

WRITE THIS DOWN: A MODEL MARKET-SHARE LIABILITY STATUTE

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ABSTRACT

The 1980s featured a remarkable series of lawsuits: the DES cases. The women who brought these cases had been harmed by a drug—DES—that their mothers had taken while the future plaintiffs were in utero. Hundreds of companies manufactured DES, each unit of DES sold was chemically identical, and the harmed women were generally unable to identify the manufacturer who had filled their mothers' prescriptions. Many of the plaintiffs could not prove causation as to a specific manufacturer and so could not bring traditional tort suits.

To provide relief, some courts forged ahead with a new tort theory: market-share liability. Under this theory, plaintiffs who were harmed by a fungible product and unable to identify the manufacturer who produced the unit that harmed them could sue all manufacturers of the product and collect from each of them according to their market share. But not every court recognized this new theory. And among the courts that did, disagreement emerged as to doctrinal determinations and mechanical considerations.

This Note is the first survey of both the legal and practical questions surrounding claims based on market-share liability, from whether a prospective plaintiff qualifies for such a cause of action to determining the relevant market to pleading requirements. It asserts that market-share liability furthers the purposes of tort and products-liability law, critiques existing state statutory schemes, and proposes a model statute for state legislatures to consider.

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*“Lying in her hospital bed after her hysterectomy in 1979, weak and wracked with pain, the 24-year-old [Mindy Hymowitz] stretched for the telephone and began calling lawyers, one after the next. ‘Somebody had to be held responsible,’ she later recalled, ‘and it certainly was not my mother.’”*¹

INTRODUCTION

Doctors and patients alike hailed diethylstilbestrol (“DES”) as a “miracle drug.”² Created by a British scientist in 1938,³ the Food and Drug Administration (“FDA”) approved it three years later “to treat four conditions: menopausal disorders, gonorrheal vaginitis, senile vaginitis, and unwanted lactation.”⁴ DES is a synthetic form of estrogen,⁵ easier to administer and cheaper to produce than natural estrogen.⁶ Further, the drug promised not only to treat the conditions for which it was approved but also to make pregnancy safer and more comfortable; some doctors prescribed it to prevent morning sickness.⁷ In 1947, the FDA approved marketing DES for preventing miscarriages.⁸

From the manufacturers’ perspective, the zeitgeist of 1940s America could not have been more auspicious. World War II ended, the economy surged, and the boys came home. Young Americans expressed a desire to begin rearing families. “[C]ouples had reason to view babies as anchoring their new, or newly reunited, marriages.”⁹ The Baby Boom began.

All the while, faith in the pharmaceutical industry reached lofty heights. The year 1942 saw the first successful use of penicillin on a

1. Anita Bernstein, *Hymowitz v. Eli Lilly and Co.: Markets of Mothers*, in *TORTS STORIES* 151, 152 (Robert L. Rabin & Stephen D. Sugarman eds., 2003).

2. *Id.* at 151.

3. *Id.* at 152–53.

4. *Id.* at 154.

5. *Id.* at 152.

6. See Randy S. Parlee, Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609, 611 n.14 (1982) (noting that DES “was preferred over natural estrogen because it was less expensive and could be administered orally”).

7. See Linda Greenhouse, *Supreme Court Roundup; Product-Liability Ruling Left Standing by Justices*, N.Y. TIMES (Oct. 31, 1989), <https://www.nytimes.com/1989/10/31/us/supreme-court-roundup-product-liability-ruling-left-standing-by-justices.html> [http://perma.cc/83LP-H625] (“DES . . . eased morning sickness.”).

8. Bernstein, *supra* note 1, at 154.

9. *Id.*

civilian patient to treat an infection,¹⁰ transforming the prognosis for strep throat, pneumonia, meningitis, gonorrhea, and syphilis, among other diseases.¹¹ The first commercial flu vaccines were sold in 1945.¹² And as many as six million women took DES with the hope that it would give them “a child expected to be even *more* healthy than nature would have provided.”¹³

The tragic—and cruelly ironic—result of this use was the birth of as many as three million DES Daughters,¹⁴ women exposed to DES in utero.¹⁵ DES caused a raft of maladies in the children: infertility, miscarriages, premature births, and other psychological and emotional conditions.¹⁶ Arthur Herbst, a physician, published the first scientific report linking DES use to clear-cell adenocarcinoma in 1971.¹⁷ Within a year, the FDA contraindicated DES for use during pregnancy.¹⁸

Lawyers began taking calls, but few took the case. Two problems loomed particularly large: state statutes of limitations and tort law’s causation requirement.¹⁹ Courts found many ways around the statutes of limitations,²⁰ but they were reluctant to stray from tort law’s traditional causation requirement.²¹ The first successful DES cases in

10. Howard Markel, *The Real Story Behind Penicillin*, PBS NEWS HOUR (Sept. 27, 2013, 2:06 PM EST), <https://www.pbs.org/newshour/health/the-real-story-behind-the-worlds-first-antibiotic> [<https://perma.cc/5JZS-4CL4>].

11. *Penicillin*, BLACK’S MEDICAL DICTIONARY (41st ed. 2005).

12. Anthony E. Fiore, Carolyn B. Bridges & Nancy J. Cox, *Seasonal Influenza Vaccines*, in VACCINES FOR PANDEMIC INFLUENZA 43, 49 (Richard W. Compans & Walter A. Orenstein eds., 2009).

13. Bernstein, *supra* note 1, at 151, 154.

14. Terry Morehead Dworkin, *Federal Reform of Product Liability Law*, 57 TUL. L. REV. 602, 628 (1983).

15. *See, e.g.*, Conley v. Boyle Drug Co., 570 So. 2d 275, 279 n.1 (Fla. 1990) (noting that “medical researchers established a possible link between exposure to DES while *in utero* and the development in young women of a form of cancer known as clear cell adenocarcinoma”).

16. Bernstein, *supra* note 1, at 156–57.

17. *Id.* at 156.

18. *See id.* at 157 (noting that DES was contraindicated for use during pregnancy in November 1971).

19. *Id.* at 162–63.

20. *See infra* notes 100–04 and accompanying text.

21. *See* Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 719 (1982) (“Several decisions have granted dismissals or summary judgments for the defendants on the ground that the plaintiff could not identify which manufacturer produced the drug that caused her injury.”).

New York state required the plaintiffs to prove, with specificity, which manufacturer filled her mother's prescription.²²

The academy suffered no such misgivings. In 1978, Naomi Sheiner, a law student at Fordham, published a theory of causation for the DES cases.²³ While courts generously edited her theory to suit their preferences, her comment became the "wellspring" of market-share liability.²⁴ The California Supreme Court was the first to adopt market-share liability, taking pains to explain how the new theory preserved tort law's causation requirement.²⁵ Many others followed, each making their own changes.²⁶ New York made the greatest modifications in *Hymowitz v. Eli Lilly & Co.*,²⁷ holding that a DES manufacturer "c[ould] be held liable, in proportion to its market share, even if it is clear from the evidence that the plaintiff could not have taken its drug."²⁸ Mindy Hymowitz, the nurse and DES Daughter whose quote opens this Note, was the named plaintiff.²⁹ DES manufacturers appealed from the New York Court of Appeals to the Supreme Court

22. See Bernstein, *supra* note 1, at 162 (recounting Joyce Bichler's case and noting that the plaintiff was "lucky" because she discovered her injuries before reaching majority and because her "mother remembered that [the mother's] pharmacist had told her the drug came from Lilly").

23. See Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 974-75 (1978) (presenting and discussing a theory of causation for the DES cases).

24. *Sindell v. Abbott Labs.*, 607 P.2d 924, 943 (Cal. 1980) (Richardson, J., dissenting).

25. See *id.* at 937 (majority opinion) ("[E]ach manufacturer's liability would approximate its responsibility for the injuries caused by its own products."); *id.* (holding that a defendant can be dismissed from the suit if "it demonstrates that it could not have made the product which caused plaintiff's injuries"). Given California's history of innovation in U.S. products-liability law, it is fitting that it was the first state to adopt market-share liability. See *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1157 (Cal. 1972) (expanding strict liability to defects that make a product unsafe for its reasonably foreseeable uses); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (adopting a strict-liability standard for defects that make a product unsafe for its intended use); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring) (calling for the adoption of strict liability in manufacturing-defect cases).

26. These differences will be discussed at length in Part III.

27. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069 (N.Y. 1989); see Bernstein, *supra* note 1, at 178 ("Hymowitz stands judged for going too far."); Laura A. Abrams, Comment, *The DES Dilemma: A Study in How Hard Cases Make Bad Law*, 59 U. CIN. L. REV. 489, 512 (1990) ("The Hymowitz court went far beyond the *Sindell* court's holding. It did not even bother trying to fit the square pegs into the board with the round holes. The Hymowitz court merely discarded the board—which had been the foundation of tort law for centuries—and brought in a different board with square holes.")

28. Greenhouse, *supra* note 7.

29. See Bernstein, *supra* note 1, at 166, 173 (noting that Mindy Hymowitz was named in the case caption of the "quasi-class action" litigation).

of the United States.³⁰ The Court unanimously denied the petition,³¹ and market-share liability survived.

Still today, DES's physical and metaphysical scars remain. While courts divided over whether tort law recognized the DES Daughters' claims,³² they were united in denying relief to plaintiffs with more attenuated claims. For example, the New York Court of Appeals denied relief to the DES grandchildren.³³ A DES Daughter could sue for the deformation of her cervix or her vagina, but the child she gave birth to, who was injured by these same deformities, could not.³⁴ Because tort law generally recognizes only economic losses, the stress and anxiety of those who knew the DES Daughters—including those who gave birth to them—went uncompensated.³⁵

The DES cases were a tragic mass tort that caught courts and legislatures flat footed. But legislatures can ensure that similar fact patterns in the future are litigable, which might deter manufacturers from bringing harmful products to the market in the first instance. States that are serious about providing a remedy to plaintiffs who are harmed by generic products, but who cannot identify the particular company responsible for the product, should pass statutes codifying a right of action. In the DES cases, state courts frequently cited deference to the legislature when declining to adopt market-share liability, and federal courts sitting in diversity refused to assume that the relevant state law recognized market-share liability. To overpower this hesitancy, the existing market-share liability case law should be

30. Petition for Writ of Certiorari, *Rexall Drug Co. v. Tigue*, 493 U.S. 944 (1989) (No. 89-168). The manufacturers claimed market-share liability violated both the Supremacy Clause and the Due Process Clause of the U.S. Constitution. *Id.* at i. The filing described the *Hymowitz* court's application of market-share liability as “[r]adical.” *Id.* at v.

31. *Rexall Drug Co. v. Tigue*, 493 U.S. 944, 944 (1989). Neither Justice Scalia nor Justice O'Connor participated in the discussion of whether to hear the case. *Greenhouse*, *supra* note 7.

32. Compare *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980) (recognizing market-share liability), with *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (en banc) (considering, and then rejecting, *Sindell*).

33. *Enright v. Eli Lilly & Co.*, 570 N.E.2d 198, 199 (N.Y. 1991).

34. Bernstein, *supra* note 1, at 174.

35. See David A. Anderson, *Reputation, Compensation, and Proof*, 25 WM. & MARY L. REV. 747, 762 (1984) (“Tort law historically has refused to compensate emotional injuries alone . . .”). One commentator described the scene in Joyce Bichler's autobiography where her mother testifies on her behalf at trial as “a crucible of mutual pain, where each woman felt she had hurt the other.” Bernstein, *supra* note 1, at 175 (citation omitted). *But see Abel v. Eli Lilly & Co.*, 343 N.W.2d 164, 166–67 (Mich. 1984) (allowing the DES Daughters—and their spouses—to proceed under concerted-action and alternative-liability theories of causation).

synthesized into a model statute. The balance of this Note does just that.

