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The Indeterminate Defendant in Products Liability Litigation and a Suggested Approach for Ohio

Rebecca J. Greenberg

THE INDETERMINATE DEFENDANT IN PRODUCTS LIABILITY LITIGATION AND A SUGGESTED APPROACH FOR OHIO*

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I. INTRODUCTION

The problems created by mass marketing, unequal bargaining power, and hidden product hazards have necessitated major changes in products liability law during the past thirty years.[1] Correspondingly, considerations of cost reduction, injury avoidance, and fair risk distribution are generally advanced as the policies behind the widespread acceptance gained by strict liability in the 1960's.[2]

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[1] B. BAUER, PRODUCTS LIABILITY: THE LAW IN OHIO § 3-1 (1982). Justice Traynor, foreshadowing the widespread acceptance of strict liability, recognized the impact of these factors in his concurrence in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944). Justice Traynor noted that because mass production and mass marketing have separated the consumer from the supplier, the consumer no longer has the opportunity or ability to obtain detailed information about products, and must "accept them on faith." *Id.* at 467, 150 P.2d at 443. Strict liability is appropriate in these circumstances because "[t]he manufacturer's obligation to the consumer must keep pace with the changing relationship between them . . . ." *Id.*

[2] Strict liability was adopted by the California Supreme Court in Greenman v. Yuba Power Products, 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), and three years later was incorporated into the RESTATEMENT (SECOND) OF TORTS, § 402A (1965).

The strict liability policies of reducing accident costs and allocating risks have been described as dual goals of utility and fairness. Henderson, *Coping with the Time Dimension in Products Liability*, 69 CALIF. L. REV. 919, 931 (1981). In this analysis, the utility goal is promoted by encouraging investment in product safety, discouraging consumption of unsafe products, reducing transaction fees, such as court costs, and promoting loss spreading through insurance, thus preventing an insolvent consumer from becoming a societal burden. *Id.* at 931-34. The goal of fairness is said to be promoted by strict liability because the producer is made liable for the consumer's unfulfilled expectations of a safe product, because the manufacturer pays for risks taken in making economically reasonable limitations on quality control, and because the party who gains the greatest financial benefit also bears the burden of paying for injuries. *Id.* at 935-39.

A decade later, these considerations were applied to the problem of proof of causation faced by plaintiffs who could not identify the specific defendant who caused their injuries.[3] A limited version of this problem had been considered earlier in the seminal case of *Summers v. Tice*, giving rise to the theory of alternative liability.[4] However, the large volume of litigation surrounding the drug diethylstilbestrol (DES) gave the issue new prominence and led to a variety of theories relaxing the plaintiff's burden of proof of causation in fact.[5] Although considerations of cost reduction and fair distribution of risk provide a common theoretical ground, no one rule has found consistent acceptance.

This Note will examine the causation problem raised by the plaintiff who cannot identify one among two or more possible manufacturer-defendants and will analyze the various approaches advanced to deal with the issue. It will then focus on the treatment of these issues in the Ohio courts. Finally, the Note will discuss the appropriateness of the Ohio approach as it relates to the goals of fair risk distribution and cost reduction.

II. CAUSATION AND THE UNIDENTIFIED DEFENDANT

Causation is a critical element in products liability actions. The plaintiff must be able to establish a sufficient nexus between his injury and the defendant's product.[6] When a products action is brought under either strict liability or negligence theories, causation is broken down as in other tort applications.[7] The plaintiff traditionally bears the full burden of proof in establishing both causation in fact and proximate cause.[8]

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[3] *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied sub nom.* E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980), where the court, in developing a new theory for proof of causation in fact, relied on the reasoning advanced by Justice Traynor in his concurrence in Escola v. Coca Cola Bottling Co., 24 Cal. 2d at 461, 150 P.2d at 440.

[4] 33 Cal. 2d 80, 199 P.2d 1 (1948).

[5] *See generally* Roberts & Royster, *DES and the Identification Problem*, 16 AKRON L. REV. 447, 455-56 (1983); Note, *DES: Judicial Interest Balancing and Innovation*, 22 B.C.L. REV. 747, 749-51 (1981) [hereinafter Note, *Judicial Interest Balancing*]; Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668, 671-72 (1981) [hereinafter Note, *Market Share Liability*]; Comment, *Overcoming the Identification Burden in DES Litigation: The Market Share Liability Theory*, 65 MARQ. L. REV. 609, 611-15 (1982) [hereinafter Comment, *Overcoming the Identification Burden*]; Note, *Proof of Causation in Multiparty Drug Litigation*, 56 TEX. L. REV. 125, 127-29 (1977) [hereinafter Note, *Proof of Causation*].

[6] *E.g.*, W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON TORTS § 41 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

[7] *See, e.g., id.* §§ 41, 42.

[8] *Id.*

Causation in fact, as used in this Note, refers to the question of whether the defendant actually manufactured or supplied the product that injured the plaintiff.[9] Alternately, cause-in-fact answers the question: "But for the defendant's supply or manufacture of the product, would the plaintiff have been injured?"[10] Difficulties arise when the plaintiff can satisfactorily establish proximate cause, including proof of injury by the product in question, but finds it difficult to meet the burden of proof necessary to show causation in fact.

This difficulty with defendant identification may occur when the product in question is destroyed, or when functionally identical products are manufactured by more than one source.[11] As mass marketing of generic or substantially similar products continues, defendant identification issues will continue to arise. The question gains unique proportions when the plaintiff cannot offer circumstantial evidence of distinctive product characteristics.[12]

In many states other than Ohio the litigation surrounding DES and asbestos related injuries brought this causation issue into focus. In either the instance of the destroyed product or the multiple manufacturer situation, adherence to the traditional burden of proof of causation results in the plaintiff being denied all compensation.[13] Judicial dissatisfaction with this outcome has led to the development of various means of altering the plaintiff's burden of proof with respect to the identity of the defendants.

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[9] The causation issue may be broken down into three elements, which are grouped in varying combinations under the headings of cause-in-fact and proximate cause. Although the terminology differs among courts, the three issues involved are (1) whether the defendant's product injured the plaintiff, (2) whether the injury was attributable to a product defect, and, in a negligence action, (3) whether the injury was one which might have foreseeably resulted from the defendant's distribution of the product. J. HENDERSON & A. TWERSKY, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 191-92 (1987). The terminology used in this Note is that of the Ohio Supreme Court. *See, e.g.*, Minnich v. Ashland Oil Co., 15 Ohio St. 3d 396, 397, 473 N.E.2d 1199, 1201 (1984).

[10] J. HENDERSON & A. TWERSKY, *supra* note 9, at 292.

[11] P. SHERMAN, PRODUCTS LIABILITY FOR THE GENERAL PRACTITIONER, § 1209 (1981 & Supp. 1989). For examples of situations in which defendant identification issues have occurred primarily because the product was destroyed, see Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (blasting caps exploded); Goldman v. Johns-Manville Sales Corp., 33 Ohio St. 3d 40, 514 N.E.2d 691 (1987) (building containing asbestos destroyed by fire). For situations in which the defendant identification problems arose due to substantially similar products, see Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, CERT. DENIED SUB NOM. E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980) (diethylstilbestrol); Minnich v. Ashland Oil Co., 15 Ohio St. 3d 396, 473 N.E.2d 1199 (1984) (ethyl acetate).

[12] DES litigation emphasized the problems caused by a lack of circumstantial evidence to aid in product identification. Because of the considerable time span between the use of DES and the onset of the injury involved, plaintiffs faced the difficulties of lost medical records, memory lapse and missing witnesses. *E.g.*, Note, *Judicial Interest Balancing*, *supra* note 5, at 748-49.

[13] *See, e.g.*, Note, *Market Share Liability*, *supra* note 5, at 670.

