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THE QUIET REVOLUTION IN PRODUCTS LIABILITY

By JAMES A. HENDERSON, JR.*

and

THEODORE EISENBERG

Most revolutions are noisy, tumultuous affairs. This is as true of significant shifts in legal doctrine as it is of shifts of political power through force of arms. Indeed, the pro-plaintiff revolution in American products liability in the early 1960s will forever be associated with heroic, martial images, epitomized in Prosser's description of the assault upon, and fall of, the fortress citadel of privity.¹ The same sort of terminology aptly could be used to describe the last five or ten years of legislative reform activity in the various states. Reacting to what many see as "crises" brought on by courts extending liability too far, state legislatures have enacted breathtakingly large numbers of changes in products liability law, ranging from the trivial to the drastic to the Draconian.² For anyone who follows products liability, these developments bring to mind the ancient Chinese curse: "May you live in interesting times."

In contrast to these noisy, exuberant events, the revolution to which we refer has gone all but unnoticed. Many followers of the American products liability wars will find our hypothesis so counterintuitive as to warrant its summary rejection. The quiet revolution to which we refer is a significant turn in the direction of judicial decisionmaking away from extending the boundaries of products liability and toward placing significant limitations on plaintiffs' rights to recover in tort for product related injuries. These

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This article is an abbreviated and updated version of a more complete version of this study, published as *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 36 *UCLA L. Rev.* 479 (1990). We gratefully acknowledge the permission of *UCLA Law Review* to reprint portions of what appears in the original version.

1. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *Minn. L. Rev.* 791 (1966); Prosser, *The Assault Upon the Citadel (Strict Liability to Consumer)*, 69 *Yale L.J.* 1099 (1960).
2. See generally J. Henderson & A. Twerski, *Products Liability: Problems and Process* at 745-749 (1987); Reed & Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 *Neb. L. Rev.* 389 (1984); Note, *The Expanding Scope of Products Liability: New Jersey Extends a Manufacturer's Responsibility to Include Injuries Caused After a Substantial Alteration of its Product*, 16 *Seton Hall L. Rev.* 722 (1986).

changes are quite recent. Looking back on these events in years to come, scholars are likely to trace the turn in judicial lawmaking to the early to mid-1980s. Although some who follow products liability cases closely have begun to sense change, even those who track products developments will be surprised to find the roots of the trend in the early 1980s.

Our objective in this Article is to substantiate that changes in judicial decisionmaking are occurring and that current trends favor defendants. This study shows that since the early - to mid-1980s policymakers and industry leaders have been operating from questionable, if not false, premises. Industry leaders have characterized products liability lawyers and clients as a "plague of locusts," who "have brought a blood bath for U.S. business and are distorting our traditional values."³ Reacting, one hopes, to somewhat less extreme descriptions of products reality, several federal proposals for products reform have been introduced⁴ and many states have enacted limiting legislation.⁵ The overall impression is one of an area of judge-made law on the rise, threatening to engulf the legal system, harming industry, and requiring legislative reaction to rein in judges.⁶ We will show that even before many of the reforms were in effect, products liability had turned an important corner. The judges whom state legislatures sought to rein in had already begun a trend of doctrinal change favoring defendants. This trend is evident in an increasing percentage of published opinions favoring defendants. At the trial court level, at a time when plaintiffs' likelihood of success in products cases is said by many to be increasing,⁷ it has been moving in quite the opposite direction.

I. The Appellate Opinion Data

Judicial opinions in recent products cases depart from prior trends in two important ways. First, several cases are, whatever other face the opinions put on the decisions, outright retreats from prior pro-plaintiff stances. Courts

3. Dee, Blood Bath, 10 Enterprise 3 (Mar.-Apr. 1986) (statement by Chairman of the Board of the National Association of Manufacturers).
4. Litan & Winston, Policy Options, in *Liability: Perspectives and Policy* 223, 227-28 (R. Litan & C. Winston eds. 1988).
5. *Id.* 229-33.
6. See generally U.S. Department of Justice, *The Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability* (GPO 1986); U.S. Department of Justice, *An Update on the Liability Crisis* (GPO 1987). For acknowledgement, without endorsement, of the widespread concern about products cases, see Terence Dungworth, *Product Liability and the Business Sector: Litigation Trends in Federal Courts* 1-3 (1988).
7. P. Huber, *Liability: The Legal Revolution and Its Consequences* 10 (1988) ("The likelihood of success rose from 20 to 30 percent in a product case in the 1960s to more than 50 percent in the 1980s . . .") It is not clear what measure of success Huber uses. If settlements count as successful cases, then he dramatically understates products cases' success. Products cases, as well as most other cases, settle 70 to 80 percent of the time. See Schwab & Eisenberg, *Explaining Constitutional Tort Litigation: The Influence of the Attorney Fees Statute and the Government as Defendant*, 73 Cornell L. Rev. 719, 729 & n.36 (1988). Since the higher settlement success rate applies to most litigation it is not an interesting feature of products litigation. Of cases not settled the 50 percent figure simply is wrong. See Part II *infra*; Eisenberg & Henderson, *Is the Quiet Revolution in Products Liability Reflected in Trial Outcomes?*, Cornell Law Forum, July 1990.

effectively are taking away what they previously have given or, in matters of first impression within a jurisdiction, are refusing to follow the lead of courts that had earlier adopted a rule benefiting plaintiffs. Second, in an area that developed for plaintiffs as rapidly as did products liability, refusals to extend doctrine signify the temper of the times almost as much as do withdrawals from earlier holdings. Courts now exhibit a novel reluctance to expand established products doctrine to benefit plaintiffs.⁸

Study of individual cases cannot prove that a broad-based change in judicial attitudes toward products liability has occurred. To speak with confidence about such a trend we read and evaluated most products liability decisions for consecutive years and found further evidence of a substantial pro-defendant trend. Since at least the mid-1980s, published opinions have moved towards benefiting defendants over plaintiffs, have increasingly demanded dismissal of plaintiffs' claims as a matter of law, and have tended increasingly to break new legal ground for defendants.

A. Party Benefiting From Decision

Our initial inquiry into the published opinion data asks how products liability plaintiffs and defendants fared in each year, reflected in what could be described as the "bottom line" assessment regarding every case that could be said to make law: "Whom does this decision benefit?" The two responses relevant to our inquiry – "plaintiffs" and "defendants" – are expressed in the plural. Thus, the data reflect the likely effects of any decision on plaintiffs and defendants generally, as classes of participants, rather than the effects of the decision on the individual parties in the particular case. Of course, in many cases the group (plaintiffs or defendants) that benefited from the decision will match the winner or loser in the particular case. But that need not be the case.⁹ And if a decision is so dependent on factors unique to it that it creates no law valuable to other litigants, it is not included in the sample. Because we are more interested in the precedential effects of opinions on the path of the law than on their resolution of particular cases, we pursue the group-oriented inquiry rather than the inquiry focused on individual litigants. The line labeled "Fed. & State Opins." in Figure 1 presents the results,¹⁰ after eliminating opinions in which the bottom-line benefits are

8. A substantial anecdotal review of the case law supporting these statements appears in Part I of Henderson & Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 36 *UCLA L. Rev.* 479 (1990).

9. For example, the trial court might, over the plaintiff's objection, give a new instruction favoring the defendant that is likely to affect the amount of plaintiff's recovery. The jury returns a plaintiff's verdict, but for a very modest amount. Both sides appeal. The court of appeals decides that the plaintiff's evidence was sufficient to reach the jury, but also that the instruction was proper. Who won the case? The plaintiff. Whom did the decision on appeal benefit? Defendants as a group. The author who collected these data is certain that this sort of decision recurred with some frequency. But attempts to quantify the rates of recurrence have failed.

10. The data plotted in the relevant line in Figure 1 appear in Appendix A, Table A-1, of Henderson & Eisenberg, *supra* note 8. We have added data for 1982 and updated the data for 1983 and 1979. The data for 1979 and 1982 data now employ the same methodology used for the years 1983 to 1988. See *id.* at 500-01.

ambiguous. The results support the hypothesis that courts have increasingly been favoring products liability defendants in recent years. In 1979 plaintiffs as a group benefited in 54 of 97 (55.7 percent) cases with ascertainable bottom-line benefits. This was something of a peak in relation to the prior three years, not shown on the graph. By 1983, success rates had returned to their 1976 level, indicating essentially sideways movement from 1976 to 1983.¹¹ By 1988 the success rate had fallen significantly to 36.6 percent (104 of 284) cases. In 1989 it recovered slightly to 38.9 percent, still lower than any year (other than 1988) since 1979.¹² The march during the period 1982-1988 towards increased defendant success over time is unrelenting, with only one year breaking the trend of decreasing plaintiff success.¹³ Both the size of the changes and their trend from 1982-1988 are unlikely to have happened by chance.¹⁴

One explanation of the data that might undermine the Figure 1 trend can be eliminated. The trend in appellate decisionmaking may be driven by the products liability reform statutes recently enacted in many states.¹⁵ Our concern is not with what might be called indirect effects – for example, if the enactment of such statutes changes judges' attitudes generally, and those attitudinal changes affect their decisionmaking, so be it. Instead, our concern is with direct effects – when a statute requires the reversal of judicial precedent regardless of whether the judges applying the statute agree with that reversal

11. Alternatively, one could regard the pro-defendant trend as dating back to 1979. This depends in part on whether one views the rise from 1979 to 1981 as a return to the 1976 level, thereby treating the declines in 1977, 1978, and 1979, as a short-term fluctuation, or regards 1979 as the low point for defendants.
12. The results for 1989 are based on 319 cases, in 239 of which the opinion clearly benefited plaintiff or defendant. Of these 239 cases, 93 benefited plaintiffs.
13. We are aware of the possible influence of the "affirmed" effect on data dominated by appellate cases. In general, the party appealing loses; appellate courts tend to affirm lower courts. Eisenberg & Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. Chi. L. Rev. 501, 517-18 (1989); Wheeler, Cartwright, Kagan & Friedman, *Do the "Haves" Come Out Ahead? Winning and Losing in State Supreme Courts, 1870-1970*, 21 Law & Soc'y Rev. 403, 406-07 (1987). Given the affirmed effect, a rise in defendants' appellate success rates could be the result of an increase in the number of appeals brought by plaintiffs. The pro-defendant trend found here is not a function of the party appealing. In 1983, in cases with clear outcomes in which plaintiffs appealed, defendants prevailed 57% of the time. This rose to about 62% until 1988 when it jumped to 73%. In 1983, in cases with clear outcomes in which defendants appealed, defendants prevailed 37% of the time. This rate sank for two years and then rose to 43% in 1986, 48% in 1987, and 43% in 1988. The trend is firmer in cases in which plaintiff appealed but it is not simply a result of more plaintiff appeals leading to defendant victories. The data do confirm the affirmed effect. There are significant differences in defendant (and plaintiff) success rates depending on whether plaintiff or defendant appealed.
14. The differences between the 1983 and 1988 data are significant at the .01 level. The analysis of the trend appears in a regression line summarized in Appendix A, Table A-5, of Henderson & Eisenberg, *supra* note 8. The significance level is the probability that a result as extreme as the one observed could have occurred if the null hypothesis were true. The null hypothesis is that there is no difference between the groups being compared with respect to the characteristic studied in the population from which the cases are drawn. See G. Snedecor & W. Cochran, *Statistical Methods* 12 (8th ed. 1989). If the observed significance level is small enough, usually less than .05 or .01, the null hypothesis is rejected. We therefore reject the hypothesis that there is no difference in benefit rates for the years 1983 and 1988.
15. See note 5 *supra* and accompanying text.

in principle. Because ours is a study of changing trends in judicial rather than legislative decisionmaking, the direct effects of reform statutes should be accounted for. To eliminate any possibility that direct effects of reform statutes affect the results, we reanalyzed the data for the years 1983-1988,¹⁶ while culling all decisions that in any way involved special products liability or tort reform statutes. We did not try to second-guess whether the statute actually affected the outcome in any given case. If a decision in any way involved a recent products or tort reform statute, out it came. Eliminating cases involving statutes removed neither the trend nor the significance of the results.¹⁷

Taking into account the several other possible sources of the pro-defendant trend, it is difficult to explain the trend by anything other than a decline in judicial receptivity towards products cases. This trend is unlikely to have happened by chance. It is not a function of increased plaintiff appeals. It is not, at least directly, a function of recently enacted statutes. It is unlikely to be a function of the same trend in other areas of law.

Notes: S.D. Ohio omitted 1985
opinion data missing 1980

Figure 1

16. Our pre-1983 data do not allow for this adjustment.

17. Another possible source of distortion is the fact that asbestos cases account for almost nine percent of the decisions in the data base, and an even greater portion of district court filings. See Appendix B of Henderson & Eisenberg, *supra* note 8. We ran the same "benefits whom" inquiry after culling those cases, together with other major "mass tort" cases, and found that their presence in the data base actually biases the results very slightly in favor of plaintiffs. Stated differently, defendants in the non-mass tort decisions in the data base actually did better than defendants in the mass tort decisions.

B. Victory As A Matter of Law

We next ask the extent to which, in each of the six years for which we have detailed published opinion data,¹⁸ courts decided products liability claims for one side or the other as a matter of law. The hypothesis of increasing defendant success predicts judges becoming increasingly willing to resolve products liability claims in favor of defendants as a matter of law. Because products claims are so infrequently resolved in plaintiffs' favor as a matter of law (no more than three cases in any year), an increase in the percentage of cases resolved as a matter of law is a pro-defendant trend. The results of this inquiry are shown in Figure 2 by the line labelled "Matter of Law."¹⁹

Cases Resolved As A Matter of Law Products Liability

Published Opinions

Figure 2

18. See note 16 *supra*.

19. The data plotted in Figure 2 appear in Appendix A, Table A-1 of Henderson & Eisenberg, *supra* note 8.

The Figure 2 results support our hypothesis. Not only, as Figure 1 suggests, did published decisions benefit defendants more frequently over time, they increasingly benefited defendants by refusing to allow plaintiffs to reach the trier of fact. In 1983, 13.9 percent (50 of 361) of published products opinions in our data base found for defendants as a matter of law. By 1988 this rate had nearly doubled to 27.2 percent (100 of 367 decisions). This significant trend²⁰ never wavered across the six year period, with increased defendant success as a matter of law in each year. Some of these dismissals as a matter of law, of course, may have been required by new reform statutes noted earlier in connexion with the increasing rate at which decisions benefited defendants. We therefore controlled for this possibility and found no significant change in the results.

II. The District Court Data

Three tests using trial court data confirm that we are in the midst of a pivotal era in products liability. During the early - to mid-1980s the rate at which products plaintiffs obtained judgments substantially declined. The decline was accompanied by, and appears to have stemmed from, an increase in the rate at which products defendants prevailed on pretrial motion. As the published opinion evidence suggests, trial courts have begun applying increasingly stringent legal standards to products claims. Moreover, the judgment, motion, and trial rate trends are not all explainable as part of a general trend applicable to all tort litigation or to all non-tort private civil litigation. Thus, to a substantial degree, the revolution of which we speak appears to be unique to products liability litigation.²¹

To further test whether the court-made changes in products liability law have affected trial court performance we explore products case filing rates. These should decline in the face of an increasingly discernable trend in the direction of defendants winning on motion. The predicted effect has occurred.

Although most tort litigation occurs in state courts, our trial court universe is limited to federal courts. Depending on the criteria parties use to select a federal forum, focusing entirely on federal court activity may introduce biases into our sample.²² Because federal courts apply state law in tort cases, however, one might expect trends in federal court litigation not to deviate significantly from those in state courts. Moreover, compared with tort cases generally, federal court products filings comprise a surprisingly high fraction of all products filings, even though the percentage of products cases filed

20. This difference between the two years is significant beyond the .01 level. See note 14 *supra*. The significance of the trend is based on the regression results in Appendix A, Table A-5 of Henderson & Eisenberg, *supra* note 8.

21. In particular, the success rate and motion rate trends discussed below do not emerge in another currently controversial area of tort law, medical malpractice litigation.

22. See generally Bumiller, Choice of Forum in Diversity Cases: Analysis of a Survey and Implications for Reform, 15 *Law & Soc'y Rev.* 749 (1980-81); Schwab & Eisenberg, Explaining, *supra* note 7, at 777 n.212.

in federal court varies across states and by product type.²³ The most comprehensive study of products filings states that "the lowest percentage for products cases filed in federal courts is 23 percent" of filings within the state.²⁴ Clearly, plaintiffs file enough federal products cases to yield meaningful results.

A. Plaintiffs' Declining Success Rates

What should count as evidence of changes in the law unfavorable to plaintiffs? This question is more complex than may first appear because the parties can be expected to adjust to rule changes in ways that, over time, dampen the effects of such changes on success rates. Because the trend we hypothesize might not be fully and instantaneously (or even very quickly) discerned by products plaintiffs or defendants, we would predict that plaintiffs' success rates at the trial court level would decline during the mid-1980s due to the identified decisional trends running against them. Thus, the simplest measure of the validity of our change hypothesis is whether plaintiffs encounter declining success in the district courts, at least until plaintiffs fully absorb the new legal standards and forgo filing cases affected by the hostile trend.

Figure 1 above (in the line labeled "Federal Dist. Cts.") plots the overall success rate for plaintiffs in all products liability cases in which judgment was entered for plaintiff or defendant.²⁵ These include cases resolved by motion, at jury, at court trial, and by settlement. To limit the analysis to cases pursued seriously in court and not quickly settled, we include only cases in which a responsive pleading was filed and some court action occurred.²⁶ But

23. United States General Accounting Office, Briefing Report to the Chairman, Subcommittee on Commerce, Consumer Protection and Competitiveness, Committee on Energy and Commerce, House of Representatives, Product Liability: Extent of "Litigation Explosion" in Federal Courts Questioned 39 (January 1988) [hereinafter GAO]. Between 1979 and 1986, for example, 32% of all products liability cases in Connecticut were filed in federal court. *Id.* at 39-40. For 1981, 1983, and 1985 (the only years for which data are available) 23% of all Iowa products filings were in federal court. *Id.* In Massachusetts from 1984 to 1986, 66% of products filings were in federal court. *Id.* Tracing filings by products, 67% of Bendectin-related suits were filed in federal courts, about 43% of Dalkon Shield claims filed from 1974 to 1986 were filed in federal courts, and about 45% of asbestos cases were filed in federal courts. *Id.* A 1983 report indicates that just over half of closed asbestos claims were filed in federal rather than state courts. James S. Kakalik, Patricia A. Ebener, William L.F. Felstiner, Michael G. Shanley, *Costs of Asbestos Litigation* 13 (1983).

24. GAO, *supra* note 23, at 40. The report also notes a time trend towards products filings in federal court rather than state court.

25. The data plotted in the relevant line in Figure 1 are based on Appendix A, Tables A-2 to A-4 of Henderson & Eisenberg, *supra* note 8.

26. The Administrative Office coding scheme recognizes the following levels of procedural progress: (1) before issue joined, (2) after motion decided but before issue joined, (3) issue joined, no other court action, (4) issue joined, and after judgment of court on motion, (5) issue joined, and after pretrial conference but before trial, (6) during court trial, (7) during jury trial, (8) after court trial, (9) after jury trial, and (10) other. For categories (1) and (2), no answer was filed to a complaint. For category (3) an answer was filed but no court action occurred. Administrative Office of the United State Courts, *Guide to Judiciary Policies and Procedures*, Transmittal 64, vol. XI, at II-21 (March 1, 1985); Inter-University Consortium for Political and Social Research (Federal Judicial Center, Principal Investigator), *Federal Court Cases: Integrated Data Base, 1970-1987*, ICPSR 8429, at 13 (2nd edn. Winter 1989) [hereinafter ICPSR]. We include cases in categories (4) through (9). In 1987, the Administrative Office changed its coding scheme for procedural progress in ways that do not affect our analysis. *Id.*

the results do not depend on this limitation.²⁷ The line shows the overall judgment rate for plaintiffs for each of the years 1979-1987. It shows, for example, that in 1979 plaintiffs prevailed in 40.5 percent of products cases showing definitive judgments and that in 1987 plaintiffs prevailed in only 32.5 percent of such cases. Plaintiffs' success rate declined by eight percent, about 20 percent of the earlier success rate. The Figure suggests a clear and significant²⁸ decline in plaintiff fortunes during the period, with the decline confirming the published opinion finding of decreasing plaintiff success from 1983 on.²⁹ Furthermore, the decline's greatest step down occurs in 1983, just when the published opinions suggest clear doctrinal reformation. The plaintiff judgment rate held steady at around 40 percent through 1983. Beginning in 1983, which corresponds to the beginning of the period of published opinion trends, plaintiffs' judgment rate fell to around 35 percent from 1983 to 1985 and to around 32 percent in 1986 and 1987. The decline at the district court level corresponds to the declining fortunes suggested by the published opinions.³⁰

Many possible explanations for the decline are available. Plaintiffs, emboldened by years of relative success in products litigation, may have begun filing marginal cases. These cases lose more often than before not because of a shift in legal standard but because they constitute a weaker class of filings. Similarly, defendants, singed by the 1960s and 1970s expansions in products liability, may have modified their underlying behavior regarding product safety so that there are fewer meritorious products cases to bring. We have no definitive test by which to prove or disprove these explanations based on the trial court data. Indeed, it is unlikely that the data needed to connect progress in product safety and products liability law exist.³¹ Although products liability's growth undoubtedly has increased corporate safety consciousness,³² the available studies cast doubt on the notion that safety behavior has changed dramatically in response to burgeoning products liability claims.³³ And the rhetoric of the published opinions, measured both qualitatively and quantitatively, strongly suggests that these are not the primary explanations. The courts seem quite clearly to be saying that products liability has gone far enough; it is time to turn things around.

27. If one includes all terminated cases, plaintiff judgment rates declined from 40.9% in 1979 to 33.8% in 1987.

28. The difference in success rates between 1979 and 1987 is significant at the .01 level. See note 14 *supra*. The significance of the trend is based on the regression results in Appendix A, Table A-5 of Henderson & Eisenberg, *supra* note 8.

29. We exclude from the judgment-rate analysis cases lacking a definitive judgment for plaintiff or defendant.

30. Rand researchers report that, in cases tried to juries, the proportion of product liability trials resulting in awards for the plaintiff increased from about 30% in the early 1960s to about 50 % by the early 1980s. In San Francisco the proportion decreased from 57% in the early 1960s to 52% in the 1980s. D. Hensler, Summary of Research Results on Product Liability 4 (1986); Michael G. Shanley & Mark A. Peterson, Comparative Justice: Civil Verdicts in San Francisco and Cook Counties, 1959-1980, at 54-55 (1983).

31. George Eads & Peter Reuter, Designing Safer Products: Corporate Responses to Product Liability Law and Regulation v, 2-3 (1983) ("It is not possible to measure the improvement, if any, in the level of safety of consumer goods that has resulted from changes in regulation and law.").

32. Eads & Reuter, *supra* note 31, at vii (product liability is the most significant influence on product safety efforts).

Those who view the new equilibrium that accompanies legal change as precluding the district court data from confirming the existence of the revolution can reject some of the implications of our analysis. To them, little one can say about the district court data can provide support for the doctrinal shift we assert. Their conclusion about the existence of a legal revolution must be based on the opinion data or on data outside the legal system. If, however, one assumes that doctrinal change is not immediately and fully absorbed by the legal system, an assumption we are comfortable making in connexion with our hypothesized shifts in products liability doctrine, the success rate data supply additional evidence of a shift in legal environment for products cases. The combination of published opinions self-consciously designed to assist products defendants, accompanied by a decline in plaintiff success rates, is powerful evidence of a changing legal climate.

One important possible explanation for the decline in products success rates does not depend on plaintiffs filing less meritorious cases or on changes in underlying behavior. The success rate of plaintiffs in all civil cases may have declined during the 1980s. It is a common shortcoming of studies of litigation trends to fail to supply a baseline against which to measure trends in the class of cases being observed.³⁴ Products liability plaintiffs, rather than suffering an unusual fate, may have been swept up in a larger pro-defendant trend. Under this view if we are in the midst of a revolution it is not a products liability revolution.

33. Priest analyzes available data on accident rates and concludes that the crude data provides no evidence that the expansion of products litigation has affected the death or injury rate. Priest, *Products Liability Law and the Accident Rate*, in *Liability: Perspectives and Policy* 184, 194 (R. Litan & C. Winston eds. 1988). Priest also notes that this conclusion corresponds to findings of the small number of careful empirical studies of specific products, each of which shows little accident-reduction effect of either expanded products liability litigation or greater direct regulation of product quality. *Id.* 194, citing W. Viscusi, *Regulating Consumer Product Safety* (1984); Peltzman, *The Effects of Automobile Safety Regulation*, 83 *J. Polit. Econ.* 677 (1975). The denial of an effect of products liability litigation must be accompanied by noting the widespread belief that possible products liability judgments affect design and production decisions of all manufacturers. *Id.* 184. But see Eads & Reuter, *supra* note 31, at 107 (all firms studied by Rand viewed product liability litigation as essentially a random influence, generating no clear signals about how to adjust design behavior). Rand researchers also report that in a study of two firms producing inherently hazardous products:

One firm treated product liability costs as an overhead expense, the other charged the costs to the product but only for pricing purposes. But "the fact that suits arose and judgments were paid out was not considered to impugn the product or anyone connected with its development or manufacture.

Hensler, *supra* note 30, at 10 (quoting Eads & Reuter). Study of two firms producing low hazard products revealed extremely active product-safety programs. But the researchers attributed the concern about safety to the "missionary" zeal of specific corporate officials, rather than to any concrete product liability experience. *Id.* In other firms concerns about the response to product safety issues was mixed. *Id.* Firms typically took the position that products defects were far more likely to be detected in some way other than by a products liability law suit. Eads & Reuter, *supra* note 31, at 108.

34. For example, the claim of an explosion in civil rights filings looks plausible if one examines only civil rights filings. It is highly questionable if one takes into account federal court filing trends for other cases. Eisenberg & Schwab, *The Reality of Constitutional Tort Litigation*, 72 *Cornell L. Rev.* 641; Schwab & Eisenberg, *supra* note 7. See generally Galanter, *The Life and Times of the Big Six; Or, the Federal Courts Since the Good Old Days*, 1988 *Wis. L. Rev.* 921.

Administrative Office data from other (non-products) tort litigation and from non-tort private federal litigation allow us to test this possibility. Since the early 1980s, the products success rate declined significantly faster than the success rate in other tort cases. The decline in plaintiffs' success in products cases cannot be explained as merely part of a more general trend that affects all civil litigation or other tort litigation. Some but by no means all of the products decline can be viewed as part of a similar trend in all of tort litigation.³⁵

B. Source of the Decline: Defendant's Pretrial Motion Success

The revolution suggested by published opinions forecasts a specific source of much of plaintiffs' declining success in the district courts. The revolution reflected in our data is not simply one of juries rebelling against the perceived excesses of the products liability system. The change we hypothesize consists largely of courts articulating new law; it is a revolution primarily of law-making, not fact-finding. To the extent the revolution is one of new legal standards, we would expect an increase in the rate at which district courts, applying the new, more pro-defendant legal standards, dispose of products cases before reaching trial. Thus, as suggested by the published opinion data,³⁶ the revolution we detect forecasts not simply a decline in plaintiffs' success rate, but also an increase in defendants' rate of success at the pretrial motion stage.

Figure 3 shows the rate at which defendants prevail on pretrial motion in products cases in which issue is joined.³⁷ The "Def. Success Rate" line (which uses the left-hand vertical scale) shows that in 1979 products defendants prevailed at the motion stage in 4.4 percent of cases in which issue had been joined. By 1987 this rate increased to 5.5 percent. From 1979 to 1983 the motion rate was relatively stable at around four percent. In 1984, in the midst of the published opinion trend, it jumped and has remained in the 5.5 percent range. A simple model in which one describes the defendant success rate on motion by the time elapsed since 1979 shows the upward trend to be statistically significant.³⁸

Is this increase in defendant success rate part of a larger trend in tort cases

35. The decline in plaintiff fortunes cannot be eliminated by taking into account the size of awards. The size of awards have increased but expected returns, which account for both the likelihood of recovery and the size of the award, have not been increasing relative to other cases since 1982. Henderson & Eisenberg, *supra* note 8, at 529.

36. See p.10 *supra*.

37. On the meaning of limiting the sample to cases in which issue is joined, see note 26 *supra*. These results do not depend on limiting the sample to contested cases, as described in text at *id*. If one includes all terminations, in 1979, products defendants prevailed by pretrial motion in 3.1% of terminated cases. By 1987, this rate had risen to 4.0%. The points plotted in Figure 3 are based on the data in Appendix A, Tables A-2 to A 4 of Henderson & Eisenberg, *supra* note 8.

generally towards increased defendant victories at the pretrial motion stage? To study this, the line labeled "Products/Tort" (which uses the right-hand scale) in Figure 3 plots the ratio of defendant win rates for products and tort litigation. It shows that in 1979 products defendants won by pretrial motion .76 times for every time other tort defendants won by pretrial motion. By 1987 this ratio had risen to .97; products defendants were winning by pretrial motion about as often as other tort defendants. The major shift occurred in 1984. Using non-tort private litigation as a reference group yields a similar story. The line labeled "Products/NonTort" in Figure 3 shows that in 1979 products defendants won by pretrial motion .47 times for every time non-tort private defendants won by pretrial motion, a figure that held roughly through 1983. By 1987 this ratio had risen to .65. Products defendants' increased success at the pretrial motion stage is not simply part of a larger trend in other tort or other private non-tort litigation.

To what extent does the decline in overall plaintiff success rates portrayed in Figure 1 correspond to the increase in defendant motion rate success portrayed in Figure 3? The overall success rate can be viewed as a combination of success rates at various stages of litigation. It is a function of success rates in jury trials, court trials, at settlement, and on pretrial motion. As expected, each of these success rates significantly correlates with the overall success rate.³⁹ Yet of all the success rates influencing the overall success rate, the defendant's success rate at the pretrial motion stage is by far the biggest factor in describing the decline in plaintiffs' overall success rate. This is true despite the fact that tried cases with known judgments substantially outnumber cases in which the defendant wins by pretrial motion.⁴⁰ The variability in the defendant's win rate on motion best explains the variability in overall success rate. Consistent with the results reached earlier in connexion with the published opinion data, in the district courts, the quiet revolution has occurred primarily at the motion stage.

C. Declining Filings

Legal change can affect characteristics other than success rates. Changes in legal doctrine can affect the numbers of claims that plaintiffs file. What do shifts in filings and trial rates tell us circumstantially about the likelihood that changes in doctrine have occurred? Our hypothesis, that courts have been engaged in a pro-defendant revolution that has made it increasingly difficult for products plaintiffs to reach juries and win judgments, has an easily identifiable effect on the number of products claims leading to court filings.

38. Appendix A, Table A-5 of Henderson & Eisenberg, *supra* note 8. The difference between the years 1979 and 1987 is significant at the .07 level. See note 14 *supra*. The defendant's increase in pretrial motion success is not accompanied by a major shift in the plaintiff motion success rate. In tort and products litigation, plaintiffs prevail at the motion stage infrequently, usually in less than one percent of cases, with a variation of about one-half of one percent over the years.

39. Appendix A, Table A-6 (using quarterly data) of Henderson & Eisenberg, *supra* note 8.

40. Appendix A, Table A-7 of Henderson & Eisenberg, *supra* note 8.

We would predict that, controlling for other variables such as increases in population, product production and consumption, overall litigiousness of our citizenry, and the like, products filings would decline relative to other kinds of civil claims.

Given the growth in products and population, we would not be surprised to see products filings continue to increase each year through the current decade, although we would expect to see the rate of increase decline in light of the unfavorable legal climate for products plaintiffs. In fact, the data support our hypothesis more strongly than we have any right to expect. Figure 4 shows

Defendant Success at Motion Stage Products Liability vs. Other Cases

Cases in which issue joined

Figure 3

ANNUAL NUMBER OF PRODUCTS CASES & PRODUCTS CASES AS % OF DOCKET

Federal Courts
Sources: Admin. Office, GAO, Rand

Figure 4

the annual products filings in federal court, with asbestos cases accounted for separately. The right hand scale in the figure shows nonasbestos filings as a percent of all federal filings.

From 1975 to 1981, products filings increased at a rate ahead of the increase in civil filings and the increase in the number of products.⁴¹ From 1981 to 1985, nonasbestos federal products liability filings increased in absolute number but declined as a percentage of the federal docket. Since 1985 nonasbestos federal products filings have declined both in absolute number and as a percent of the federal docket. In 1987, for example, federal nonasbestos products filings declined by about nine percent when overall federal filings were down only about six percent.⁴² And in 1988, nonasbestos federal products filings declined a further 17 percent while overall federal filings were down

41. GAO, *supra* note 23, at 3.

42. Annual Report of the Director of the Administrative of the United State Courts Table C-2A, p.181 (1987). These figures and those in the following sentence exclude asbestos cases but include Dalkon Shield and Bendectin cases.

less than one percent.⁴³ This trend continued in 1989.⁴⁴ In absolute terms, nonasbestos filings declined by more than 30 percent from 1985 to 1989. In relative terms, they have for half a decade been a shrinking portion of the federal docket. The combination of declining success rates at the trial court and appellate levels, together with the sharp drop in products filings is powerful evidence of a shifting products liability climate.

III. Conclusion

American courts deciding products liability cases are in the midst of a significant revolution. After decades of extending the boundaries of liability, both appellate and trial judges are reaching decisions favoring products defendants in unprecedented numbers. Although it is difficult to pinpoint exactly when this legal change began, we trace its origins to the early - to mid-1980s. Clearly it has been in full swing for the past several years. Unlike most revolutions, legal and non-legal, this one has been amazingly silent. Other writers have observed that some recent claims of "crisis" in products and other areas of tort are exaggerated.⁴⁵ And the products revolution in state legislatures has not gone unnoticed.⁴⁶ But no one has paid systematic attention to patterns of all products decisions by courts. This article discerns, and empirically establishes, that revolutionary changes in judicial decisionmaking are occurring.

Two sources substantiate the legal change hypothesis. Viewed anecdotally and systematically, the published opinion data unambiguously point to significant shifts in direction. The federal district court data, though more ambiguous standing alone, support the conclusion that a revolution is taking place. Controlling for independent variables that offer alternative explanations confirms our findings. The change in products decisions is driven by shifting trends in judicial decisionmaking, not by the products liability and tort reform statutes enacted in many states in the 1980s. The change is not simply part of broader pro-defendant trends in tort cases or in civil litigation generally. The change reflects trends in products generally, not in one or two large (and thus potentially distorting) subsets of products litigation, such as asbestos cases.

Despite our efforts to control for influential variables, important items remain to be explored. The breadth of the data we rely on, while assuring that the detected trends are not isolated local phenomena, can mask notable

43. Annual Report of the Director of the Administrative of the United State Courts Table C-2A, p.184 (1988).

44. Annual Report of the Director of the Administrative Office of the United States Courts Table C-2A (1989).

45. Eisenberg & Schwab, *supra* note 34; Galanter, *supra* note 34; Galanter, Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society, 31 *UCLA L. Rev.* 4 (1983); Galanter, The Day After the Litigation Explosion, 46 *Md. L. Rev.* 3 (1986.); Schwab & Eisenberg, *supra* note 7.

46. E.g., Litan & Winston, *supra* note 4.

subthemes. For example, the published opinion data reveal important differences between state and federal courts. Plaintiffs' declining success in cases leading to published opinions is attributable to a decline at the state, but not the federal, level.⁴⁷ Federal district courts thus seem to be faithfully applying state products law, but it is something of a mystery why federal opinions reveal no similar trend. In addition, the spate of tort and products reform statutes may have created or may reflect local legal environments that differ widely. The published opinion data contain the information necessary to decide whether a case construes a reform statute. The district court data do not. Distinguishing among regions based on their statutory environment is a possible fruitful area of study.

A final issue worth pursuing is the very quietness of the revolution. In some areas of law, observers of opinions and trial court activity see very different realities and one can understand why one view of reality might dominate.⁴⁸ But the observed trends in products liability are not ambiguous. Both opinions and trial court activity tell the same story. How can knowledgeable observers not only have failed to detect a near decade old trend, but have believed that products law was leaning in the opposite direction?

47. In our published opinion study, defendants have benefited overall in about 60 percent of the cases throughout the years. The trend favoring defendants consists largely of state court opinions moving towards the federal "benefits defendant" rate.

48. Eisenberg & Schwab, *supra* note 13.