Although plaintiffs who need market-share liability in order to sue are rare, they are easy to imagine. Those injured by any generic drug whose side effects have a long latency period would qualify if they cannot identify the particular company that supplied their prescription. Outside the pharmaceutical context, the rise of 3D printing may present identification challenges for plaintiffs injured by products printed from identical blueprints but created and sold by multiple manufacturers. Commentators call for market-share liability in other discrete contexts as well.³⁶

The Note proceeds in four Parts. Part I argues that market-share liability furthers the purposes of tort law and products-liability law, and is doctrinally sound. Part II discusses the circumstances in which market-share liability applies, how courts determine the appropriate market, whether every actor in that market is jointly or severally liable for a plaintiff's injury, and other mechanical considerations. Part III argues for the codification of market-share liability and critiques the existing state statutes that address market-share liability. Part IV unveils the model statute. The Note's conclusion follows.

I. THEORETICAL AND DOCTRINAL JUSTIFICATIONS FOR MARKET-SHARE LIABILITY

Market-share liability is “[l]iability that is imposed, usu[ally] severally, on each member of an industry, based on each member's share of the market or respective percentage of the product that is placed on the market.”³⁷ This Part demonstrates that market-share liability advances the central objectives of tort and products liability. It then considers other theories of multiple causation, examines why courts determined that those theories did not apply to the DES cases, and argues that market-share liability is merely another step down a path that tort law has already been walking.

A. *Tort Law*

Tort law serves at least five functions: compensation, deterrence, confrontation, responsibility, and punishment. Among these, “[t]he

36. See *infra* notes 275–81 and accompanying text.

37. *Market-Share Liability*, BLACK'S LAW DICTIONARY (10th ed. 2014).

compensation rationale is paramount.”³⁸ Tort law is the most widely available recourse for people who have been injured.³⁹ They may not have first-party insurance, may not receive charitable donations, and may not qualify for government benefits.⁴⁰ “[T]he comparative underdevelopment of social insurance in America”⁴¹ may partially account for the prevalence of tort law in American society.⁴²

This compensation rationale overlays and undergirds tort law’s deterrence rationale. Tortfeasors that intentionally or negligently injure others must internalize the cost of having done so by paying the party or parties they have injured.⁴³ Accordingly, people and companies must account for the consequences their actions will have on third parties.⁴⁴ And the risk of paying damages deters potentially harmful conduct; the more claims that courts recognize, and the more likely those claims are to be successful, the more deterred potential tortfeasors are likely to be.⁴⁵

Further, tort law empowers victims to confront their alleged tortfeasors. Neither insurance, nor charity, nor government benefits vest victims with this power. The legal system arranges the plaintiff and the defendant in an adversarial posture,⁴⁶ which reduces the chance

38. DONALD H. BESKIND & DORIANE LAMBELET COLEMAN, TORTS: DOCTRINE AND PROCESS 1 (2016).

39. *Id.*

40. *Id.*

41. Gregory C. Keating, *Products Liability as Enterprise Liability*, 10 J. TORT L. 41, 55 (2017).

42. *See id.* at 55 (referring to “the comparative underdevelopment of social insurance in America” as one of the “peculiarities of the American context”); *see also* Stathis Banakas, *A Global Concept of Justice—Dream or Nightmare? Looking at Different Concepts of Justice or Righteousness Competing in Today’s World*, 67 LA. L. REV. 1021, 1034 (2007) (“As the U.S. experience has shown, tort law offers a safety net when social welfare is inadequate.”); *id.* at 1034 n.49 (“[T]he weakening of Europe’s welfare state has caused a dramatic increase in tort litigation.”).

43. *See* Joanna M. Shepherd, *Tort Reforms’ Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 912 (2008) (“The expectation of paying compensatory damages forces a potential tortfeasor to internalize the costs of his dangerous activity.”).

44. Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1719 (1976).

45. *See* Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1165 (2001) (stating that the deterrent effect of tort law “depend[s] on which victims actually sue and the expected outcomes of the resulting litigation”).

46. *See, e.g.*, Christopher Kutz, *Pragmatism Regained*, 100 MICH. L. REV. 1639, 1647 (2002) (“All the central issues of tort law . . . involve a confrontation between an injured plaintiff and an ostensible injurer.”).

that either party seeks redress through extralegal measures.⁴⁷ In some circumstances, courtroom confrontation has therapeutic benefits for plaintiffs.⁴⁸

These confrontations accentuate tort law's concern with responsibility. Courts hold tortfeasors accountable for their behavior by forcing them to pay for its costs.⁴⁹ Tort law is concerned not only with compensating a plaintiff for her injuries but also with ensuring that compensation comes from the person who harmed her.⁵⁰ Responsibility tethers the plaintiff's compensation to the defendant's liability.⁵¹

Finally, juries can punish defendants by assessing punitive damages, which “serve the same purpose[] as criminal penalties”—retribution.⁵² Punitive damages allow juries to ensure that the amount the defendant pays, if any, is commensurate with the blameworthiness of the defendant's actions.⁵³ Functionally, punitive damages empower juries to compensate plaintiffs beyond what compensatory damages allow.⁵⁴

B. *Products-Liability Law*

Products-liability law is the expression of these tort principles in the marketplace for goods. To better effect compensation and deterrence, most state courts have adopted a strict-liability standard

47. See Christopher J. Robinette, *Peace: A Public Purpose for Punitive Damages?*, 2 CHARLESTON L. REV. 327, 344 (2008) (“[P]reserving the peace . . . [was] the original purpose of what became known as tort law.”).

48. See Beth Van Schaack, *With All Deliberate Speed: Civil Human Rights Litigation as a Tool for Social Change*, 57 VAND. L. REV. 2305, 2318–26 (2004) (describing the benefits to victim-plaintiffs in human-rights litigations and other civil lawsuits).

49. Benjamin Ewing, *The Structure of Tort Law, Revisited: The Problem of Corporate Responsibility*, 8 J. TORT L. 1, 1 (2015).

50. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 517 (2003) (noting that “[t]ort was thus conceived as a law of personal redress” under which a liable tortfeasor would “provide redress to the victim, usually in the form of money damages”).

51. *Id.*

52. *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408, 416–17 (2003).

53. See Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 6 (1982) (arguing that punitive damages ensure “that the punishment [is] proportional to the wrong in an absolute sense, that is, that the punishment fit the crime” (citation omitted)).

54. See *id.* at 10–12 (observing that one justification for punitive damages is that “wrongdoers deserve punishment, beyond that provided by reparative damages”).

for most products-liability suits.⁵⁵ Plaintiffs in strict-liability cases need not prove that the manufacturer intentionally or negligently created the defective product that harmed them.⁵⁶ They must only prove that the defendant's product caused their injury and was defective at the time of sale or distribution.⁵⁷

Like tort law as a whole, products-liability law's foremost concern is compensating plaintiffs.⁵⁸ Companies that lose products-liability suits compensate successful plaintiffs through insurance pooling⁵⁹ and risk spreading.⁶⁰ These corporate processes reflect the deterrent effect of products-liability law on corporations. They ensure that adequate demand exists for potentially harmful products that make it to market and deter the creation of harmful products in the first instance.⁶¹

Through insurance pooling, purchasers pay slightly more for a product than they would otherwise to ensure that the manufacturer can compensate them in case of an accident.⁶² Generally, few of the people who use a product will be injured by it. The injuries that do occur, however, are distributed at "random," and the injured are subject to "possibly crushing financial burdens."⁶³ Strict liability ensures that companies that create defective products must pay for the injuries these products cause. In response, companies set the prices higher than

55. See JAMES A. HENDERSON, JR., AARON D. TWERSKI & DOUGLAS A. KYSAR, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 16 (8th ed. 2016) (describing the adoption of the strict-liability standard for products liability into section 402A of the Restatement (Second) of Torts and declaring that it "was destined to dominate . . . the law of products liability to the present day"); see also Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231, 238 (1996) ("Almost all states now recognize strict products liability under section 402A.").

56. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 (AM. LAW. INST. 1998) ("One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the defect.").

57. *Id.*

58. See JAMES A. HENDERSON JR., DOUGLAS A. KYSAR & RICHARD N. PEARSON, *THE TORTS PROCESS* 539 (9th ed. 2017) (listing "compensating injured plaintiffs" first among seven objectives).

59. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) ("[T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.").

60. DAVID G. OWEN & MARY J. DAVIS, *PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS* 169 (7th ed. 2015).

61. See *infra* notes 69–73 and accompanying text.

62. See OWEN & DAVIS, *supra* note 60, at 169.

63. *Id.*

they would otherwise and designate this “premium” for potential tort judgments.⁶⁴

In some markets, price competition prevents a company from passing onto consumers the entire cost of its tort judgments.⁶⁵ The remaining costs are then distributed through a process known as risk spreading.⁶⁶ When this happens, shareholders, and the company itself, absorb some of the risk of consumer injuries.⁶⁷ These costs may be reflected in lower returns to shareholders, suppressed compensation for employees, or foregone investments in the firm. Fairness is advanced when the firms who create, market, and profit from harmful products incur losses to compensate injured plaintiffs.⁶⁸

Litigation costs, including judgments to injured plaintiffs, are part of a product’s cost of production. Firms will not make products whose costs are greater than the revenues the firm can realize through their sale. Through this mechanism, products-liability law deters the sale of harmful products.⁶⁹ While the deterrent power of tort law on natural persons is often questioned,⁷⁰ businesses are more sensitive to potential litigation costs.⁷¹ The effective deterrence of businesses is particularly desirable because firms are in a better “position to discover and guard

64. *Id.*

65. *See id.* (“[B]ecause competition often prevents manufacturers from raising prices significantly, some portion of product accident costs are spread . . . to the owners and operators of enterprises that make and sell defective products.”).

66. *Id.*

67. *Id.* at 168.

68. *See* Keating, *supra* note 41, at 47 (observing that fairness supports strict enterprise liability because it “spreads the costs of product accidents across all those who benefit from the product: consumers, producers, and distributors”).

69. *Cf.* John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1948 (2010) (concluding that, as a corpus of law, products liability “contributes in direct and indirect ways to deterrence”).

70. *See* Daniel W. Shuman, *The Psychology of Compensation in Tort Law*, 43 U. KAN. L. REV. 39, 43 (1994) (“[P]roof that the tort system deters with any degree of precision has not been made.”). Commentators disagree not only about whether tort law deters natural persons but also about whether it overdeters or underdeters them. *Compare, e.g.*, Jason S. Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 COLUM. L. REV. 1385, 1411 (1987) (noting that an arbitrarily high level of punitive liability results in overdeterrence), with Thomas C. Galligan, Jr., *The Risks of and Reactions to Underdeterrence in Torts*, 70 MO. L. REV. 691, 691 (2005) (arguing that traditional tort law results in underdeterrence).

71. *See* HENDERSON, JR. ET AL., *supra* note 55, at 446 (stating that a “manufacturer, unlike the public, can anticipate or guard against the recurrence of hazards”).

against defects in its products and to warn of harmful effects.”⁷² They can also prevent dangerous products from ever reaching the market.⁷³

This deterrence protects consumer expectations by disincentivizing the manufacture and sale of defective products.⁷⁴ Historically, products-liability claims against a manufacturer required privity of contract,⁷⁵ thus precluding claims unless the plaintiff had purchased the product directly from the manufacturer.⁷⁶ Because modern supply chains made this requirement a legal defense against most suits, courts have since abandoned the privity requirement.⁷⁷ Nevertheless, consumer expectations still require protection. Through advertising, manufacturers create favorable impressions of their products’ safety.⁷⁸ Additionally, consumers operate under a baseline assumption that the products they buy are safe.⁷⁹

C. Market-Share Liability

Market-share liability affirms and serves the most fundamental purposes of tort and products-liability law—compensation and deterrence—although it fails to fully satisfy their other traditional justifications. Punishment is not served, for example, because courts generally do not allow for the imposition of punitive damages in market-share liability suits.⁸⁰ Neither, at least in the realm of medications, is the protection of consumer expectations. Consumers seeking medical attention are particularly vulnerable; they may lack the expertise, finances, and alternative treatment options to protect themselves from potentially harmful side effects.⁸¹ Patients may accept treatments that bear harmful side effects. Accordingly, products-

72. *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980).

73. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

74. OWEN & DAVIS, *supra* note 60, at 167–69.

75. HENDERSON, JR. ET AL., *supra* note 55, at 6.

76. *Id.*

77. It is “now universally recognized” that privity of contract is not required for a products-liability suit. *Id.* at 7.

78. OWEN & DAVIS, *supra* note 60, at 167.

79. Gerald F. Tietz, *Strict Products Liability, Design Defects and Corporate Decision-Making: Greater Deterrence Through Stricter Process*, 38 VILL. L. REV. 1361, 1378 (1993).

80. *See, e.g., Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 54 (Wis. 1984) (noting that a plaintiff could not recover punitive damages in a products-liability suit when she could not prove which specific defendant created the unit of the product that caused her injuries).

81. *See McCormack v. Abbott Labs.*, 617 F. Supp. 1521, 1528 (D. Mass. 1985) (“The consumer is virtually helpless to protect herself from serious, sometimes permanent injuries caused by defective drugs.”).

liability law recognizes an exception for “unavoidably unsafe” drugs.⁸² Finally, market-share liability deviates from tort law’s binary understanding of responsibility. For some courts, allowing a plaintiff to collect from a defendant for which the plaintiff was unable to prove causation was sufficient reason to reject market-share liability.⁸³ Some courts that adopted market-share liability acknowledged this tension.⁸⁴

Additional criticisms of market-share liability are more pragmatic than doctrinal. Some jurists elected to wait for a legislative response to the causation problem.⁸⁵ Other judges worried that market-share liability would stifle innovation in the pharmaceutical industry and that courts might inappropriately apply it to nonqualifying products.⁸⁶ Finally, the difficulties of determining how many manufacturers plaintiffs must sue in their complaint and of defining the relevant market “persist[ed] and discourage[d] courts . . . from embracing” market-share liability.⁸⁷ Aware of these problems, several opinions adopting market-share liability also suggested that its application might be limited to DES cases.⁸⁸

These criticisms, however, fail to overshadow market-share liability’s reaffirmation of tort law’s fundamental commitments and the doctrine’s equitable justifications. “The concept itself meets the objectives of tort law, both by providing plaintiffs a remedy, but also

82. RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (AM. LAW INST. 1965) (capitalization altered and emphasis omitted from original). DES did not qualify as such a drug. *Collins*, 342 N.W.2d at 52.

83. *See, e.g., Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 244 (Mo. 1984) (en banc) (“Actionable negligence requires a causal connection between the conduct of the defendant and the resulting injury to the plaintiff.” (citations omitted)). *Zafft* characterized market-share liability as an “abandonment” of tort law’s “established requirement of proving causation.” *Id.* at 246–47.

84. *See, e.g., Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989) (“[W]e choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large.”); *Collins*, 342 N.W.2d at 49 (noting that the DES manufacturers did not “act[] in concert” but that each “contributed to the risk of injury to the public” and that this conduct was a sufficient basis for the imposition of tort liability).

85. *See, e.g., Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986) (“The imposition of liability upon a manufacturer for harm that it may not have caused . . . is an act more closely identified as a function assigned to the legislature under its power to enact laws.”).

86. *See, e.g., Zafft*, 676 S.W.2d at 247 (describing “legitimate concerns that liability will discourage desired pharmaceutical research and development”).

87. *Id.* at 246.

88. *Hymowitz*, 539 N.E.2d at 1075 (“[T]he DES situation is a singular case . . .”); *see Conley v. Boyle Drug Co.*, 570 So. 2d 275, 285 (Fla. 1990) (“Market share liability is generally looked upon as a theory of last resort . . .”). *But see Collins*, 342 N.W.2d at 49 (“[T]his method of recovery could apply in situations which are factually similar to the DES cases.”).

by deterring defendants from negligent acts.”⁸⁹ Multiple courts perceived that mass production and technological advancement would lead to an increase in fungible consumer goods.⁹⁰ Plaintiffs injured by these goods would require market-share liability to sue, which made the theory necessary to vindicate consumer expectations. Market-share liability empowers plaintiffs to bring an entire industry before a court.⁹¹

Equitable considerations, and their existing footholds in tort law, also justify market-share liability. Multiple courts considered market-share liability an extension of the established theory of alternative liability.⁹² The policy judgment at the core of alternative liability, as the California Supreme Court described it, is that “as between an innocent plaintiff and [culpable] defendants, the latter should bear the cost of the injury.”⁹³ On its way to recognizing market-share liability, one court noted that the doctrine of *res ipsa loquitur* allows for a similar presumption of fault in circumstances where a plaintiff cannot identify her tortfeasor.⁹⁴

Rational manufacturers might respond to market-share liability by investing in product safety,⁹⁵ distinguishing their products from those of their competition,⁹⁶ and instituting superior recordkeeping

89. *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 727 (Haw. 1991).

90. *See McCormack v. Abbott Labs.*, 617 F. Supp. 1521, 1525 (D. Mass. 1985) (observing “that the field of products liability has been changed drastically with the advent of mass production of fungible goods”); *Smith*, 823 P.2d at 727 (noting “the creation of fungible goods whose source cannot be traced” as one of the policy rationales for market-share liability).

91. *See Hymowitz*, 539 N.E.2d at 1078 (“[W]e adopt a market share theory using a national market.”).

92. *See Smith*, 823 P.2d at 727 (noting that one of the policy justifications for market-share liability is the principle “that between innocent plaintiffs and negligent defendants, the negligent party should be held liable”). Indeed, the Michigan Supreme Court did not bother to reinvent the wheel, holding that the DES Daughters could proceed under an alternative-liability theory. *Abel v. Eli Lilly & Co.*, 343 N.W.2d 164, 167 (Mich. 1984).

93. *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980).

94. *See id.* at 283 (noting that market-share liability “would not be the first time this Court has relaxed the identity requirement where it would be unjust to adhere rigidly to traditional principles of tort law”). The *res ipsa loquitur* doctrine allows for an inference of negligence where circumstantial evidence permits, even absent proof. *Mayer v. Once Upon a Rose, Inc.*, 58 A.3d 1221, 1226 (N.J. Super. Ct. App. Div. 2013).

95. *See Sindell*, 607 P.2d at 936 (concluding that market-share liability will “provide an incentive to product safety” to manufacturers).

96. *See McCormack v. Abbott Labs.*, 617 F. Supp. 1521, 1528 (D. Mass. 1985) (asserting that “differen[ces] in size, shape and color” will generally be sufficient to defeat the fungible product requirement (citation omitted)).

practices.⁹⁷ The latter two responses would reduce the likelihood of market-share liability being applied to future products by making it more likely that plaintiffs could identify their tortfeasors. Finally, one court supplemented its doctrinal analysis by asserting that “the magnitude of the physical and psychological injuries which are at issue in DES cases counsels toward permitting a remedy,”⁹⁸ and a second appealed to “equity and fairness.”⁹⁹ The realization of these lofty ideals would require courts to extend existing tort law and midwife market-share liability into being.

II. BUILDING A STATUTE

A. *Necessity and Causation*

Market-share liability, among the courts that adopted it, allowed the DES Daughters to recover despite their inability to trace their injury to specific defendants. But it did not affect the statute of limitations, which requires that a potential plaintiff bring a lawsuit within a certain amount of time from the date of the injury.¹⁰⁰ Because the DES Daughters’ injuries occurred in utero, the statute of limitations had often expired before they began attending junior high.¹⁰¹ Even in locations that tolled their statutes of limitations until minors reached majority, the afflictions associated with DES exposure often did not appear until after the statutes expired.¹⁰² Plaintiffs cleared this hurdle in different ways. In some places, the statute of limitations did not begin to run until a plaintiff discovered her injury.¹⁰³ In New

97. See *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 52 (Wis. 1984) (declaring that “if relevant records do not exist, we believe that the equities of DES cases favor placing the consequences on the defendants”).

98. *McCormack*, 617 F. Supp. at 1526.

99. *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 727 (Haw. 1991).

100. *Developments in the Law – Statutes of Limitations*, 63 HARV. L. REV. 1177, 1179 (1950). In addition to statutes of limitations, some states also have statutes of repose. Statutes of repose are like statutes of limitations, but they begin to run at the time of the “sale by the manufacturer or the time when the product was first purchased for use” rather than the time of the plaintiff’s injury. See HENDERSON, JR. ET AL., *supra* note 55, at 151.

101. See HENDERSON, JR. ET AL., *supra* note 55, at 150 (“The traditional tort statute of limitations begins to run when the cause of action accrues—at the time of injury to the plaintiff. . . . The vast majority of jurisdictions bar actions after two or three years have passed.”).

102. See Bernstein, *supra* note 1, at 163 (claiming that, at least “in New York, the statute of limitations was a far more pressing problem than identifying the defendant”).

103. See HENDERSON, JR. ET AL., *supra* note 55, at 491 (asserting that, in some jurisdictions, “the statute of limitations does not generally begin to run until discovery of the injury”).

York, public outcry spurred the passage of a revival statute, which created exceptions to the ordinary statute of limitations.¹⁰⁴

After avoiding “the Scylla of the statute of limitations,” however, plaintiffs still faced “the Charybdis of nonidentification.”¹⁰⁵ Causation is presumed necessary for tort liability¹⁰⁶—an “axiom[] of tort law [is] that a defendant may not be held liable unless he caused the injury about which the plaintiff is complaining.”¹⁰⁷ The DES Daughters did not know, and often could not determine, which manufacturer had harmed them; they were plaintiffs searching for a theory of causation.¹⁰⁸ “[T]he near unanimous” opinion of the courts that heard DES cases was that no previously accepted theory applied to their facts.¹⁰⁹

Plaintiffs generally pleaded market-share liability in the alternative and after offering four more-established theories of multiple causation: alternative liability, concerted action, industrywide liability, and civil conspiracy.¹¹⁰ Courts refused to apply alternative liability because that theory’s previous applications required that the defendants be better situated than the plaintiff to determine which defendant caused the injury, and the plaintiffs could not show that this was the case in the DES context.¹¹¹ Moreover, when market-share liability allowed plaintiffs to sue only some manufacturers instead of the entire market, there was no guarantee that the responsible defendant was among the sued manufacturers.¹¹² And alternative

104. Bernstein, *supra* note 1, at 164–65. In addition to ratifying market-share liability, Hymowitz rejected four constitutional challenges. The New York Court of Appeals held that the revival statute violated neither the Due Process Clause nor the Equal Protection Clause of the U.S. Constitution, nor their parallel clauses in the New York Constitution. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1079–80 (N.Y. 1989).

105. Bernstein, *supra* note 1, at 162.

106. Aaron Twerski & Anthony J. Sebok, *Liability Without Cause? Further Ruminations on Cause-in-Fact as Applied to Handgun Liability*, 32 CONN. L. REV. 1379, 1379 (2000).

107. *Id.*

108. See *Bichler v. Eli Lilly & Co.*, 436 N.E.2d 182, 185 (N.Y. 1982) (recognizing “the practical impossibility for most victims of pinpointing the manufacturer directly responsible for their particular injury threatens to bar any recovery”).

109. *Hymowitz*, 539 N.E.2d at 1073.

110. While each theory will be distinguished briefly here, exhaustive treatment of the first three can be found in the *Sindell* opinion. *Sindell v. Abbott Labs.*, 607 P.2d 924, 928–36 (Cal. 1980). *Collins* addresses civil conspiracy. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 47–48 (Wis. 1984).

111. See *Sindell*, 607 P.2d at 929–31 (“While we propose, *infra*, an adaptation of the rule in *Summers* which will substantially overcome these difficulties, defendants appear to be correct that the rule, as previously applied, cannot relieve plaintiff of the burden of proving the identity of the manufacturer which made the drug causing her injuries.”).

112. *Collins*, 342 N.W.2d at 46.

liability offered no guidance on how to apportion damages among defendants on the basis of their different market shares and, therefore, their variable contribution to plaintiff's injury.¹¹³

Courts distinguished concerted action on its facts. The theory requires "substantial assistance or encouragement," which the California Supreme Court noted was lacking in the DES cases.¹¹⁴ Although DES manufacturers copied and benefitted from each other's safety research and advertising, so do all manufacturers of identical or substitutable products.¹¹⁵ Therefore, adopting concerted action would greatly expand the doctrine's reach.¹¹⁶ Moreover, these manufacturers were competitors that benefitted from the inability or failure of the others to market DES; they were not encouraging each other to cut into their profits.¹¹⁷

Industrywide liability fared no better. The theory requires that defendants "jointly control the risk of injury,"¹¹⁸ and its canonical illustration is *Hall*.¹¹⁹ The case involved blasting caps—fungible products that harmed users and could not be traced to specific manufacturers.¹²⁰ Evidence that the defendants delegated the establishment and enforcement of safety standards to their trade association satisfied the joint-control standard because each of them cooperated in setting standards through the neutral body.¹²¹ In the DES cases, by contrast, drug manufacturers abided by regulations set and enforced by the government.¹²²

Finally, plaintiffs pleading civil conspiracy alleged that DES manufacturers conspired to deceive the FDA into falsely believing that the drug was "safe and efficacious for use in pregnancy."¹²³ This theory

113. *Id.*

114. *Sindell*, 607 P.2d at 932 (quoting RESTATEMENT (SECOND) OF TORTS § 876(b) (AM. LAW INST. 1979)).

115. *See id.* at 933 ("[S]uch conduct describes a common practice in industry . . .").

116. *Id.*

117. *See id.* at 932 (holding that the plaintiffs' allegations "do not amount to a charge . . . that [defendants] substantially aided and encouraged one another in" their tortious conduct).

118. *Collins*, 342 N.W.2d at 47.

119. *Hall v. E. I. Du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972).

120. *See id.* at 378 (crediting the plaintiffs' contention "that they should be relieved of the usual burden of proving a causal connection between each of their injuries and a particular manufacturer" because "a blasting cap found and exploded by a child often destroys what will be the only reliable evidence of its manufacturer").

121. *Sindell*, 607 P.2d at 934.

122. *Collins*, 342 N.W.2d at 47.

123. *Id.*

did not apply to manufacturers who only marketed DES for use during pregnancy after its 1947 approval for that purpose.¹²⁴ Plaintiffs pleading this theory also failed to establish that the defendants lobbying the FDA were conspiring together rather than acting individually.¹²⁵ And so, the DES Daughters found themselves at the mercy of judges, who had to decide whether to adopt the novel theory of causation that was market-share liability. Many refused to do so,¹²⁶ and those that did rarely agreed on how to paddle plaintiffs past this Charybdis.

These disagreements touched every stage of litigation. Courts disagreed about which products and plaintiffs qualified for market-share liability, the doctrinal assumptions that market-share liability credits, and other considerations necessary to operationalize market-share liability. These disagreements are considered in turn below, alongside proposed resolutions which are reflected in the model statute.

B. The Factual Conditions Necessary for Market-Share Liability

Commentators have not coalesced around a list of conditions necessary for market-share liability to obtain.¹²⁷ Mindful of this disagreement, the model statute proposes that two conditions must be met before a plaintiff can plead market-share liability. First, the product at issue must be identically produced by multiple manufacturers; it must be a fungible product.¹²⁸ Generic drugs are paradigmatic examples. Second, the plaintiff must be unable to identify which manufacturer created the specific unit that harmed her.¹²⁹

124. *See id.* at 48 (“[T]his theory becomes unworkable when we consider the fact that many drug companies entered the DES market well after FDA approval. These later entrants should not be charged with participation in or knowledge of the alleged . . . conspiracies.”).

125. *See id.* (stating that “parallel behavior alone cannot prove agreement”).

126. *See, e.g.,* Zafft v. Eli Lilly & Co., 676 S.W.2d 241, 247 (Mo. 1984) (en banc) (“There is insufficient justification at this time to support abandonment of so fundamental a concept of tort law as the requirement that a plaintiff prove, at a minimum, some nexus between wrongdoing and injury.”).

127. *Compare* Kathy J. Owen & C. Vernon Hartline, Jr., *Industry-Wide Liability: Protecting Plaintiffs and Defendants*, 44 BAYLOR L. REV. 45, 59–60 (1992) (asserting that *Sindell* lays out five conditions), *with* Kenneth R. Lepage, Note, *Lead-Based Paint Litigation and The Problem of Causation: Toward a Unified Theory of Market Share Liability*, 37 B.C. L. REV. 155, 159 (1995) (citing *Sindell* as support for the proposition that market-share liability cases generally require three conditions).

128. *See, e.g.,* *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980) (“[H]ere, all defendants produced a drug from an identical formula . . .”).

129. *Id.* Almost every court enumerated additional requirements, but these can be distinguished from statements about the factual context from which the case emerged. For

The failure to meet either prong precludes the application of market-share liability. In many instances, plaintiffs have struggled to show that the product that harmed them was identically produced by multiple manufacturers. For an acute example, consider the lead-based paint litigations. Lead carbonate is a harmful substance, capable of causing nerve damage and lead poisoning.¹³⁰ However, lead carbonate is sold to paint manufacturers before it comes into contact with end consumers, with each of the manufacturers adding different amounts of lead carbonate to their paints.¹³¹ The variable concentrations of lead carbonate place lead-based paint beyond the reach of market-share liability.¹³² To recover, plaintiffs must sue the manufacturer of the particular lead-based paint that injured them. Despite meeting the nonidentification requirement, these prospective plaintiffs fail the generic-product requirement.

The generic-product requirement has also prevented market-share liability from being used against cigarette manufacturers and breast-implant manufacturers. For cigarettes, “plaintiff smokers should certainly be able to identify the cigarette brands which they have used.”¹³³ Even if each cigarette manufacturer produced cigarettes identical to every other manufacturer, packaging and advertising might be sufficient grounds to exclude a product from market-share

example, *Sindell* notes that the plaintiffs must be blameless for their inability to identify the specific manufacturers that harmed them. *Id.* This could be considered a pleading requirement—plaintiffs must allege that they exercised “due diligence” in attempting to identify the responsible manufacturer. *See McCormack v. Abbott Labs.*, 617 F. Supp. 1521, 1528 (D. Mass. 1985) (considering and rejecting such a requirement). Or it could be considered a statement of factual context—plaintiffs who have not even tried to identify the responsible manufacturer may not sue under a causation theory of market-share liability; they must sue the identified tortfeasor. It is difficult to confidently guess and probably impossible to know until the California Supreme Court hears a market-share liability case that is distinguishable from *Sindell* on that basis.

Courts may also impose other pleading prerequisites. *See Sindell*, 607 P.2d at 937 (requiring plaintiffs’ complaint to name manufacturers comprising “a substantial percentage” of the relevant market); *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1073 (N.Y. 1989) (noting that, absent a revival statute, the case would be barred by the statute of limitations, but that the legislature had “reviv[ed] these time-barred actions”). These requirements have legal force; they can preclude plaintiffs from pursuing an otherwise lawful claim in a qualifying factual setting. However, they stem from pragmatic concerns better considered separate from whether or not the plaintiff’s factual setting is amenable to a market-share liability theory. Accordingly, they are addressed elsewhere. *See infra* notes 200–13 and accompanying text.

130. *See Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848, 849 (App. Div. 1999) (including allegations that ingested lead carbonate proximately caused plaintiff’s injuries).

131. *Id.* at 852–53.

132. *Id.* at 854.

133. *DaSilva v. Am. Tobacco Co.*, 667 N.Y.S.2d 653, 655 (Sup. Ct. 1997).

liability.¹³⁴ Breast-implant manufacturers also engage in targeted marketing; along with the fact that different manufacturers include different warnings on the products, this has precluded market-share liability for breast implants.¹³⁵ And in situations where manufacturers produce implants with unique designs, the products would necessarily fail the generic-product requirement.¹³⁶

As far as the author can tell, only one court has deviated from the generic-product requirement. In 1991, the Hawaii Supreme Court extended market-share liability to blood proteins.¹³⁷ The plaintiff in that case contracted HIV after receiving blood transfusions.¹³⁸ Despite noting that blood proteins are harmful only if the donor who gave them is infected, while “DES is inherently harmful,” the court adopted a market-share theory of causation.¹³⁹ Nowhere in its analysis does the court justify waiving the generic-product requirement.¹⁴⁰ Rather, after conceding that the donors of the proteins are not constant—and therefore that the proteins themselves are not generic¹⁴¹—it doubles down on the nonidentification requirement.¹⁴²

Maintaining the generic-product requirement is important for at least two reasons. First, allowing potential defendants to excuse themselves from market-share liability by creating products that have unique physical features increases the chance that injured plaintiffs will be able to identify the manufacturers of the products that injure them. The requirement incentivizes defendants to brand their products,

134. *Id.*

135. *See In re New York State Silicone Breast Implant Litig.*, 631 N.Y.S. 2d 491, 494 (Sup. Ct. 1995) (stating that breast implants “are not generically marketed” and that “the warning inserts in each of the products vary”).

136. *See id.* (referencing “differences in the design and composition of the implants” as a reason for denying market-share liability).

137. *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 727 (Haw. 1991).

138. *Id.* at 721.

139. *Id.* at 724.

140. The court does suggest both that the manufacturers’ screening processes used to secure blood donations are insufficient to protect the eventual recipients of that blood and that these end consumers might not receive sufficient warnings as to the risks associated with the blood transfusions. *Cf. id.* (noting that a “lack of screening of donors and failure to warn are the breaches alleged”). To the extent that these practices might have been uniform across the industry, and fungible in that sense, the Hawaii Supreme Court may have been seeking to discipline these practices. If that was the court’s reasoning, the court nowhere explicitly adopts it.

141. *See id.* (“Factor VIII . . . does not have the constant quality of DES. The reason is obvious—the donor source of the plasma is not a constant.”).

142. *Id.* The plaintiff did not contract with a protein manufacturer; instead, he received the proteins from his healthcare provider, the United States. *Id.* at 721. The plaintiff sued all four of the manufacturers who provided Factor VIII to the United States. *Id.* at 722.

increases the odds that plaintiffs know who to sue if they are harmed, and reduces the cost to all parties of having to litigate market-share liability—a theory whose contours, in most jurisdictions, remain undefined. Second, the generic-product requirement limits the products that are eligible for market-share liability. Manufacturers in markets with sufficiently distinct brands (like cigarettes)¹⁴³ and manufacturers of inputs that are used in multiple consumer products (like asbestos)¹⁴⁴ remain excluded from market share liability.

The inability to identify one's tortfeasor does independently important doctrinal work; it does not excuse a failure to meet the generic-product requirement. The nonidentification requirement ensures that when a plaintiff can identify the tortfeasor who harmed her, she brings suit against that tortfeasor. It reinforces a reluctance to "impos[e] . . . liability upon a manufacturer for harm that it may not have caused"¹⁴⁵ and ensures that market-share liability remains "a theory of last resort."¹⁴⁶ Even though market-share liability is consistent with the objectives of tort law and with equitable considerations,¹⁴⁷ the administrative burden it imposes on the courts applying it counsels in favor of limiting its applicability to exceptional cases.¹⁴⁸ Codification of the generic-product and nonidentification requirements achieve this prudential limitation.

C. Doctrinal Determinations

Any theory of market-share liability must answer three theoretical questions. What is the relevant market?¹⁴⁹ Can defendants exculpate

143. See *DaSilva v. Am. Tobacco Co.*, 667 N.Y.S.2d 653, 655 (Sup. Ct. 1997) (noting that "the plaintiff smokers should certainly be able to identify the cigarette brands which they have used").

144. See *In re New York State Silicone Breast Implant Litig.*, 631 N.Y.S.2d 491, 494 (Sup. Ct. 1995) ("[A]sbestos is used in many different products in many different percentages."). Manufacturers use asbestos in home insulation and automobiles, among other products.

145. *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986).

146. *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 285 (Fla. 1990).

147. See *supra* notes 89–99 and accompanying text.

148. In rejecting market-share liability, the Illinois Supreme Court wrote that accepting the theory would "imprudently bog down the judiciary in an almost futile endeavor." *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 338 (Ill. 1990). Such pragmatic considerations have shaped the doctrinal contours of the theories of market-share liability that courts have adopted. See *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989) ("[F]or essentially practical reasons, we adopt a market-share theory using a national market."). Even when doctrinal determinations are made independently of such pragmatic considerations, courts recognize the objections. See *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980) ("We are not unmindful of the practical problems involved in defining the market and determining market share . . .").

149. HENDERSON, JR. ET AL., *supra* note 55, at 106.

themselves from the proceedings if they can prove their product did not injure the plaintiff?¹⁵⁰ Is the resulting liability several, or joint and several?¹⁵¹ Courts have disagreed on each of these questions.

1. *The Relevant Market.* Courts choose between two different tests when defining the relevant market: an as-local-as-possible approach and a national-market approach. Adopting the national-market approach makes it more likely that a plaintiff can collect at least some of her judgment and makes determining a plaintiff's award easier, among other beneficial results.

The New York Court of Appeals was the first state supreme court to hold that a national market was the relevant market for apportioning market-share liability.¹⁵² After the California Supreme Court in *Sindell v. Abbott Laboratories*¹⁵³ punted the determination of the relevant market in each case to the lower California courts,¹⁵⁴ a consensus emerged around the as-local-as-possible test.¹⁵⁵ One dissenting judge's description of the test could be envisioned as concentric circles, each getting smaller.¹⁵⁶ As the evidence allows, the market could be defined as narrowly as a particular pharmacist's practice of filling prescriptions.¹⁵⁷

The distinction between the two tests lies in how courts define the injury that market-share liability is attempting to remedy. The national-market approach apportions liability based on "the amount of

150. *Id.*

151. *See id.* ("[I]f only a given percentage of defendants who participated in the market at the time of injury can be accounted for, who should bear the loss for the missing market shares?").

152. *Cf. Hymowitz*, 539 N.E.2d at 1078 (distinguishing other states' approaches to defining a relevant market and choosing a national-market approach).

153. *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

154. *See id.* at 937–38 (observing that the determination of the relevant market was a "matter[] of proof which properly cannot be determined at the pleadings stage").

155. *See, e.g., McCormack v. Abbott Labs.*, 617 F. Supp. 1521, 1528 (D. Mass. 1985) ("[I]n the typical situation, the inquiry narrows down to one or two drug stores" (citation omitted)); *George v. Parke-Davis*, 733 P.2d 507, 512 (Wash. 1987) (en banc) ("[T]he relevant market for determining liability [must] be as narrow as possible." (interpreting *Martin v. Abbott Labs.*, 689 P.2d 368, 377 (Wash. 1984) (en banc))).

156. *See Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 248 (Mo. 1984) (en banc) (Gunn, J., dissenting) (arguing in dissent for the adoption of market-share liability and describing the contracting nature of the relevant-market inquiry as focused on "the DES mother herself" and "the means of proof" available to her, beginning with "the area of her residence" and then narrowing to "her drugstore" and, if need be, narrowing as far as to "her pharmacist").

157. *Id.*

risk of injury each defendant created to the public-at-large.”¹⁵⁸ The as-local-as-possible approach is concerned with ensuring that each defendant is held liable for the amount of risk to which it exposed the individual plaintiff.¹⁵⁹ It allows “the imposition of liability only on those companies who potentially could have manufactured the drug which caused [plaintiff’s] injuries.”¹⁶⁰ As to the number of defendants before the court, and the grounds for bringing them there, it is “more circumscribed and more traditional,” which is why courts are more comfortable adopting it.¹⁶¹

It is also second best. One commentator has written that the as-local-as-possible test “does violence to the fundamental market share liability theory” and fails “to meet even a pretense of even handedness.”¹⁶² A hypothetical example demonstrates why this is so. Imagine two pharmacies and two pharmaceutical companies. Each company supplies 90 percent of the DES to one pharmacy and 10 percent to the other. The daughter of a customer at each pharmacy contracts vaginal cancer and sues both companies for the same amount. Pharmacy A, which received 90 percent of its DES from Company A, kept meticulous records and turns them over to the parties in discovery. Pharmacy B has since burned to the ground. All of its records were lost in the fire, and Company A is unable to prove that it only provided 10 percent of the DES Pharmacy B sold. The general practice in market-share liability cases is to presume that each defendant before the court contributed equally to the market until proof is made to the contrary.¹⁶³ Although the judgments in these cases fully compensate the plaintiff, Company A will have paid 70 percent of the damages, despite only being accountable for 50 percent of the harm.¹⁶⁴

158. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989).

159. *Cf. George*, 733 P.2d at 512 (“National figures should therefore be admitted when the trial court determines that they tend to establish an accurate approximation of the drug companies’ local market shares.”).

160. *Id.*

161. Aaron D. Twerski, *Market Share – A Tale of Two Centuries*, 55 BROOK. L. REV. 869, 871–72 (1989).

162. *Id.* at 871.

163. *See, e.g., Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990) (“Each of the remaining defendants is presumed initially to have an equal share of the market.”).

164. When the court cannot determine how much each company provided to the market (here, two pharmacies), the judge assumes they provided an equal amount. Company A is assigned 90 percent of the surviving pharmacy’s output and 50 percent of the destroyed

As the *Hymowitz* decision recognized, allowing DES manufacturers to escape judgments for DES injuries solely because they did not sell DES to a particular pharmacy was tantamount to giving those DES manufacturers a “windfall.”¹⁶⁵ The preceding example confirms that intuition.

Harnessing a national market yields further advantages. First, the national market is the only market that guarantees that the company that made the unit of the product that harmed the plaintiff is held responsible for doing so.¹⁶⁶ Second, it accounts for the possibility that plaintiffs who were harmed out of state might sue in the forum.¹⁶⁷ Third, the more defendants the plaintiff can sue, the less likely it is that the plaintiff will be unable to collect much, or all, of her judgment from the few insolvent defendants who contributed most to her harm.¹⁶⁸ Such an arrangement also protects vulnerable defendants by aligning tort liability with financial resources.¹⁶⁹ Small companies that supply all of a product to a certain market are more likely to be left bankrupt by a tort judgment than a much larger company that has achieved a similar monopoly. Where these small companies also produce and sell other beneficial products, their bankruptcy harms consumers by removing these products from the market.

Moreover, because national market share does not change across fora, the national market is the only market that allows for the possibility of uniform judgments across jurisdictions. This requires every jurisdiction to recognize market-share liability and to adopt the national-market test. The as-local-as-possible approach allows no such

pharmacy’s. After dividing this 140 percent capacity over the 200 percent capacity of both pharmacies, Company A is assessed 70 percent of the damages.

165. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989).

166. *See Twerski, supra* note 161, at 871–72 (describing the “most uncomfortable” possibility that even a plaintiff suing—or for the model statute’s purposes, defendant impleading—“two hundred ninety-nine out of a pool of three hundred” defendants might only be suing “non-causal defendants”).

167. The facts of *Mizell v. Eli Lilly & Co.* hammer home both that every state should codify market-share liability and that those statutes should adopt a national market. *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589 (D.S.C. 1981). There, the plaintiff had been injured by DES consumption in California but had since moved to South Carolina. *Id.* at 591. The court refused to adopt market-share liability because it would be contrary to South Carolina’s “public policy.” *Id.* at 596. The more salient consideration here, however, is the difficulty associated with asking a court to perform factfinding involving witnesses and companies situated on the opposite coast every time a geographically mobile plaintiff brings suit.

168. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 51 (Wis. 1984).

169. This assumes that the more financial resources a company has, the more successful it will be in bringing its products to the market.

symmetry. Two reasonable assumptions support this instinct: First, there is at least one pharmacy where none of the DES customers experienced ill effects. Second, that pharmacy's supply of DES is not identical to the national supply. Removing this pharmacy guarantees that, even if every court applies an as-local-as-possible market, and even if those applications are fully informed by the facts necessary to trace each DES Daughter's injury to a particular pharmacy, the allocation of liability will not match the respective risks each defendant visited upon the public.

Last, judicial administration is served by adopting the national-market approach. After *Hymowitz*, New York litigators built and began using a matrix to determine awards.¹⁷⁰ The economies of scale triggered by one state's creation of such a matrix are obvious—any other state that adopts the national market can use the same matrix to resolve claims. The same year, lower California courts built their own grid by determining the national market share of DES by manufacturer by year.¹⁷¹ Justice by matrix may not give victims the catharsis that communities expect from traditional trials and jury awards,¹⁷² but it is certainly better than arbitrary justice—or no justice at all. Therefore, the model statute adopts a national market.

2. *Exculpation*. After deciding which market to adopt, courts must then decide whether to allow defendants to exculpate themselves from the lawsuit by proving that they did not participate in the market. Courts that adopted the national-market approach prohibited such exculpation.¹⁷³ But most courts that adopted the as-local-as-possible

170. Bernstein, *supra* note 1, at 170–72.

171. Diane S. Wilner & Lee S. Gayer, *Hymowitz v. Eli Lilly: New York Adopts a "National Risk" Doctrine for DES*, 25 TORT & INS. L.J. 150, 155 (1989).

172. See Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and Nolo Contendere Pleas*, 88 CORNELL L. REV. 1361, 1402 (2003) ("[T]rials . . . bring catharsis and closure to victims and the community."); *cf. id.* at 1407 (arguing that, as resolutions to litigation become more efficient, "catharsis, expressive condemnation, and the vindication of the community's norms" all suffer).

173. For example, the Court of Appeals of New York explains:

[T]here should be no exculpation of a defendant who, although a member of the market producing DES for pregnancy use, appears not to have caused a particular plaintiff's injury. . . . These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here.

Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989). Defendants who were not active in the market during the relevant time may exculpate themselves. *Id.*

approach allowed defendants to exculpate themselves from DES suits.¹⁷⁴ It is worth considering how and why.

Until *Hymowitz*, defendants who could prove that they did not sell DES in the relevant market were exculpated from the proceedings.¹⁷⁵ Allowing defendants to exculpate themselves better ensures that each defendant's liability corresponds to the specific injuries its products caused;¹⁷⁶ at the least, all defendants held responsible could have actually injured the specific plaintiffs before the court.¹⁷⁷

But this result distorts the rationale and underlying premise of market-share liability. Supplying a harmful product to the market is the culpable conduct, not the particular sale that harms a particular plaintiff.¹⁷⁸ All defendants in a market-share liability case manufactured fungible products.¹⁷⁹ “Each defendant contributed to the *risk* of injury to the public and, consequently, the risk of injury to individual plaintiffs”¹⁸⁰ Even courts that allowed defendants to exculpate themselves recognized that marketing the drug is the blameworthy conduct.¹⁸¹ Allowing a culpable defendant to elude liability gives that defendant an undeserved “windfall.”¹⁸²

Exculpation also raises prudential concerns. The fact-intensive nature of proving that the plaintiff could not have consumed a particular defendant's product means that making the defense available disproportionately favors wealthy companies able to “expend large sums of money for the detective work necessary to establish the defense.”¹⁸³ Further, if different defendants are able to exculpate themselves vis-à-vis different plaintiffs, every case would require “the

174. See, e.g., *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 49 n.10 (Wis. 1984) (“We . . . require it be shown that the defendant drug company reasonably could have contributed in some way to the actual injury.”).

175. Twerski, *supra* note 161, at 872.

176. *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980).

177. See, e.g., *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 284 (Fla. 1990) (“The narrower the market, the greater the likelihood that liability will be imposed only on those drug companies who could have manufactured the DES which caused the plaintiff's injuries.”).

178. *Hymowitz*, 539 N.E.2d at 1078; see Robinson, *supra* note 21, at 740 (“‘Fault’ can be imputed to a defendant's conduct from the fact that it made a product that created such a risk. Whether the defendant's actions caused injury in the particular case does not alter the character of its conduct.”).

179. *Collins*, 342 N.W.2d at 44.

180. *Id.* at 49.

181. *Conley*, 570 So. 2d at 283; *Sindell*, 607 P.2d at 936.

182. *Hymowitz*, 539 N.E.2d at 1078.

183. Twerski, *supra* note 161, at 872.

establishment of a separate market share matrix.”¹⁸⁴ This squanders the administrative advantages of using a national market.

It would be disingenuous to paper over the model statute’s departure from classic tort law. “Culpability in the air . . . is not the business of tort law”¹⁸⁵ Until *Hymowitz*, “a defendant who could prove that its product did not cause the harm in question could rightfully walk away from the courthouse without liability.”¹⁸⁶ Not here. Not where the defendant has manufactured a fungible product and the plaintiff is unable to identify the manufacturer of the unit that injured her. Under market-share liability, each defendant is “liable, in proportion to its market share, even if it is clear from the evidence that the plaintiff could not have taken its drug.”¹⁸⁷

This departure is warranted. Indeed, tort law has made analytically similar departures before.¹⁸⁸ Defendants are culpable for marketing a fungible product, each unit of which carries identical risks. Even if market-share liability “cannot be reconciled with traditional causation theory,”¹⁸⁹ the theory sustains tort law’s traditional commitments: compensation and deterrence.¹⁹⁰ Given these doctrinal and prudential concerns, the model statute does not permit defendants to exculpate themselves.

3. *Joint Liability.* Courts have also diverged on whether plaintiffs or defendants should bear the cost of missing market shares.¹⁹¹ If the court adopts joint liability, the defendants will bear the cost of missing market shares; if the court does not, the plaintiff will lose that portion of her judgment. In some instances, less than 100 percent of the market will be accounted for, either because some defendants will have gone

184. *Hymowitz*, 539 N.E.2d at 1077.

185. Twerski & Sebok, *supra* note 106, at 1379.

186. Wilner & Gayer, *supra* note 171, at 155.

187. Greenhouse, *supra* note 7.

188. See *supra* notes 110–25 and accompanying text.

189. Twerski, *supra* note 161, at 873.

190. *Smith v. Cutter Biological, Inc.*, 823 P.2d 717, 727 (Haw. 1991); see *supra* notes 38–45, 55–73, 89–99 and accompanying text.

191. Compare *Martin v. Abbott Labs.*, 689 P.2d 368, 383 (Wash. 1984) (en banc) (“To the extent that other defendants fail to establish their actual market share, their presumed market share is adjusted so that 100 percent of the market is accounted for.”), with *Brown v. Superior Court*, 751 P.2d 470, 486 (Cal. 1988) (“It is apparent that the imposition of joint liability on defendants in a market share action would be inconsistent with its rationale” of “approximat[ing] the injuries caused by the DES it manufactured.”).

bankrupt¹⁹² or because all defendants will prove their market shares and those shares will sum to less than 100 percent.¹⁹³ Regardless of whether the court applies a national market or an as-local-as-possible market, the decision about who should bear the cost of missing market shares must always be made. In these instances, plaintiffs will be unable to collect the unaccounted-for percentages of their judgments; the model statute does not recognize joint liability.

The advantage of joint liability is obvious: it fully compensates the plaintiff for her harm.¹⁹⁴ It does so, however, by attributing liability to tortfeasors who are not responsible for the missing market share.¹⁹⁵ This attribution is unjustified.

The culpable conduct in a market-share liability case is producing the offending product for sale.¹⁹⁶ A relationship sufficient to justify joint liability would also likely make another theory of multiple causation possible.¹⁹⁷ Further, joint liability applies only where “each tortfeasor is the proximate cause of the entirety of plaintiff’s harm.”¹⁹⁸ That is not true in market-share liability cases. Instead, the percentage of the injury for which each defendant is responsible has already been calculated; it must have been in order to determine that some percentage of the market was missing. That calculation, because it represents a defendant’s “fair share of responsibility,” caps a defendant’s liability.¹⁹⁹ The model statute assigns the costs of missing market shares to plaintiffs.

D. Mechanical Considerations

The mechanics of how plaintiffs would bring suit under a market-share liability statute must be considered. Legislators must make determinations as to pleadings requirements, the availability of

192. Twerski, *supra* note 161, at 873.

193. Conley v. Boyle Drug Co., 570 So. 2d 275, 286 (Fla. 1990). At least two different explanations could account for this gap. First, a relevant manufacturer might be neither sued by the plaintiff nor impleaded by the other manufacturers. Second, because legal proof is imperfect, defendants’ proven contributions may sum to fewer units of the product than were in the relevant market during the relevant time.

194. *Martin*, 689 P.2d at 381.

195. *Id.* at 382.

196. Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069, 1078 (N.Y. 1989).

197. *See supra* notes 110–25 and accompanying text.

198. Twerski, *supra* note 161, at 873.

199. *Hymowitz*, 539 N.E.2d at 1078.

punitive damages, and how market-share liability interacts with existing state statutes of limitations and repose.

1. *Pleading Requirements.*

i. *The Number of Defendants Named in the Complaint.* The model statute requires a plaintiff to name only one defendant in her complaint.²⁰⁰ For several reasons, this course of action is preferable to applying an amorphous “substantial share” standard, under which courts attempt to determine, at the pleadings stage, whether the complaint names a sufficient percent of the relevant market.²⁰¹ Given differences in market concentration, this standard risks unequal enforcement. One defendant is certainly sufficient when that defendant accounts for all of the product in a certain market.²⁰² But in more competitive markets, even a complaint naming ten defendants may not name a “reasonable number.”²⁰³ Litigating such a standard depletes resources that the bench and the parties could otherwise expend on the merits.²⁰⁴ Finally, a defendant has superior information as to the identities of other potential defendants;²⁰⁵ manufacturers, especially those of fungible products, know their competitors.

Although the one-defendant standard is imperfect, the substantial-share standard offers no advantages. The *Sindell* court conceded that such a standard permitted “a 10 percent likelihood that the offending producer would escape liability.”²⁰⁶ This admission misunderstands the conduct that market-share liability is intended to discipline (the marketing of the product)²⁰⁷ and fails to exploit the defendant’s self-interest in impleading other manufacturers and gathering evidence of their market shares to reduce its own liability.²⁰⁸ There is no reason to bar a harmed plaintiff from court because she

200. See *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 50 (Wis. 1984) (noting the “[p]ractical considerations” that weigh in favor of allowing the plaintiff to proceed against a singular defendant).

201. *Sindell v. Abbott Labs.*, 607 P.2d 924, 937 (Cal. 1980).

202. See *id.* (holding that a complaint must name “a substantial percentage” of the relevant market).

203. *Collins*, 342 N.W.2d at 50.

204. *Id.*

205. *Id.*

206. *Sindell*, 607 P.2d at 937.

207. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1078 (N.Y. 1989).

208. *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990).

lacks the industry expertise required to learn which companies sold which products at a specific time.

ii. *Due-Diligence Requirement.* To prevent frivolous pleadings, however, the model statute requires plaintiffs to plead that they have exercised due diligence in their attempts to identify the manufacturer of the specific unit of the product that harmed them.²⁰⁹ Plaintiffs can satisfy this burden by pleading that they have “made a genuine attempt to locate and to identify the manufacturer responsible for her injury.”²¹⁰ In discovery, defendants will have the opportunity to defeat the complaint by showing that no such due diligence took place.²¹¹

It is simply untrue to assert that “[p]laintiffs have little incentive to conceal identification information.”²¹² Consider a plaintiff who has learned that a defunct manufacturer caused her injury. Because her tortfeasor is judgment-proof, she now has *every* incentive to try to sue the remaining manufacturers under a theory of market-share liability and to conceal the identity of the company that made the unit of the product that harmed her. But if she concedes her inability to meet the nonidentification requirement, she cannot sue under market-share liability. It is true that discovery proceedings will allow defendants to uproot such claims,²¹³ but they should not be made to bear this unnecessary expense. And courts should not be forced to manage discovery in cases that claim, but do not qualify for, market-share liability.

2. *Punitive Damages.* Plaintiffs suing under the model statute may not recover punitive damages. Punitive damages serve a retributive function.²¹⁴ Accordingly, they are considered an individualized punishment,²¹⁵ and they are generally awarded for conduct directed

209. *See id.* at 286 (“Where a plaintiff can identify a specific tortfeasor as causing her injury and traditional remedies are thus available, we see no reason for resort to a remedy based on the concept of risk contribution.”).

210. *Id.*

211. *McCormack v. Abbott Labs.*, 617 F.Supp. 1521, 1528 (D. Mass. 1985).

212. *Id.*

213. *Id.* at 1529.

214. *See supra* note 52 and accompanying text.

215. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 875 (1998) (stating that one “objective” of punitive damages is to “penalize especially blameworthy individuals” (emphasis omitted)).

toward individual plaintiffs.²¹⁶ Punitive damages further neither of these purposes in a market-share liability case.²¹⁷ By their nature, market-share liability cases concern the actions of multiple defendants toward an indefinite number of potential consumers.

3. *Statutes of Limitations and Repose.* The model statute supersedes any applicable statutes of limitations or repose in the jurisdiction. The statute's identification requirement is likely to limit market-share liability's application to products that result in injury only after a long latency period.²¹⁸ However, "even if one has a just claim[,] it is unjust not to put the adversary on notice to defend within the period of limitation."²¹⁹ The passage of time increases the chances that "evidence has been lost, memories have faded, and witnesses have disappeared."²²⁰

To balance these considerations, the model statute adopts a three-year statute of limitations, subject to the discovery rule. The discovery rule tolls the statute of limitations until the plaintiff discovers, or reasonably should have discovered, her injury.²²¹ Three years is a common length for statutes of limitations.²²²

The model statute adopts no statute of repose. Statutes of repose bar actions in the same fashion as statutes of limitation.²²³ They begin to run at the time of "sale by the manufacturer or the time when the product was first purchased for use."²²⁴ Given the likelihood that the harms wrought by products eligible for market-share liability will have long latency periods, any such statute jeopardizes a plaintiff's ability to

216. See Thomas B. Colby, *Clearing The Smoke From Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 399 (2008) (arguing against, but acknowledging a consensus around, the view that "punitive damages historically were understood to serve as punishment for private wrongs to individuals, rather than as punishment for public wrongs to society").

217. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 54 (Wis. 1984).

218. See Twerski, *supra* note 161, at 876 ("It is thus highly unlikely that market share will be extended . . . to products that do not have latency periods . . .").

219. *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 349 (1944).

220. *Id.*

221. David G. Owen, *Special Defenses in Modern Products Liability Law*, 70 MO. L. REV. 1, 36 (2005).

222. See HENDERSON, JR. ET AL., *supra* note 55, at 150 ("The vast majority of jurisdictions bar actions after two or three years have passed.")

223. See *id.* at 151 (noting that statutes of repose are triggered by either the manufacturer's sale of the product or the products purchase for use. They generally run for four to twelve years, after which "a plaintiff is totally barred from bringing his action").

224. *Id.*

bring an otherwise qualifying market-share liability claim. Even outside of the market-share liability context, commentators have questioned the fairness of subjecting plaintiffs to statutes of repose.²²⁵ The model statute preserves causes of action that statutes of limitations and statutes of repose would displace.

III. EXISTING STATE STATUTES

The relative merits of legislation and common law are familiar to any first-year law student. Common law evolves;²²⁶ with the ability to overturn obsolete precedents,²²⁷ courts can keep pace with technological and societal advances better than an inflexible statutory scheme allows.²²⁸ And, so far as societies want to encourage a perception of the law as something natural and objective rather than manmade and fallible, the common law better comports with this perception.²²⁹

Statutes have different strengths. Because the governed population elects the legislators who pass the statutes, statutes have a democratic legitimacy that unelected state courts lack.²³⁰ They also bind both state courts²³¹ and federal courts applying that state's law in

225. See, e.g., *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 823 (2d. Cir. 1952) (Frank, J., dissenting):

Except in topsy-turvy land, you can't die before you are conceived, or be divorced before ever you marry, or harvest a crop never planted, or burn down a house never built, or miss a train running on a non-existent railroad. For substantially similar reasons, it has always heretofore been accepted, as a sort of legal 'axiom,' that a statute of limitations does not begin to run against a cause of action before that cause of action exists, *i.e.*, before a judicial remedy is available to the plaintiff.

226. See *Hilen v. Hays*, 673 S.W.2d 713, 717 (Ky. 1984) ("The common law is not a stagnant pool, but a moving stream. It seeks to purify itself as it flows through time." (citation omitted)).

227. See *DeAngelis v. Lutheran Med. Ctr.*, 445 N.Y.S.2d 188, 194 (N.Y. App. Div. 1981) ("We are aware that courts should not shirk their duty to overturn unsound precedent and should strive to continually develop the common law in accordance with our changing society.").

228. Viva R. Moffat, *Regulating Search*, 22 HARV. J.L. & TECH, 475, 501 (2009).

229. See Daniel L. Dreisbach, *In Search of a Christian Commonwealth: An Examination of Selected Nineteenth-Century Commentaries on References to God and The Christian Religion in the United States Constitution*, 48 BAYLOR L. REV. 927, 989 (1996) (recounting a historical view that the common law was "consistent with divine revelation").

230. See Matthew D. Adler, *Judicial Restraint in the Administrative State: Beyond the Countermajoritarian Difficulty*, 145 U. PA. L. REV. 759, 767 (1997) (mentioning the argument as one supporting broader theories of judicial restraint).

231. See *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 76 (Iowa 1986) (refusing to recognize market-share liability and referring to the theory as "social engineering more appropriately within the legislative domain").

diversity jurisdiction.²³² This binding quality makes statutory application more predictable than some common-law doctrines.²³³ Yet, it also entrenches errors, subject to few exceptions.²³⁴ Courts could interpret a codified theory of tort liability as a deliberate decision to abrogate established theories of liability or as a reason for courts not to explore novel theories of liability. Given this concern, the model statute includes a savings clause.

The DES litigations attest to the advantages of statutes.²³⁵ At least two federal courts declined to recognize market-share liability because it was not recognized in state law.²³⁶ State courts that refused to recognize market-share liability as an application of common law would be bound by a statute to do so.²³⁷

Three state legislatures have passed statutes addressing market-share liability. Both Ohio²³⁸ and Georgia²³⁹ have outlawed it. Georgia's provision is straightforward: "a manufacturer shall not be held liable for the manufacture of a product alleged to be defective based on theories of market-share or enterprise liability, or other theories of industry-wide liability."²⁴⁰ Ohio's is similarly clear: "A manufacturer

232. See *McElhaney v. Eli Lilly & Co.*, 575 F. Supp. 228, 230 (D.S.D. 1983) ("In the absence of a controlling rule established either by statute or by case decision, this court must apply the rule it believes the South Dakota Supreme Court would adopt."). As this quote makes clear, state common law also binds federal courts. A state statute, however, can ensure that federal courts apply market-share liability in a qualifying context, even if the state's high court has not yet considered the question.

233. See Cristina D. Lockwood, *Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine*, 8 CARDOZO PUB. L., POL'Y & ETHICS J. 255, 314 (2010) (noting, in the criminal-law context, that statutes have greater predictive value than common law).

234. See David M. Sollors, *The War on Error: The Scrivener's Error Doctrine and Textual Criticism: Confronting Errors in Statutes and Literary Texts*, 49 SANTA CLARA L. REV. 459, 462 (2009) (recognizing scrivener's error and the absurdity doctrine as exceptions to the general rule that courts apply statutes as written). A discussion of the ambiguities in Wisconsin's market-share liability statute can be found *infra* notes 258–63 and accompanying text.

235. Although, it would be remiss not to mention that market-share liability is itself a product of the common law's adaptability.

236. *McElhaney*, 575 F. Supp. at 230 ("In the absence of a controlling rule established either by statute or by case decision, this court must apply the rule it believes the South Dakota Supreme Court would adopt."); *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589, 596 (D.S.C. 1981) ("Market share liability represents a radical departure from the body of products liability law that has been developed in South Carolina.").

237. *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 247 (Mo. 1984) (en banc) (rejecting market-share liability and describing its potential adoption as "a public policy choice").

238. OHIO REV. CODE ANN. § 2307.73(C) (2018).

239. GA. CODE ANN. § 51-1-11(d) (2018).

240. *Id.*

may not be held liable in a product liability action based on market share, enterprise, or industrywide liability.²⁴¹

Conversely, Wisconsin's statute recognizes market-share liability, but only in limited circumstances.²⁴² The Wisconsin Supreme Court cited the Wisconsin Constitution for its authority to “fashion an adequate remedy” in the DES cases.²⁴³ The Wisconsin statute attempted to “preserv[e] the narrow and limited application of the risk contribution theory of [market-share] liability announced” in that case.²⁴⁴

However, the legislation was intended to overturn a later market-share liability decision. In *Thomas ex rel. Gramling v. Mallett*,²⁴⁵ the Wisconsin Supreme Court held that manufacturers of white lead carbonate could be sued under a market-share liability theory.²⁴⁶ Wisconsin legislators believed that *Mallett*'s holding “raised substantial questions of deprivation of due process, equal protection, and right to jury trial under the federal and Wisconsin constitutions.”²⁴⁷

To resolve these perceived shortcomings, the statute provides four conditions for when market-share liability obtains. First, the product must be “chemically and physically identical to the specific product that allegedly caused the claimant's injury or harm.”²⁴⁸ This condition effectively distinguishes the white lead carbonate at issue in *Thomas* from DES, which was at issue in *Collins v. Eli Lilly Co.*²⁴⁹ “All DES was of identical chemical composition.”²⁵⁰ White lead carbonate, by contrast, is an ingredient in lead paint.²⁵¹ Different lead paints contained different concentrations of lead pigments, and different lead

241. OHIO REV. CODE § 2307.73(C).

242. WIS. STAT. ANN. § 895.046 (2018).

243. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 45 (Wis. 1984) (quoting *In re D.H.*, 251 N.W.2d 196, 201 (Wis. 1977)).

244. WIS. STAT. ANN. § 895.046(1g).

245. *Thomas ex rel. Gramling v. Mallett*, 701 N.W.2d 523 (Wis. 2005).

246. *Id.* at 532–33. Although the Wisconsin refers to this theory as a market-contribution theory, it is a market-share liability theory for purposes of this analysis because it meets the fungible product and nonidentification requirements.

247. WIS. STAT. ANN. § 895.046(1g). The legislative history for each of these three market-share liability statutes is relatively inaccessible. However, all three of them were passed after the *Thomas* decision. The Wisconsin Supreme Court decided *Thomas* in 2005. Ohio passed its statute in 2007, Georgia followed suit in 2009, and Wisconsin's is from 2013. It is possible that all three are reactions to this ruling.

248. WIS. STAT. ANN. § 895.046(4)(a).

249. *Collins v. Eli Lilly Co.*, 342 N.W.2d 37, 42 (Wis. 1984).

250. *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1072 (N.Y. 1989).

251. *Brenner v. Am. Cyanamid Co.*, 699 N.Y.S.2d 848, 853 (App. Div. 1999).

pigments were added to different paints.²⁵² Lead paint, then, was not a fungible product, despite the fact that each of its manufacturers used a common ingredient. Second, the statute excludes products that have any “labeling or any distinctive characteristic[s] that identified the manufacturer, distributor, seller, or promoter.”²⁵³ Third, the plaintiff must not have any “other lawful process” through which to claim relief.²⁵⁴ Fourth, the manufacturer must have “manufactured, distributed, sold, or promoted” the product in the plaintiff’s “geographic market” at the time her injury occurred.²⁵⁵

Two additional subsections place specific requirements on potential plaintiffs. The plaintiff must name defendants that together produced 80 percent of the product in her market at the time of purchase.²⁵⁶ And because the statute also includes a twenty-five-year statute of repose, a plaintiff must bring suit within twenty-five years of the defendant’s last effort to sell or the last sale of the product.²⁵⁷

Two provisions of the statute are unclear, potentially to the plaintiff’s detriment: the definitions of “geographic market” and “lawful process.” Courts might construe these ambiguities against a plaintiff because the statute cabins market-share liability’s applicability.

Foremost, as to the relevant market, Wisconsin’s statute provides limited guidance. A plaintiff’s “geographic market”²⁵⁸ might be the plaintiff’s state, county, municipality, or pharmacy. Given that Wisconsin’s statute abrogates market-share liability, the legislators likely intended to adopt an as-local-as-possible rule, similar to the Florida Supreme Court’s.²⁵⁹ If Wisconsin intended this, it is not clear from the statute.

Further, there are many “lawful process[es]” outside of the court system from which plaintiffs can seek compensation for, and “redress” of, their injuries.²⁶⁰ More than 90 percent of Americans have health

252. *Id.*

253. WIS. STAT. ANN. § 895.046(4)(a).

254. *Id.*

255. *Id.*

256. *Id.* § 895.046(4)(b).

257. *Id.* § 895.046(5).

258. *Id.* § 895.046(4)(a).

259. The Florida Supreme Court held that “the relevant market . . . should be as narrowly defined as the evidence in a given case allows.” *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 284 (Fla. 1990).

260. BESKIND & COLEMAN, *supra* note 38, at 1.

insurance,²⁶¹ and people injured at work may be eligible for workers' compensation.²⁶² A plain-language reading of the statute bars insured plaintiffs and plaintiffs who qualify for workers' compensation from bringing a market-share liability lawsuit. No opinion adopting market-share liability contemplates such a displacement, and it is unlikely that Wisconsin intended one. Rather, the legislature probably intended for this language to enforce the identification requirement: if a plaintiff can identify the manufacturer of the product that harmed her, she is required to sue that manufacturer. Such a plaintiff may not rely on a market-share liability lawsuit where a traditional tort action will suffice. A simpler means of achieving the same result is to include a due-diligence requirement in the pleadings.²⁶³

Wisconsin's statute of repose would even have precluded some of the DES Daughters from bringing suit, threatening to uproot *Collins* along with *Thomas*. DES's negative effects had long latency periods; Mindy Hymowitz was twenty-four years old when she discovered her injuries.²⁶⁴ Because the statute of repose begins running when the product is taken off the market, she may have been unable to sue.²⁶⁵ Since the nonidentification required for market-share liability is likely to overlap with a long (possibly, as in the case of DES, multigenerational) latency period, a market-share liability statute should be exempt from any state statute of repose.²⁶⁶

261. See Julie Rovner, *A Record Percentage of Americans Now Have Health Insurance*, TIME (Sept. 13, 2016), <http://time.com/money/4490196/health-insurance-coverage-census-2015> [<https://perma.cc/8M9Z-6E4B>] (reporting an uninsured rate of 9.1 percent).

262. HENDERSON, JR. ET AL., *supra* note 55, at 68. States vary significantly in how they determine whether the employer's negligence contributed to the worker's injury, and whether and how much a successful worker's compensation claim might offset a plaintiff's potential tort award. *Id.* at 80–83.

263. See *supra* notes 209–14 and accompanying text.

264. Bernstein, *supra* note 1, at 163.

265. For example, imagine that Hymowitz was twenty-four years and eleven months old when she learned of her injuries and that the FDA discontinued DES when Hymowitz's mother was four months pregnant. The statute of repose in Wisconsin's market-share liability statute would prevent Hymowitz from suing.

266. See *supra* notes 223–25 and accompanying text.

IV. MODEL STATUTE

*[STATE] REVISED CODE § 1-001 ET SEQ.: MARKET-SHARE LIABILITY
CAUSE OF ACTION**§ 1-001 Statement of Purpose.*

Because market-share liability furthers the compensatory and deterrent commitments of tort law, and because courts choosing whether to apply market-share liability do not uniformly elect to do so, the Legislature has deemed it necessary to codify a theory of market-share liability.

§ 1-002 Necessary Factual Conditions for a Plaintiff to Bring a Market-Share Liability Suit.

a) The product in question must be fungible. It must be manufactured by multiple producers, and every manufactured unit must be either physically identical or chemically identical to every other manufactured unit.

b) A plaintiff must be unable to identify the manufacturer of the specific unit that harmed the plaintiff.

§ 1-003 Pleading Requirements.

a) A complaint need only name one appropriate manufacturer. Defendants may implead additional, appropriate manufacturers.

b) A plaintiff must attest that due diligence was exercised in an unsuccessful attempt to identify the manufacturer of the specific unit that caused the harm.

§ 1-004 Trial Administration.

a) The relevant market shall be the national market for the product in question.

b) Courts may not remove defendants from the proceedings even upon a showing that the defendant could not have manufactured the unit of the product that harmed the plaintiff. Courts may dismiss defendants upon a showing that they were not marketing the product in question at the relevant time.

c) Any liability is several but not joint.

d) Punitive damages may not be awarded.

§ 1-005 Interactions with Existing Law.

a) Any otherwise applicable statute of limitations is superseded by this subsection. A plaintiff must file suit within three years of the date of discovery of injury or within three years of the date upon which the plaintiff reasonably should have discovered the injury, whichever is earlier.

b) Any otherwise applicable statute of repose is superseded by this subsection. Actions under this section are not subject to statutes of repose.

§ 1-006 Savings Clause.

This section does not preclude consideration of any novel theory of liability proffered by plaintiffs in a tort suit or serve as evidence of a legislative intent to abrogate any previously recognized theory of liability.

CONCLUSION

Courts have proven reluctant to recognize market-share liability—for good reason. The conditions necessary to impose market-share liability are rare.²⁶⁷ And several other theories of multiple causation already allow most plaintiffs confronting multiple tortfeasors to bring suit.²⁶⁸ The DES cases themselves were a Black Swan event.²⁶⁹ No single manufacturer held a patent for DES, allowing hundreds of producers into the market.²⁷⁰ Today, by contrast, pharmaceutical companies “evergreen” their patents, patenting their drugs as many times as possible to keep generics, and other manufacturers, from the market.²⁷¹ Moreover, DES was manufactured during the Baby Boom. The year 1957 held the record for most births in the United States until 2007.²⁷² From 1954 until 1964, the United States welcomed more than

267. *See supra* notes 127–47 and accompanying text.

268. *See supra* notes 110–25 and accompanying text.

269. Black Swan events are those which are both “incredibly consequential” and “unanticipated.” Mehrsa Baradaran, *Regulation by Hypothetical*, 67 VAND. L. REV. 1247, 1279 (2014).

270. *Collins*, 342 N.W.2d at 43–44.

271. Benjamin N. Roin, *Unpatentable Drugs and the Standards of Patentability*, 87 TEX. L. REV. 503, 526 (2009).

272. Erik Eckholm, *'07 U.S. Births Break Baby Boom Record*, N.Y. TIMES (Mar. 18, 2009), <https://www.nytimes.com/2009/03/19/health/19birth.html> [<https://perma.cc/AT5F-QCYF>].

four million babies each year.²⁷³ For context, 1946's 3.4 million births had been a record.²⁷⁴ And finally, the digitization of records will make the nonidentification requirement increasingly difficult to satisfy.

However, this analysis has not been a purely academic exercise. Commentators have called for market-share liability's application to pesticides,²⁷⁵ lead paint,²⁷⁶ genetic modifications,²⁷⁷ and orbital debris.²⁷⁸ Others, motivated by a desire to discipline actions they perceive as harmful, have suggested using market-share liability against drug dealers,²⁷⁹ companies that release carbon dioxide,²⁸⁰ and produce companies.²⁸¹ It is possible to envision companies that sell 3D-printing blueprints, designed to enable multiple printer owners to create physically identical products. If someone is harmed using such a product and cannot determine who made it, does market-share liability obtain against the printer owners? Against the blueprint company?

As we learn more about epigenetics²⁸² and how the products we use and consume affect our genetic profiles, and our children's after

273. *Baby Boomers*, HISTORY (2010), <https://www.history.com/topics/baby-boomers#https://perma.cc/6JBV-93E4>.

274. *Id.*

275. Benjamin Thomas Greer, Comment, *Market Share Liability Shouldn't Die: Proposed Application to Agricultural Pesticides and the Need to Refine the Apportionment of Liability*, 17 SAN JOAQUIN AGRIC. L. REV. 85, 85 (2008).

276. Lepage, *supra* note 127, at 181–82; Lisa A. Perillo, Note, *Scraping Beneath the Surface: Finally Holding Lead-Based Paint Manufacturers Liable by Applying Public Nuisance and Market-Share Liability Theories?*, 32 HOFSTRA L. REV. 1039, 1040 (2004). Courts have almost unanimously rejected lead-paint cases brought under the theory of market-share liability. *See, e.g.*, *City of Philadelphia v. Lead Indus. Ass'n*, 994 F.2d 112, 115 (3d Cir. 1993) (denying the application of market-share liability to lead paint). *But see* Thomas *ex rel.* Gramling v. Mallett, 701 N.W.2d 523, 533 (Wis. 2005) (applying market-share liability to lead paint).

277. Note, *The Price Tag on Designer Babies: Market Share Liability*, 59 B.C. L. REV. 319, 343–44 (2018).

278. Mark J. Sundahl, Note, *Unidentified Orbital Debris: The Case for a Market-Share Liability Regime*, 24 HASTINGS INT'L & COMP. L. REV. 125, 127 (2000).

279. *See* Joel W. Baar, Note, *Let the Drug Dealer Beware: Market-Share Liability in Michigan for the Injuries Caused by the Illegal Drug Market*, 32 VAL. U. L. REV. 139, 145 (1997) (“[M]arket-share liability . . . should be used to hold illegal drug dealers liable for the injuries that result from their involvement in the illegal drug market . . .”).

280. Daniel J. Grimm, Note, *Global Warming and Market Share Liability: A Proposed Model for Allocating Tort Damages Among CO₂ Producers*, 32 COLUM. J. ENVTL. L. 209, 211 (2007).

281. *See* Angela Holt, Note, *Alternative Liability Theory: Solving the Mystery of Who Dunit in Foodborne Illness Cases*, 2 PITT. J. ENVTL. & PUB. HEALTH L. 105, 120–21 (2008) (describing market-share liability as a modification of alternative liability and subsequently noting that “foodborne illness cases are particularly well-suited” to alternative liability and modifications thereof).

282. Epigenetics is the study of how the environment can affect the body's internal chemical processes. *See* Tabitha M. Powledge, *Behavioral Epigenetics: How Nurture Shapes Nature*, 61

that, it is possible to conceive of a suit against manufacturers whose generic products are proved to alter a user's genetic expression. In exceptional cases, these consumers' children might be able to show that their parents' use of the product affected their development or health in measurable ways.

Finally, with more Americans beginning to take prescription drugs,²⁸³ and those who were already taking prescription drugs increasing their usage,²⁸⁴ the risk that a drug harms consumers' offspring, through their epigenetic profiles or otherwise, commensurately grows. Whether market-share liability does or should apply to these products is for future commentators.

But if and when those determinations are made, plaintiffs should not have to wait for a statute under which to sue, federal courts should not have to wait for direction from the states, and state courts should not have to look to the academy and each other for guidance. An applicable statute should be on the books. The model statute bends tort law's fundamental assumptions. It does so to ensure that tort law does not break its fundamental commitment: compensating injured plaintiffs.

BIOSCIENCE 588, 588 (2011) (defining one branch of epigenetics as the study of how environmental factors, including social experience, nutrition, hormones, and toxicological exposures, trigger molecular biological changes). In turn, these processes semipermanently alter both a person's genetic profile and the genetic profile they pass on to their offspring. *Epigenetics*, BLACK'S MEDICAL DICTIONARY (41st ed. 2005).

283. See Brady Dennis, *Nearly 60 Percent of Americans – the Highest Ever – Are Taking Prescription Drugs*, WASH. POST (Nov. 3, 2015), https://www.washingtonpost.com/news/to-your-health/wp/2015/11/03/more-americans-than-ever-are-taking-prescription-drugs/?utm_term=.7355a3c79db5 [<https://perma.cc/JR6X-JRS5>] (“[R]esearchers found that the prevalence of prescription drug use among people 20 and older had risen to 59 percent in 2012 from 51 percent just a dozen years earlier.”).

284. See Teresa Carr, *Too Many Meds? America's Love Affair With Prescription Medication*, CONSUMER REP. (Aug. 3, 2017), <https://www.consumerreports.org/prescription-drugs/too-many-meds-americas-love-affair-with-prescription-medication> [<https://perma.cc/DZ3T-KNB7>] (“The percentage of Americans taking more than five prescription medications has nearly tripled in the past 20 years . . .”).