III. Approaches to Altering the Burden of Proof

A. Alternative Liability and Concerted Action

Two tort theories, alternative liability and concerted action, have been considered as a basis for recovery by the plaintiff who cannot specify which of a number of tortious actors actually caused his injury. In many jurisdictions, alternative liability is the accepted doctrine when this situation arises in a simple negligence action. Because elements of both theories have been used in many later formulations of causation rules in products liability actions, they merit a discussion here.

The theory of alternative liability was specifically developed as a solution to the causation in fact problem raised by the indeterminate defendant. The California Supreme Court is credited with first stating this theory in *Summers v. Tice*.[14] In that case, the plaintiff was injured in a hunting accident when he was struck in the eye by birdshot.[15] Both of the plaintiff's companions had fired at the same time, using the same size birdshot, and both had negligently fired in the plaintiff's direction.[16] Although the plaintiff could not prove which of the two had fired the shot that hit his eye, the court held both defendants jointly and severally liable.[17] Because proximate cause was established and the conduct of both defendants was tortious, each had the burden of absolving himself.[18]

The alternative liability theory was later adopted as Section 433(B)(3) of the *Restatement (Second) of Torts*:

> Where the conduct of two or more actors is tortious, and it is proved that the harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm.[19]

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[14] 33 Cal. 2d 80, 199 P.2d 1 (1948). It has been said that the California court first applied the reasoning of alternative liability when it extended the theory of res ipsa loquitur to provide an inference of both causation and negligence in Ybarra v. Spangard, 25 Cal. 2d 486, 154 P.2d 687 (1944). Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 Fordham L. Rev. 963, 989-90 (1978) [hereinafter Comment, *Enterprise Liability*]. Other courts have shifted the burden of proof of causation to a number of possible defendants under the name of res ipsa loquitur, but, in effect, have applied elements of various theories, including concerted action and alternative liability. *See, e.g.*, Anderson v. Somberg, 134 N.J. Super. 1, 338 A.2d 35 (1973), *aff'd*, 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975). For a discussion of the criticisms of this application of res ipsa loquitor see Comment, *Enterprise Liability*, *supra*, at 988-90 & nn.143-44.

[15] *Summers*, 33 Cal. 2d at 82, 199 P.2d at 2.

[16] *Id.*

[17] *Id.* at 88, 199 P.2d at 4.

[18] *Id.*

[19] Restatement (Second) of Torts § 433B(3) (1965).

The *Restatement* explained the rationale for shifting the burden of proof to the defendants:

> [T]he reason for the exception is the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them has caused the harm.[20]

The fairness of this rationale, as it relates to the original facts on which alternative liability was modeled,[21] has been attributed to several factors. First, all of the defendants must be shown to have acted tortiously, under either strict liability or negligence principles.[22] This requirement removes the possibility of a defendant whose behavior could not have proximately caused the harm being held liable. Second, it is often stated that all possible tortfeasors must be joined as defendants.[23] While the *Restatement* does not refer to this conclusively, the purpose is to ensure that the actual tortfeasor does not escape liability while others bear the burden of paying damages.[24] A third factor, often cited as a requirement for the application

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[20] *Id.* at § 433B(3) comment f.

[21] The limited nature of the situations for which alternative liability was originally intended can be seen in the examples provided in the RESTATEMENT (SECOND) OF TORTS. One illustration describes the facts of Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948). RESTATEMENT (SECOND) OF TORTS § 433B(3) illustration 9 (1965). The other illustration also involves a simple negligence situation:

> While A's automobile is stopped at an intersection, it is struck in the rear by B's negligently driven car. Immediately afterward C's negligently driven car strikes the rear of B's car, causing a second impact upon A's car. In one collision or the other, A sustains an injury to his neck and shoulder. In A's action against B and C, each defendant has the burden of proving that his conduct did not cause the injury.

Id. at illustration 11.

[22] *Id.* at comment g.

[23] The fact that all possible defendants were not before the court has been a major factor in the rejection of alternative liability in both drug and asbestos litigation, where hundreds of manufacturers may potentially be involved. For discussions of this requirement, see Goldman v. Johns-Manville Sales Corp., 33 Ohio St. 3d 40, 46, 514 N.E.2d 691, 697 (1987); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 591, 689 P.2d 368, 377 (1984). Those courts that have purported to make alternative liability available in these situations have either maintained the joinder requirements or modified the theory. *See* Abel v. Eli Lilly & Co., 418 Mich. 311, 333, 343 N.W.2d 164, 174, *cert. denied sub nom.* E.R. Squibb & Sons v. Abel, 469 U.S. 833 (1984) (plaintiff must bring all possible defendants into court); Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 568, 420 A.2d 1305, 1316 (1980) (each defendant held liable for percentage share of market). Even when all possible defendants are before the court, alternative liability may be rejected on broad policy grounds. *E.g.* Senn v. Merrell-Dow Pharmaceuticals, 305 Or. 256, 261, 751 P.2d 215, 223 (1988) (diphtheria-pertussis-tetanus vaccination).

[24] *See* RESTATEMENT (SECOND) OF TORTS § 433B(3) comment h (1965).

of alternative liability, is that the defendants must be in a better position than the plaintiff to identify the actual tortfeasor.[25] The validity of this requirement is questionable, and it is not entirely consistent with the rationale advanced for shifting the burden of proof to the defendants.[26]

Although the stated rationale for the imposition of alternative liability stresses fairness to the innocent plaintiff, the factors advanced as requirements for the theory emphasize that it is a causation rule. Thus, alternative liability provides for the situation in which causation in fact truly cannot be determined. The doctrine also has a secondary function, facilitating the identification of the actual tortfeasor.

Alternative liability was conceived as a solution to a limited fact pattern, and was put forth as a theory which might need later revision.[27] When it has been considered as a theory for products liability cases involving large industries, factors such as joinder of all possible tortfeasors have proved impractical or impossible.[28] Although a comment to Section 433(B)(3) of the *Restatement* suggests that alternative liability may be applied to multi-defendant litigation, courts have been hesitant to use the theory in these situations.[29] A possible reason for this is that as the

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[25] One court, in requiring that the defendants have greater knowledge of causation than the plaintiff, stated that the alternative liability theory is premised on the belief that the defendants know the identity of the tortfeasor, and will reveal it when faced with the prospect of joint and several liability. Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 505, 539 N.E.2d 1069, 1074, 541 N.Y.S.2d 941, 946, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 110 S.Ct. 350 (1989), *accord* Collins v. Eli Lilly Co., 116 Wis. 2d 166, 183, 342 N.W.2d 37, 46, *cert. denied sub nom.* E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984). While alternative liability is directed, in part, to determining the identity of the actual tortfeasor, the *Hymowitz* court made this the central goal by asserting that the defendants must know the tortfeasor's identity. Under this interpretation of alternative liability, the central purpose of compensating the innocent plaintiff is impeded whenever causation cannot be determined by either the plaintiff or the defendants. *See supra* note 20 & accompanying text.

[26] The proponents of this requirement apparently draw it from the language of the seminal case, which states that "[o]rdinarily defendants are in a far better position to offer evidence to determine which one caused the injury." Summers v. Tice, 33 Cal. 2d 80, 86, 199 P.2d 1, 4 (1948). However, the California Supreme Court later noted that, as the defendants in *Summers* did not have this knowledge, it was not a requirement, but merely a condition that might accompany tortious action by more than one person. Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 600, 607 P.2d 924, 929, 163 Cal. Rptr. 132, 137, *cert. denied sub nom.* E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980).

[27] *See infra* text accompanying note 133.

[28] *See supra* note 23 & accompanying text.

[29] RESTATEMENT (SECOND) OF TORTS § 433B(3) comment h (1965). *See also infra* note 133 & accompanying text.

number of potential defendants grows, the probability that any one defendant is the actual causation in fact of the plaintiff's injury tends to decrease.[30]

Pure alternative liability is best applied to those situations similar to the facts of *Summers v. Tice*.[31] Products liability actions involving relatively few tortious actors and comparatively uncommon events fit into this category. Complications occur where the products of one industry, with multiple participants, repeatedly cause harm. In these situations, both the size of the potential defendant class and considerations of loss spreading and risk apportionment warrant an adapted theory.[32] As a result, variations of alternative liability that depart from the original joint and several damage apportionment, or which otherwise explain the causation element, have been developed.[33]

Concerted action, or concert-of-action, was not developed as a rule of causation or a solution to the problem of the unidentified defendant.[34] The theory originated to provide a form of vicarious liability. Thus, it imposes joint and several liability upon actors whose harmful conduct is shown by the plaintiff to be linked by an element of agreement or conscious cooperation.[35] Although concerted action can be applied to extend liability to other members of a group when the identity of the party actually causing the harm is known, this identification is not necessary to the final formulation of liability.[36] The imposition of joint and several

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[30] When the individual members of an entire industry are engaged in tortious activity and any one manufacturer could have caused the plaintiff's injury, the goals of providing safety incentives and allocating costs of injuries to those best able to pay become more significant. At least one court has determined that these goals outweigh the importance of relating liability to causation-in-fact, and has opted for a form of insurer liability. *See* Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 512, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 110 S.Ct. 350 (1989). However, the caution of the majority of courts is well founded, as this type of judicially imposed insurer liability may create substantial problems. *See infra* text accompanying notes 103-04.

[31] 33 Cal. 2d 80, 199 P.2d 1 (1948).

[32] For a discussion of theories developed in response to these issues, see *infra* pt. III.B.

[33] The cases in which joint and several liability will be imposed have been classified into four general groups. These are (1) situations in which the defendants act in concert, (2) agency relationships that result in vicarious liability, (3) failure of the defendants to perform a common obligation, and (4) activity resulting in a single indivisible injury. PROSSER AND KEETON ON TORTS, *supra* note 6, at § 52. All of these traditional bases for the imposition of entire liability presuppose that causation-in-fact has been determined. *Id.*

[34] PROSSER AND KEETON ON TORTS, *supra* note 6, at § 46.

[35] While a tacit agreement may result in liability under the theory of concerted action, knowledge of the tortious actions of another is not sufficient, unless there is a special duty to intervene. *Id.* Some courts have determined that concerted action is applicable only to instances of illegal conduct. 2 V. SCHWARTZ, P. LEE, F. SOUK. K. KELLY & M. MULLEN, PRODUCT LIABILITY: A PRACTICAL GUIDE para. 62,111 (1988).

[36] *See* Comment, *Enterprise Liability*, *supra* note 14, at 980.

liability has been explained on the theory that each defendant becomes a causation in fact of the plaintiff's injury because of his contribution to the action of the group as a whole.[37]

Because the application of concerted action obviates the requirement of proof of causation by each individual in the group, the plaintiff's proof of the element of agreement is especially critical. Section 876 of the *Restatement (Second) of Torts* sets out three situations in which joint and several liability will be imposed on the theory of concerted action:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.[38]

Many courts have rejected the concert-of-action theory in products cases involving unidentified defendants because proof of this agreement element is thought to be too speculative.[39] The fact that proof of an improper agreement can be implied through circumstantial evidence[40] has created difficulty. The circumstantial evidence to support implied agreement is usually found in the parallel behavior of the parties. It has been argued that such behavior does not sufficiently establish the required element of agreement or action in concert.[41] Imitative practices among suppliers of a given product are a common feature of a competitive industry. Thus, it is reasoned that a concert-of-action theory would often result in joint and several liability among defendants who had no express or even tacit agreement.[42] Such a result would be unfair as each actor wrongfully found to be in concert would be held to be a causation in fact of the plaintiff's

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[37] *Id.* at 973.

[38] RESTATEMENT (SECOND) OF TORTS § 876 (1965).

[39] *E.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 605, 607 P.2d 924, 933, 163 Cal. Rptr. 132, 141, *cert. denied sub nom.* E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980); Hymowitz v. Abbott Laboratories, 73 N.Y.2d 487, 508, 539 N.E.2d 1069, 1076, 541 N.Y.S.2d 941, 950, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 110 S.Ct. 350 (1989); Collins v. Eli Lilly Co., 116 Wis. 2d 166, 183, 342 N.W.2d 37, 46, *cert. denied sub nom.* E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984).

[40] *See infra* note 35.

[41] *E.g.*, *Sindell*, 26 Cal. 3d at 604, 607 P.2d at 932, 163 Cal. Rptr. at 140. *Cf.*, *e.g.*, Cousineau v. Ford Motor Co., 140 Mich. App. 19, 34, 363 N.W.2d 721, 729, *cert. denied sub nom.* Firestone Tire & Rubber Co. v. Cousineau, 474 U.S. 971 (1985) (manufacturers' OSHA petition campaign could support finding of concerted effort to relax safety standards). *But see* Abel v. Eli Lilly & Co., 418 Mich. 311, 339, 343 N.W.2d 164, 176, *cert. denied sub nom.* E.R. Squibb & Sons v. Abel, 496 U.S. 833 (1983) (manufacturers' participation in testing and promotion of DES could support finding of concerted action).

[42] *E.g.*, *Sindell*, 26 Cal. 3d at 605, 607 P.2d at 933, 163 Cal Rptr. at 141.

injury. Even a defendant who could prove that it had not supplied the actual product that caused the plaintiff's harm could not escape liability.[43] This has led courts to fear that one supplier could be held liable for the acts of an entire industry.[44]

The rejection of parallel business practices as an indicator of concerted action can be explained in terms of unfair distribution of financial burden.[45] This would be evident, for example, if a small manufacturer who had received little benefit from its supply of the product was the only solvent defendant. The cost reduction policies prevalent in products liability law may also be relevant to the rejection of concerted action theories. Inadequate evidence of an agreement or cooperation between defendants may indicate that the parties have little control or influence over others in the industry, and thus will not be able to effect widespread changes.[46] Also, because liability will not attach without an agreement, manufacturers may determine that it is more advantageous to make their own safety related errors than to join with others to address safety issues. Furthermore, as with alternative liability, the imposition of joint and several liability may ultimately have a detrimental effect on plaintiffs' recoveries, because even solvent suppliers will eventually be financially overburdened.[47]

Finally, concerted action has been deemed inappropriate in defendant identification cases due to its origin. The theory was developed to extend liability to a group as a means of deterrence, and was not intended to be used in proving causation.[48] An application different than that originally intended should not, in itself, be a basis for the rejection of a theory. The goal of deterrence of hazardous activities, to a limited extent, is consistent with many of the policies behind products liability innovations.[49] How-

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[43] *Id.*

[44] *Id.* Although application of the concerted action theory could result in inequitable allocation of liability, one defendant would be liable for the acts of an entire industry only if all others joined in the action were judgment proof.

[45] For a compilation of courts declining to apply concerted action for this reason, and for an excellent discussion of the original uses of the concerted action theory, see Shackil v. Lederle Laboratories, 116 N.J. 155, 163, 561 A.2d 511, 515 (1989).

[46] The manufacturer of a useful new product, for example, would be likely to prompt imitative practices among others in the industry, but would not necessarily be able to influence the other manufacturers to produce a safer but less profitable version of the product. *See infra* note 35.

[47] Comment, *Overcoming the Identification Burden*, *supra* note 5, at 634. While the defendants may be able to defray some of these costs by passing them on to the public through product pricing or by obtaining insurance, these options may not always produce the results desired. In some instances, insurance is available only at great expense, and with large deductibles. As a result of these increased costs, the safest products may become inaccessibly priced. The problem is magnified when extensive injuries are caused by products such as DES. When a drug is no longer widely marketed, the costs must be passed on through the sale of other pharmaceutical products. The importance of avoiding price increases for these life saving products may outweigh the short term benefits of compensating individual plaintiffs by a method that does not apportion costs among defendants.

[48] *E.g.* Collins v. Eli Lilly Co., 116 Wis. 2d 166, 186, 342 N.W.2d 37, 47, *cert. denied sub nom.* E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984).

[49] *See supra* notes 1-2.

ever, when the agreement element is tenuous, the application of a concerted action theory will result in a fictional determination of causation in fact. Imposition of liability without regard for causation would violate tort principles, chill productivity among suppliers, and would permit a direct form of virtually absolute, insurer liability upon an industry and its individual members.

Both alternative liability and concerted action are traditional tort theories which have been considered in light of the issue of causation in fact in multi-defendant litigation. However, these theories were developed in response to factual settings vastly different from the problem raised by the indeterminate defendant.[50] Both theories have shortcomings when applied to the products liability area and, perhaps for that reason, neither theory in its pure form has had significant acceptance in the field. However, elements of both concerted action and alternative liability appear in many of the approaches taken to the problem of the indeterminate defendant in products liability actions.

B. Theories Developed for Products Liability Cases

Both courts and commentators have recognized that alternative liability and concert-of-action theories are inadequate when applied to multi-party product liability actions. The inadequacies of these theories have left the courts with two options. The first possibility is to reject both theories, leaving many innocent consumers without compensation because they cannot prove causation. A second option is to readdress the issue of causation in fact by limiting or eliminating the plaintiff's burden of proof. Courts have taken various paths, and have both adapted old theories and formulated new approaches. The courts which have opted for recovery turned first to the concept of enterprise liability.

The general concept of "enterprise liability" is the idea that an enterprise should bear the cost of the losses it causes. In other words, the parties who market a defective product can best control the associated risks, and should be held liable.[51] In *Hall v. E.I. DuPont De Nemours & Co.*,[52] the applicability of this concept to a products liability action involving indeterminate defendants was considered. In one of the cases consolidated in *Hall*, the plaintiffs were injured in twelve unrelated accidents involving dynamite blasting caps.[53] Because all identifying fea-

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[50] Alternative liability was developed to aid the plaintiff in proof of causation in simple negligence situations. *See supra* notes 15-21 & accompanying text. Concerted action evolved as a means of controlling group activity, and has only a coincidental relationship to the causation issue. *See supra* notes 34-38 & accompanying text.

[51] *Bauer*, *supra* note 1, at § 1-10; Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 598, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136, *cert. denied sub nom.* E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980).

[52] 345 F. Supp. 353 (E.D.N.Y. 1972).

[53] *Id.* at 359.

tures on the caps had been destroyed, the plaintiffs sued six manufacturers and their trade association. These manufacturers represented most of the United States explosives industry.[54] The gravamen of the complaint was a theory of concerted action, and the court utilized concerted action terminology. Nevertheless, the actual basis for the imposition of liability was distinct from its purported source. As courts often do, old language was used to create new law.

As one theory available to the plaintiffs, the court stated that if the manufacturers had worked through the trade association to determine precautionary measures, such as warnings on the blasting caps, then the enterprise as a whole could be said to control the risk, and the explosives industry could be held jointly liable.[55] The court reasoned that "[p]recautions should be taken and liability imposed . . . " at an industry-wide level.[56] The court went on to explain the necessity for joint liability:

> The point is not only that the damage is caused by multiple actors, but that the sole feasible way of anticipating costs or damages and devising practical remedies is to consider the activities of a group. We do not . . . suggest that private actions are the best way to meet these problems but only that in the absence of preemptive legislation, tort principals will support a remedy.[57]

Although *Hall* made reference to both concerted action and enterprise liability, the court went on to set out a modified version of alternative liability which would operate as a corollary theory of causation.[58] Thus, although alternative liability had previously been applied where all possible tortfeasors had been joined as defendants, here the plaintiffs needed only to prove by a preponderance of the evidence that the products had not come from a different source.[59] After this, each defendant could escape liability by proving that it had not manufactured the blasting caps involved in the accidents.[60] This possibility of exculpation is contrary to the theory of concerted action, where the defendants' participation in group activity, rather than the supply of a specific product, is treated as the causation in fact of the plaintiff's injury.

While *Hall* has been the subject of a variety of interpretations, and has been the basis for other proposed theories, two aspects of the case are particularly notable.[61] First, although a showing of concerted group ac-

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[54] *Id.*
[55] *Id.* at 378.
[56] Hall v. E.I. DuPont Nemours & Co., 345 F. Supp. 353, 378 (E.D.N.Y. 1972).
[57] *Id.*
[58] *Id.* at 379.
[59] *Id.*
[60] *Id.*
[61] Because the *Hall* court dealt with two consolidated cases, and set out a number of theories of recovery, the opinion has been the basis of much commentary. For a detailed analysis of *Hall* as it applies to DES litigation, see Comment, *Enterprise Liability*, *supra* note 14, at 981-85.

tivity by an industry does not provide a basis for unconditional liability under *Hall*, it does allow for the preliminary identification of an entire industry as a suitable defendant group. Because it need only be "[m]ore probable than not" that the actual tortfeasor is before the court, the focus is shifted away from determining causation in fact, and toward the goals of risk allocation and cost reduction.[62]

A second notable aspect of *Hall* is the unexplained combination of theories. This points up a fundamental conflict created by the indeterminate defendant in a products liability case. While the *Hall* court cites strict liability commentary in its argument for risk allocation, it also indicates that a legislative solution is more appropriate.[63] The addition of an alternative liability qualifier may indicate the court's uneasiness with its role. While strict liability removed the requirements of intent or negligence to meet society's needs, deemphasizing causation may leave the courts little on which to efficiently and consistently base decisions.

A related issue concerns the extent to which courts can ignore the conduct of a party when imposing liability. At a certain point the actual, rather than theoretical, status of insurer becomes operative. If fault plays no role in imposing strict liability and conduct plays no role in establishing causation in fact, there is little protection for an innocent manufacturer whose product happens to fall within a generic class. The *Hall* court appears to have recognized at least some of this danger. The same may not be true of courts taking even greater steps to protect injured consumers.

Many of the more recent approaches to altering the burden of proof for the plaintiff who cannot identify one defendant have been developed in cases involving the drug diethylstilbestrol (DES).[64] DES, a drug which had been commonly prescribed to pregnant women, was subsequently shown to have a significant correlation to the development of cancer in the adult female offspring of those women.[65] Because of the time lapse

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[62] Hall v. E.I. DuPont De Nemours & Co., 345 F. Supp. 353, 379 (E.D.N.Y. 1972).

[63] *Id.* at 378.

[64] These approaches include market share liability, risk share liability and national market share liability. *See infra* notes 69-99 & accompanying text. Other variations of alternative liability have also been developed in the course of DES litigation. *See, e.g.*, Ferrigno v. Eli Lilly & Co., 175 N.J. Super. 551, 420 A.2d 1305 (1980) (percentage share liability); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 687 P.2d 368 (1984) (market share alternative liability).

[65] DES, a synthetic estrogen, was prescribed to millions of pregnant women for the prevention of miscarriage between 1947 and 1971. Because DES was never patented, the drug was marketed in a generic form by as many as 300 companies during those years. By 1971, medical researchers had recognized a significant increase in previously rare genital tract cancers and abnormalities among young women who had been exposed to DES in utero. The actions against the DES manufacturers are typically instituted two decades after the mothers' ingestion of the drug. In these suits, the plaintiffs allege that the manufacturers marketed the drug without adequate testing, and that they knew or should have known that DES was both dangerous and ineffective for use during pregnancy. Comment, *Enterprise Liability*, *supra* note 14, at 96-67.

between the mothers' ingestion of the drug and the onset of the plaintiffs' injuries, and because a functionally identical product was sold by hundreds of manufacturers, plaintiffs have had difficulty identifying one defendant.[66]

Although DES litigation is characterized by many unique factors, the large number of manufacturers and the generic nature of the drug have had the greatest effect on the methods used to prove causation in fact. For example, several courts, faced with litigation related to DES, have considered and rejected the application of enterprise liability.[67] Because DES was manufactured by hundreds of companies, rather than the six involved in *Hall*, the presumption of joint control of risk is considered to be weak.[68]

In *Sindell v. Abbott Laboratories* the California Supreme Court declined to apply enterprise liability, and instead outlined a new theory of market share liability.[69] First, it was presumed that the DES manufacturers had acted tortiously toward the plaintiff, and that DES was the proximate cause of the plaintiff's injury.[70] Next, the DES plaintiff was required to

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DES, which is still prescribed for conditions unrelated to pregnancy, continues to be an area of concern. The mothers who took DES during pregnancy may have an increased risk of breast cancer, and further research has been recommended to determine the effects of DES on infertility and other reproductive difficulties. U. S. FOOD AND DRUG ADMINISTRATION. DEPARTMENT OF HEALTH AND HUMAN SERVICE, DIETHYLSTILBESTROL TASK FORCE RECOMMENDATIONS (1985). The research on men who were exposed in utero to DES currently is inconclusive on the issue of infertility. However, it is agreed that these men have a higher incidence of genital tract abnormalities. *E.g.* Hembree, Nagler, Fang, Myles & Jagiello, *Infertility in a Patient with Abnormal Spermatogenesis and In Utero DES Exposure*, 33 INT'L J. FERTILITY 173, 176 (1988); Shy, Stenchever, Karp, Berger, Williamson & Leonard, *Genital Tract Examinations and Zona-free Hamster Egg Penetration Tests from Men Exposed In Utero to Diethylstilbestrol*, 42 FERTILITY & STERILITY 772, 777 (1984).

[66] *See supra* note 12.

[67] Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 608, 607 P.2d 924, 934, 163 Cal. Rptr. 132, 142, *cert. denied sub nom.* E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980); Collins v. Eli Lilly Co., 116 Wis. 2d 166, 186, 342 N.W.2d 37, 47, *cert. denied sub nom.* E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984).

[68] The role of FDA regulations followed by the drug industry has also been considered in relation to the imposition of enterprise liability. Adherence to these regulations alone will not absolve a manufacturer when culpability is known. However, when causation is uncertain, the FDA's imposition of industry standards indicates that enterprise liability could be inappropriate, because the control element would be weakened. *Sindell*, 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143; *Collins*, 116 Wis. 2d at 186, 342 N.W.2d at 47. In situations involving patented drugs, separate licensing by the FDA has also been used to demonstrate a lack of joint control of risk among manufacturers. Shackil v. Lederle Laboratories, 116 N.J.155, 561 A.2d 511, 516 (1989).

[69] *Sindell*, 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143. The court actually did adopt many elements of the modified enterprise theory set out by one commentator. *Compare id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145 with Comment, *Enterprise Liability*, *supra* note 14, at 995.

[70] Because the defendants demurred to the complaint, the allegations of negligence were presumed to be true. *Sindell*, 26 Cal. 3d at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134.

join as defendants an undefined "substantial share" of the manufacturers of the particular pills her mother may have taken.[71] Then, unless a defendant could prove that it did not produce the pills actually taken by the plaintiff's mother, it would be liable for a percentage of the total damages proportional to its share of the market, with the market defined as that relevant to the plaintiff's mother.[72]

In explaining its reasons for applying market share liability, the *Sindell* court adopted the rationale of fairness to the innocent plaintiff set out in *Summers v. Tice*.[73] However, the *Sindell* court went further, and cited rationale borrowed from arguments for the imposition of strict liability.[74] Here, as in *Hall*, the manufacturers were said not only to be better able to bear the loss, but to be in the best position to take preventative measures, and were therefore the best target for incentives to increase product safety.[75] The market share apportionment among defendants was thought to be fair because it would approximate each defendant's share of responsibility for the injuries of the relevant group of plaintiffs.[76]

The market share approach is generally thought to be an improvement over the pure forms of either alternative liability or concerted action in DES cases.[77] Under market share, the plaintiff need not prove concerted activity or an industry-wide standard allowing unsafe products, and does not have to join all possible tortfeasors, as often required in alternative liability.[78] Also, it has been argued that liability will closely approximate actual causation if each defendant is held liable for its market share of damages in all cases. With no complications, the burden on each defendant would be the same as if it could always be identified and had to pay the entire amount in a number of cases proportional to its market share.[79]

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[71] *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The *Sindell* court specifically stated that "only a substantial percentage is required . . ." rather than adopting the 75-80% suggested in Comment, *Enterprise Liability*, *supra* note 14, at 996. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. However, the defendants named in that action allegedly produced 90% of the DES marketed. *Id.*

[72] *Id.*

[73] Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 611, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 144, *cert. denied sub nom.* E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980).

[74] *Id.*

[75] *Id.*

[76] *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. This apportionment of liability could also be said to correspond to the benefit that each defendant had received from the product.

[77] *See e.g.*, Note, *Judicial Interest Balancing*, *supra* note 5, at 776; Note, *Market Share Liability*, *supra* note 5, at 675.

[78] It has been noted that this may actually favor the plaintiff who cannot identify one defendant, because she will have a greater chance of recovering at least partial damages from a solvent party. Comment, *Overcoming the Identification Burden*, *supra* note 5, at 632.

[79] Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132, 145, *cert. denied sub nom.* E.R. Squibb & Sons v. Sindell, 449 U.S. 912 (1980). *Cf.* Comment, *Enterprise Liability*, *supra* note 14, at 994 (discussing the fairness of joint liability under the alternative theory).

Like enterprise liability, market share recognizes the applicability of the strict liability goals of fair risk allocation and safety incentives, which would lead to an overall reduction in the costs of injuries. However, market share liability is also similar to the theory suggested in *Hall* in that it is directed toward a goal of determining or approximating actual causation.[80]

The *Sindell* court's approach to balancing broad policy goals with the need to link liability to causation might not promote both objectives to the extent intended. First, allowing a reduction in necessary parties by permitting joinder of less than all of the possible tortfeasors obviously reduces the possibility of the actual actor being found. This is, however, a necessary compromise when complicating factors preclude joinder of all manufacturers.[81] The apportionment by market share seeks to temper this by allocating damages to each defendant in a proportion which "[w]ould approximate its responsibility for the injuries caused by its own products . . ." over time.[82] Allowing each defendant to escape liability by proving that it had not manufactured the pills in question could negate this effect. It is possible, for example, that the manufacturer of a pill with an unusual appearance could escape liability in many of the cases in which it was not the actual tortfeasor, while similarly innocent manufacturers of plain pills could not.[83] This would occur if plaintiffs were able to exclude the unusual pill from the field of similar products more often than they were able to identify it specifically as the medication taken. Thus, some manufacturers could be liable for substantially less than the injuries caused by their own products.

Second, the market share theory may also fail to fully promote the goals of risk allocation and cost reduction. The determination of market share in *Sindell* proved to be very difficult and time consuming.[84] The transaction costs involved in this procedure could easily outweigh any benefit that would result. Third, if the necessary percentage of manufacturers to be joined is inconsistent, or if the market share could not be determined accurately, the theory would impose liability in a manner that could not be anticipated and insured against by manufacturers.

Finally, *Sindell* did not address the question of whether joint and several liability would be applicable. This determination is significant in evaluating whether the theory is effective in promoting the policies of strict liability. Those suppliers held jointly liable could be exposed to costs disproportionate to their market share, and thus disproportionate to their

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[80] Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 509, 539 N.E.2d 1069, 1076, 541 N.Y.S.2d 941, 948, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 110 S.Ct. 350 (1989).

[81] *See Sindell*, 26 Cal. 3d at 602, 607 P.2d at 931, 163 Cal. Rptr. at 139.

[82] *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

[83] *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

[84] California eventually determined that using a national market share was more feasible than working with smaller geographical units. *Id.* at 509, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948 (citing In re Complex DES Litigation, No. 830-109 (Cal. Super. Ct.)).

fair allocation of risk. However, the application of several liability would prevent many plaintiffs, who are the least able to bear the costs of their injuries, from obtaining full recovery. The California Supreme Court resolved the issue in *Brown v. Superior Court*,[85] holding that the liability of DES manufacturers under the market share theory was several only. By choosing this approach, the California court implicitly attacked the policies of fairness to the innocent plaintiff and shifting loss to the party best able to pay. As these were key policies underlying *Sindell*, *Brown* has also drawn the acceptance of market share liability in its progenitor court into question.

Several courts, also in the context of DES litigation, have formulated liability theories that are designed to avoid some of the weaker elements of market share liability. In *Collins v. Eli Lilly Co.*,[86] the Supreme Court of Wisconsin recognized the difficulty of determining the appropriate market share and declined to apply the theory on that ground. Instead of basing liability on the proportion of harm caused by a manufacturer's product, the *Collins* court considered the contribution that each manufacturer had made to the plaintiff's risk of injury by marketing its product.[87]

The theory of "risk share liability" defined in *Collins* was not conceived as a variant of alternative liability, and thus involves a different procedure. To avoid the difficulty of determining a suitable group of defendants, the court required the plaintiff to bring an action in negligence or strict liability against only one defendant.[88] Equitable distribution of liability was said to be attained by allowing the defendant to implead other manufacturers as third party defendants.[89] The plaintiff then had the burden of proving, by a preponderance of evidence, that the defendant had supplied a product with the same physical characteristics as that responsible for her injury.[90] As in alternative liability, the burden then shifted to the defendants to prove, by time or geographical location, that they could not have supplied the specific product in question.[91]

Under the risk share theory, if more than one defendant is found to be liable, the damages are apportioned by a jury under the state's compar-

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[85] 44 Cal. 3d 1049, 1075, 751 P.2d 470, 487, 245 Cal. Rptr. 412, 428 (1988).

[86] 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied sub nom.* E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984).

[87] *Id.* at 191, 342 N.W.2d at 49.

[88] The plaintiff was not limited to suing only one manufacturer. The court noted that the plaintiff would be encouraged to join as many defendants as reasonably possible to prevent future actions from being barred by the statute of limitations. *Id.* at 194, 342 N.W.2d at 51.

[89] Collins v. Eli Lilly Co., 116 Wis. 2d 166, 194, 342 N.W.2d 37, 51, *cert. denied sub nom.*, E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984).

[90] *Id.*

[91] *Id.* at 198, 342 N.W.2d at 52.

ative fault statute.[92] Percentages of liability are assigned according to the risk imposed on the plaintiff by each manufacturer. This risk is determined by considering a number of factors, including the general size of each defendant's relevant market share.[93]

In *Hymowitz v. Eli Lilly & Co.*[94] New York also adopted a theory which apportions liability among defendants according to the risk imposed. Here, the court was concerned not with the individual plaintiff's risk of injury, but with the risk imposed on the public in general. The difficulty encountered by the *Sindell* court in determining market shares at an individualized level was noted.[95] Allowing a jury to determine liabilities according to personal risk was also rejected as time consuming and inconsistent.[96] Conceding that it could make no connection between liability and causation in fact in an individual case, the *Hymowitz* court chose to apportion liability according to national market share.[97] Under the "national market share" theory, a defendant cannot escape liability by showing that it did not manufacture the product which caused the plaintiff's injury. The theory simply abolishes all need for causation in fact.[98] However, liability is several only, resulting in a less than 100% recovery for the plaintiff if the manufacturers joined as defendants represent less than 100% of the market.[99] The *Hymowitz* approach is easily applied and highly supportive of consumer protection. Under this theory, any manufacturer who contributed to any individual's risk of harm becomes severally liable for all resultant injuries. The limitation on liability is provided by the portion of the market controlled by each individual defendant. Although the wisdom of the *Hymowitz* approach may be questioned, its simplicity of application and direct approach to the policy promoted have merit.

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[92] The Wisconsin statute is written in terms of negligence, but it has also been applied to strict liability actions. *Id.* at 199, 342 N.W.2d at 53. Although the statute refers only to proportionate fault between the plaintiff and the defendant, it is used to apportion liability among defendants. *Id.* The statute provides:

> Contributory negligence shall not bar recovery in an action by any person . . . to recover damages for negligence resulting in death or injury to person or property, if such negligence was not greater than the negligence of the person against whom recovery is sought, but any damages allowed shall be diminished in the proportion to the amount of negligence attributable to the person recovering.

Wis. Stat. § 895.045 (1987). The statute does not specify whether this liability is joint and several, but this is apparently intended by the Wisconsin court. *Collins*, 116 Wis. 2d at 194, 342 N.W.2d at 50. *See infra* note 102 & accompanying text.

[93] Collins v. Eli Lilly Co., 116 Wis. 2d 166, 200, 342 N.W.2d 37, 53, *cert. denied sub nom.*, E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984).

[94] 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 110 S.Ct. 350 (1989).

[95] *Id.* at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949.

[96] *Id.* at 511, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

[97] California has also chosen to compile statistics on national market share for DES, rather than considering local markets. *See supra* note 84 & accompanying text.

[98] Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 483, 512, 539 N.E.2d 1069, 1078, 541 N.Y.S.2d 941, 950, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 110 S. Ct. 350 (1989).

[99] *Id.* at 513, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

Both *Hymowitz* and *Collins*, in making a conceptual shift from actual injury to creation of a risk, explicitly recognize the goals of effective spreading of losses and cost reduction through safety incentives.[100] However, in application and effect the two theories differ. The risk share theory espoused in *Collins* maintains a substantial connection with causation-in-fact through a focus on individual risk. Although this causal link provides a sense of fairness under traditional tort principles, the jury apportionment process may actually be time consuming, expensive and unpredictable.[101] In addition, the liability of a defendant under the risk share theory is apparently joint and several.[102] Joint and several liability allows the plaintiff to obtain full recovery when some defendants are judgment proof, beyond the court's jurisdiction, or no longer subject to process for any reason. This furthers the policy of allocating costs to the manufacturers, who may be better able to pay. However, this theory also removes the focus from an imposition of liability that is proportional to individual risk. In addition to weakening the link between the risk share theory and causation in fact, this undermines the policy of fair risk allocation, and may have a negative impact on safety incentives.

In contrast to the risk share theory, the national market share theory utilized in *Hymowitz* makes a complete departure from traditional causation principals in favor of optimizing risk allocation and cost reduction. National market share liability operates as a judicially administered insurance system. A manufacturer who creates greater risks makes larger payments on a regular basis. Whether a particular injury is attributable to that manufacturer's products is rendered academic.

Difficulties in the application of national market share liability may arise for at least three reasons. The first problem arises because the plaintiff may recover less than 100% of her damages if less than the entire national market is joined.[103] When a consumer, for reasons of time and expense, can join only a limited number of defendants, there will be an incentive to sue only the largest manufacturers. These manufacturers, although limited in number, would provide near to 100% of the national market. A consistent focus on the largest manufacturers would result in a windfall to the manufacturers who controlled a smaller proportion of the market, because they, in effect, would be imposing risks on the public without liability for the accompanying losses.

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[100] *Id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950; Collins v. Eli Lilly Co., 116 Wis. 2d 166, 192, 342 N.W.2d 37, 49, *cert. denied sub nom.* E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984).

[101] *See supra* note 96 & accompanying text.

[102] This is similar to the question raised by California's original statement of market share liability. That issue was later resolved by Brown v. Superior Court, 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988). *See supra* note 85 & accompanying text.

[103] *See supra* note 99 & accompanying text.

The second problem associated with the national market share theory may arise not from the theory itself, but from its application at only a statewide level. Manufacturers who did not contribute to the actual risk to the plaintiff in a given New York case may nonetheless be liable in proportion to their national market share. However, when these manufacturers are found liable in a state which operates under a different theory, they may have to pay damages exceeding their market share. Thus, in the aggregate, these manufacturers would pay more than a sum proportional to the risk they imposed. Simultaneously, those who distributed their products primarily in the New York area would pay less as they would not be subject to liability in other states.

Finally, because the national market share theory is extremely favorable to plaintiffs, there is a substantial possibility that New York will become a haven for suits in which the plaintiff cannot prove causation in fact. Most major manufacturers do business in New York, and the fairly liberal jurisdiction and venue rules would probably allow such suits.[104] This influx of litigation would place an additional burden on the already overloaded New York civil justice system. It is quite possible that the resultant cost increases, lengthy delays and concomitant problems would substantially outweigh the benefits to the plaintiffs involved in products liability actions.

Overall, no one theory of liability has found consistent acceptance for proving causation in fact in products liability actions.[105] The theories of concerted action and alternative liability originated in simple negligence contexts and have not been widely applied in their pure form.[106] Market

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[104] Since the development of the "minimum contacts" theory set forth in International Shoe Co. v. Washington, 326 U.S. 310 (1945), it is apparent that almost any contact with a state will suffice to meet the due process requirements. Although recent developments have perhaps complicated the application of the minimum contacts rule, the rule is still operational. Asahi v. Metal Industry Co. v. Superior Court of California, 480 U.S. 102 (1987). As most pharmaceutical houses have strong marketing efforts in New York, it is apparent that a substantial number can be subjected to in personam jurisdiction in that state. *Hymowitz* establishes that subject matter jurisdiction exists. Finally, New York has a broad long arm statute, *see* N.Y. CIV. PRAC. L. & R. 302 (McKinney 1988), and venue is appropriate in any county in which a defendant has its "principal office." *Id* at 503. "Principal office" has been broadly interpreted to include both the location designated on the certificate of incorporation and the defendant's principal place of business. E.g., Weiss v. Saks Fifth Ave., 157 A.D.2d 475, 476, 549 N.Y.S.2d 400, 401 (1990).

[105] Even within one jurisdiction, the acceptance of a theory may be ambiguous or short-lived. *E.g.*, *compare* Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982) (concerted action available in DES suit) *with* Hymowitz v. Eli Lilly & Co., 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied sub nom.* Rexall Drug Co. v. Tigue, 110 S.Ct. 350 (1989) (concerted action rejected; national market share formulated).

[106] For references to discussions of the accepted use of these theories, see *supra* note 50.

share theory, although conceptually more appropriate, has proved difficult to apply, and may now be disfavored in even its progenitor court.[107] Some states have used the earlier approaches as springboards to develop tailored theories.[108] Finally, a number of states, including Ohio, have not taken a definite stance or have rejected any expansion of liability.[109]

IV. THE INDETERMINATE DEFENDANT IN OHIO PRODUCTS LIABILITY

A. Ohio's Approach to Causation In Fact

In many respects, shifts in Ohio products liability law have paralleled those of the rest of the country. Significantly, Ohio applied the principles of strict products liability soon after precedent was set by California.[110] In 1977, strict liability was expressly recognized as a valid doctrine through the adoption of section 402(A) of the *Restatement (Second) of Torts*.[111] The adoption of strict liability brought with it a recognition of the underlying policies of allocating risks fairly and reducing the costs of accidents. These same policies have played an important role in the courts' approaches to causation in fact problems.[112]

Ohio, by its adherence to more traditional tort principles, has been slower than some states to adopt a solution to the causation problem created by the indeterminate defendant. This adherence may reflect a variety of factors, including the nature of the cases which have arisen in Ohio, observation of the difficulties encountered by other states, and an awareness of functions more appropriate to the legislature.

In 1984, several years after California, New York and other states had developed theories in response to DES litigation, the Ohio Supreme Court stated its position in *Minnich v. Ashland Oil Co. Inc.*.[113] In that case the plaintiff was severely injured when a solvent he was using to clean a printing press exploded.[114] Because Minnich's employer purchased chemically identical solvent, ethyl acetate, from two chemical companies, Min-

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[107] *See supra* text accompanying note 85.

[108] In addition to Wisconsin's risk share and New Yorks's national market share theories, Illinois, Michigan and Washington have developed theories which combine various aspects of earlier principles. For a listing of current cases addressing this topic, see *Sherman*, *supra* note 11, Supp. 1989 at § 12.09.

[109] At least seven states have explicitly declined to apply market share liability and various adaptations of alternative liability and concerted action. These states are Florida, Iowa, Missouri, New Jersey, Ohio, Oklahoma and Pennsylvania. *See id.*

[110] *Bauer*, *supra* note 1, at § 6-4 (citing Lonzrick v. Republic Steel Corp., 6 Ohio St.2d 227, 218 N.E.2d 185 (1966)).

[111] *Id.* (citing Temple v. Wean United, Inc., 50 Ohio St.2d 317, 364 N.E.2d 267 (1977)).

[112] For a discussion of the policies underlying strict liability, see *supra* note 2.

[113] 15 Ohio St. 3d 396, 473 N.E.2d 1199 (1984).

[114] *Id.* at 397, 473 N.E.2d at 1200.

nich was unable to determine which company had produced the particular batch involved in the explosion.[115]

The court, in allowing the plaintiff to proceed against both suppliers, adopted the theory of alternative liability as it is expressed in Section 433(B)(3) of the *Restatement (Second) of Torts*.[116] The *Minnich* court stressed that before the burden of proof would be shifted to the defendants, the plaintiff would initially have to prove that two or more defendants had acted tortiously, and that the plaintiff's injury was proximately caused by one of the defendants.[117]

It is notable that *Minnich* is a very brief opinion, in which the majority cites only the *Restatement* on the issue of alternative liability. Although market share liability had been created and other theories were being developed, the problems inherent in altering the plaintiff's burden of proof regarding causation in fact were not addressed.

The court's lack of discussion may have been a conscious omission, made for tactical reasons. However, alternative liability was completely appropriate to the simple tort situation presented in *Minnich*. First, the alleged tortious act was committed by only one of two possible parties.[118] In addition to placing no hardship on the plaintiff with respect to joinder, there was no doubt that one of the two suppliers was the actual tortfeasor.[119] Furthermore, there was no indication that the alleged failure to warn was an industry-wide practice, or that it had caused a number of injuries. Because of this, the issues of fair risk allocation within the chemical industry and promotion of safety procedures were absent.

Minnich, which presented a fact situation very similar to that of *Summers v. Tice*,[120] was a model case for the application of alternative liability. However, alternative liability will not always be the most appropriate solution to the problem faced by the plaintiff who cannot identify one defendant from a group of tortious actors.[121] In particular, situations involving many defendants have been deemed inappropriate for the application of alternative liability in many jurisdictions.[122]

Since the adoption of alternative liability in *Minnich*, the Ohio Supreme Court has reviewed only one products liability case involving an inde-

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[115] The plaintiff alleged that the suppliers had negligently failed to provide warnings of the solvent's explosive properties. *Id.*

[116] RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965). *See supra* notes 19-20 & accompanying text.

[117] The Ohio Supreme Court did not address these issues, as the lower court had granted the defendants' motions for summary judgment on the basis of the plaintiff's inability to identify one supplier. *Minnich*, 15 Ohio St. 3d at 398, 473 N.E.2d at 1200.

[118] *Id.* at 397, 473 N.E.2d at 1200.

[119] If each defendant provided equal amounts of the chemical to the plaintiff's employer, there would be a 50% chance that any one of the suppliers was the actual tortfeasor. If one of the defendants was only an occasional supplier, and provided substantially less of the chemical, the application of alternative liability could have inequitable results. This inequity is mitigated, in part, by the occasional supplier's increased chances of exculpation.

[120] 33 Cal. 2d 80, 199 P.2d 1 (1948).

[121] *See supra* notes 27-33 & accompanying text.

[122] *Id.*

terminate defendant. In that case, the court recognized the limitations of alternative liability in a situation where not only many defendants, but the special problems presented by asbestos were involved. In *Goldman v. Johns-Manville Sales Corp.*,[123] the plaintiff sued eleven asbestos suppliers, alleging that her husband had developed cancer due to his exposure to asbestos products at the bakery where he had worked.[124] Because the bakery had burned down, the plaintiff could identify neither the specific products nor the suppliers.[125]

In affirming a summary judgment in favor of the defendants, the court first determined that the plaintiff could not prove proximate causation with respect to most of the products, because she had presented insufficient evidence as to their existence.[126] The court did find that one product, asbestos tape, had been used at the bakery, but declined to apply alternative liability to shift the burden of proving causation in fact to the remaining defendants.[127]

One of the grounds for the *Goldman* court's rejection of alternative liability was that all of the companies that had produced asbestos tape were not before the court.[128] The court found support for this requirement in a comment to Section 433(B)(3) of the *Restatement (Second) of Torts*, because "[t]he cases thus far decided in which [alternative liability] has been applied have all been cases in which all of the actors involved have been joined as defendants."[129] Similarly, a second basis for rejecting alternative liability was also found in this comment.[130] Here, the court noted that the theory was traditionally applied in situations where all of the defendants created similar risks of harm to the plaintiff.[131] Because asbestos products that appear to be similar may contain different types and varying quantities of the substance, asbestos suppliers do not meet this criterion.[132] Interestingly, like most other courts that have considered this

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[123] 33 Ohio St. 3d 40, 514 N.E.2d 691 (1987).

[124] *Id.* at 40, 514 N.E.2d at 692.

[125] *Id.*

[126] *Id.* at 42, 514 N.E.2d at 693.

[127] *Id.* at 45, 514 N.E.2d at 696.

[128] *Id.* at 48, 514 N.E.2d at 699. The court noted that at least 165 companies have produced or supplied asbestos products. As a result, all of the possible tortfeasors are seldom before the court in asbestos litigation. The inappropriateness of alternative liability in *Goldman* was compounded by the fact that Johns-Manville, the largest asbestos supplier, had reorganized and was no longer amenable to suit. *Id.* at 46, 514 N.E.2d at 697.

[129] *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 433B(3) comment h (1965)).

[130] *Id.*

[131] *Goldman*, 33 Ohio St. 3d at 46, 514 N.E.2d at 697.

[132] Asbestos is not fungible because at least three variables may result in functional differences among apparently similar asbestos products. First, asbestos is the general name for a number of different fibers. Some fibers have more harmful effects than others. Second, the quantity of asbestos in any given product is not standardized, but varies with the manufacturer. Finally, asbestos is most harmful when it is friable, or crushable, because the fibers are then more likely to become airborne. The friability of a product may depend on the other substances used in the product, as well as the nature of the product and how it is used. *See generally id.* at 50, 514 N.E.2d at 700; Cleveland Board of Education v. Armstrong World Industries, 22 Ohio Misc. 2d 18, 23, 476 N.E.2d 397, 404 (1985).

problem, the *Goldman* court did not apply the remainder of the *Restatement* comment upon which it had relied. The comment to Section 433(B)(3) continues:

> It is possible that cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks which they have created.[133]

The *Goldman* court noted that alternative liability, in its original form, imposes joint and several liability, which would be inequitable if either all of the possible defendants were not present, or if the defendants had posed varying degrees of risk.[134] A modification of the joinder or fungibility requirements of alternative liability theory without an accompanying adjustment of liability allocation would impose a burden unrelated to causation in fact. This substantial departure from traditional tort principles would lead to the problem of judicial imposition of absolute, insurer liability on the members of an industry.[135]

Market share liability, which does modify the allocation of liability, was rejected by the *Goldman* court, primarily on the grounds that DES, for which the theory was developed, is fungible, while asbestos is not.[136] Recognizing that the application of the market share theory to an asbestos case would result in the imposition of liability without regard for the risk imposed by each defendant, the court rejected the theory as a "court-constructed insurance plan."[137] On a policy basis, the court explained that "[a] device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain."[138]

The Ohio Supreme Court, in *Goldman*, recognized the limitations of the market share theory as a method of liability apportionment in asbestos litigation.[139] Specifically, market share liability will not fairly allocate liability among manufacturers unless their different shares of the relevant market represent the only variable in the determination of the

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[133] RESTATEMENT (SECOND) OF TORTS § 433B(3) comment h (1965). For a discussion of how other courts have approached this issue, see *supra* note 23.

[134] *Goldman*, 33 Ohio St. 3d at 46, 514 N.E.2d at 697.

[135] This type of insurer liability would raise issues similar to those discussed with regard to the imposition of concerted action in DES cases. *See supra* text following note 49.

[136] *Goldman*, 33 Ohio St. 3d at 50, 514 N.E.2d at 700. For a discussion of the non-fungibility of asbestos, see *supra* note 132.

[137] *Goldman*, 33 Ohio St. 3d at 52, 514 N.E.2d at 702 (quoting Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986)).

[138] *Id.* at 52, 514 N.E.2d at 701-02.

[139] *Goldman*, 33 Ohio St. 3d at 50-52, 514 N.E.2d at 700-02.

amount of risk each has imposed upon the public.[140] Asbestos litigation, with its unique complications, presents an exceptional number of such variables, including a product that is not truly generic.[141] However, the court specifically recognized the need for a solution to the problem posed by the indeterminate defendant, and noted the possibility of adopting a theory in a future case.[142]

Other than the two cases considered by the Ohio Supreme Court, there is very little Ohio law addressing the topic of the indeterminate defendant. Since Ohio's adoption of alternative liability, the topic has been considered in only four products actions.[143] Three other cases have discussed alternative liability in relation to simple tort claims.[144] In general, the courts have worked within the parameters set in *Minnich*. Indeed, none of the cases have presented fact patterns which required a more liberal or imaginative approach.

Similarly, the Ohio legislature has been silent on the issue of proof of causation in fact by a plaintiff who cannot identify one of many possible defendants. The Ohio Tort Reform Act, which took effect in 1988, codified extensive areas of products liability law.[145] Included in the Act are the

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[140] Determination of the relevant market proved to be extremely difficult in litigation involving DES. *See supra* notes 84, 97 and accompanying text. The *Goldman* court noted that determination of an appropriate market in asbestos litigation would present even greater difficulties. Many injuries attributed to asbestos are caused by the plaintiff's long term exposure to a variety of products, possibly in a number of geographical areas. Furthermore, during the relevant exposure periods, many manufacturers began or ceased making the products. *Goldman*, 33 Ohio St. 3d at 50, 514 N.E.2d at 700.

[141] *See supra* note 132.

[142] *Goldman*, 33 Ohio St. 3d at 51, 52, 514 N.E.2d at 701, 702.

[143] Allen v. Johns-Manville Sales Corp., No. 026-764 (Ohio Ct. App., 8th Dist. June 14, 1984) (WESTLAW, OH-CS database) (alternative liability, enterprise liability, and risk share theories not applicable to asbestos action); Frank v. Thomson-MacConnell Cadillac, Inc., No. C-870563 (Ohio Ct. App., 1st Dist. July 6, 1988) (1988 Ohio App. LEXIS 2657) (alternative liability not applicable where defendants are not shown to have acted tortiously); Renfro v. