in Table 2 present descriptive statistics for products liability judge and jury trials for all twenty years aggregated together. The standard deviations are not noticeably different and one cannot reject the hypothesis that there is no difference in their standard deviations.¹⁷

TABLE 2. DESCRIPTIVE STATISTICS, JUDGE AND JURY TRIAL AWARDS, FEDERAL PRODUCTS LIABILITY AND CONTRACTS CASES, 1978-1997

	<i>Mean award (logs of thousands of dollars)</i>	<i>Median award (logs of thousands of dollars)</i>	<i>Standard deviation</i>	<i>Number of cases</i>
Products judge trials	5.23	5.15	2.05	469
Products jury trials	5.94	5.96	2.12	2335
Contracts judge trials	4.71	4.42	2.04	1226
Contracts jury trials	5.36	5.14	2.11	876

Using contracts cases as a comparison group again adds perspective to the judge-jury comparison. The relation between judge and jury awards in contracts cases is similar to that in products liability cases. The jury-trial mean and median awards substantially exceed the judge-trial mean and median awards. The standard deviations of the awards are not significantly different.¹⁸

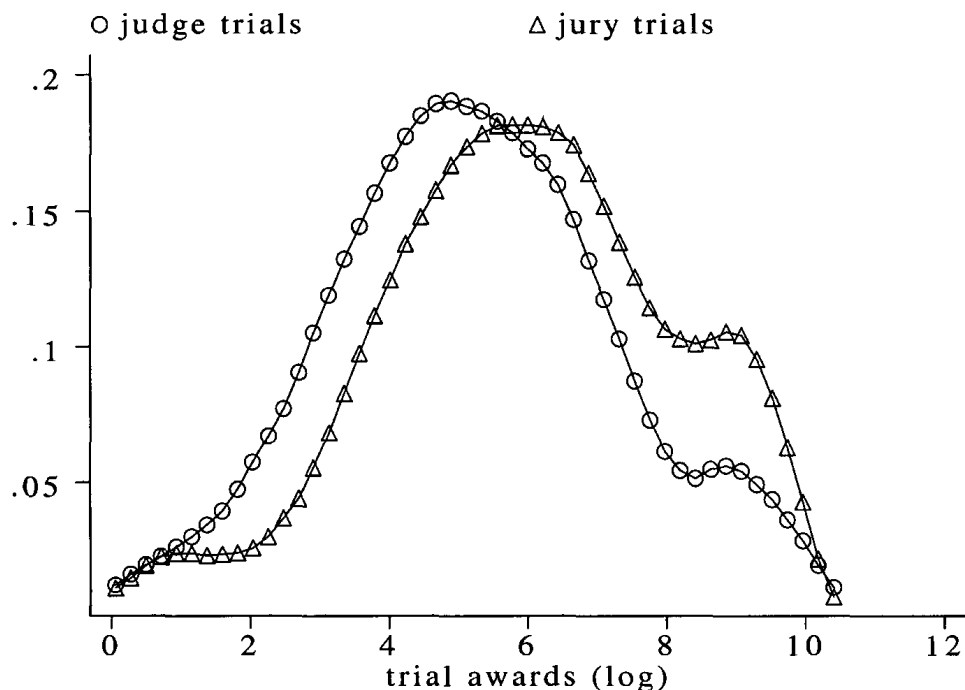
Figure 3 presents the frequency distributions of judge and jury trial awards in products liability cases. It thus provides information in addition to that provided by statistics summarizing central tendencies. The jury distribution is substantially and significantly right-shifted. Higher stakes cases emerge from jury trials. But the shapes of the

17. An F-test of the hypothesis that the standard deviations are the same yields a significance level (p-value) of 0.408.

18. An F-test of the hypothesis that the standard deviations are the same yields a significance level (p-value) of 0.328.

distributions are quite similar; hence the insignificant variation in the standard deviations. Judicial award patterns mirror those of jury award patterns once one accounts for the generally smaller stakes of judge-trying cases.

FIGURE 3. DISTRIBUTIONS OF JUDGE AND JURY TRIAL AWARDS, FEDERAL PRODUCTS LIABILITY CASES, 1978-1998



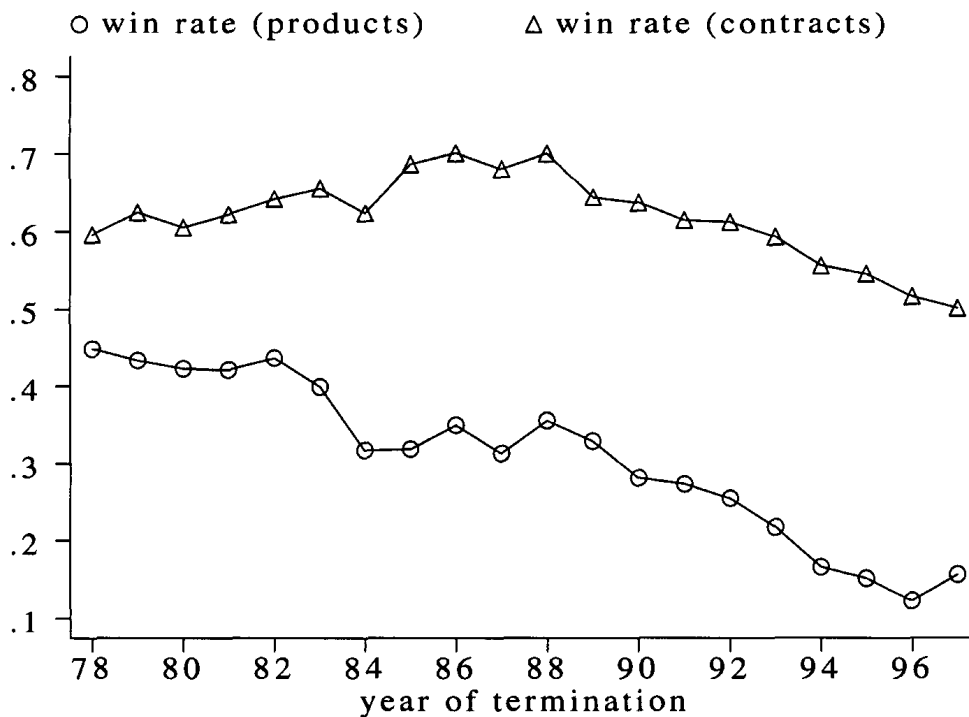
C. Pretrial Win Rate Trends

So far the focus has been on cases adjudicated by judge or jury after trial. The mass of cases never reach trial. Trial rates in federal courts in recent years are well under 5%.¹⁹ By granting or denying pretrial motions, judges exert a powerful influence over what cases reach trial and on the outcome of cases that do not reach trial. But many pretrial dispositions are more influenced by the parties' desires to settle or withdraw cases than by judicial rulings on the merits of cases. To study the pattern of pretrial judicial rulings, I screen out cases less likely to be dominated by parties' agreements or unilateral acts than by judges. The Administrative Office groups cases into twelve proce-

19. See Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 Wis. L. REV. 631, 633.

dural progress stages.²⁰ For purposes of this pretrial analysis, I also drop cases adjudicated before issue was joined and those decided after issue was joined but in which no court action occurred. This leaves a residue of cases in which judgments that were entered should tend to be based on action by the judge. Because I am interested in studying win rates, I further limit the sample to cases in which judgment was entered for plaintiff or defendant. Figure 4 presents the results of such pretrial outcomes over time.²¹ In recent years, pretrial plaintiff win rates in products liability and contracts cases both show steady declines, with the products decline being steeper than the contracts decline. Through the late 1970s and most of the 1980s, plaintiffs were

FIGURE 4. PLAINTIFF PRETRIAL WIN RATES, FEDERAL PRODUCTS LIABILITY AND CONTRACTS CASES, 1978-1997



20. The procedural stages and their numeric codes are as follows: 01: Before issue joined, no court action; 02: Before issue joined, order entered; 03: After issue joined, no court action; 04: After issue joined, judgment on motion; 05: After issue joined, pretrial conference held; 06: After issue joined, during court trial; 07: After issue joined, during jury trial; 08: After issue joined, after court trial; 09: After issue joined, after jury trial; 10: After issue joined, other; 11: Before issue joined, hearing held; 12: Before issue joined, motion decided. ICPSR, *supra* note 6.

21. Figure 4 excludes cases from the Eastern District of New York terminated in 1984 and cases from the Eastern District of Virginia terminated in 1990. The districts had large consolidated cases in which judgments simultaneously disposed of hundreds of cases. The New York cases were resolved against plaintiffs and the Virginia cases were resolved for plaintiffs.

receiving an increasing percentage of the trial judgments in contracts cases. In products liability cases, however, plaintiffs were faring worse and worse for about a decade. For once our contracts and products lines do not match in one significant respect. Amidst the claims of products liability law being highly favorable to plaintiffs, judges were in fact entering pretrial judgments at increasing rates for defendants, a trend that has now lasted for about two decades.

More than one reason can explain this pro-defendant trend. It is possible that judges have become increasingly hostile to products liability claims. It is also possible that the judges have been seeing a set of products liability cases of decreasing quality over time. In the midst of increasing loss rates, plaintiffs would have to be bringing increasingly weaker cases. One might expect that increasing losses would lead to plaintiffs shifting to a stronger set of cases.

III. CONCLUSION

Most public discussion of products liability cases focuses on juries. This is understandable in light of the dominance of jury trials in products cases. Awards in judge-trying cases can shed light on jury trial outcomes. The similarity of award patterns suggests an essential similarity between trial adjudicators. Juries see higher stakes cases, so headline-grabbing awards tend to be in jury trials. Though in recent years awards in judge-trying products cases have in fact exceeded awards in jury-trying products cases.

The headlines and most commentators ignore the mass of products cases that never reach trial. Most cases settle or are adjudicated by judges. Here, the evidence suggests that judges continue to increasingly resist products liability claims. Of cases in which judgment is entered before trial, it is increasingly entered for products liability defendants.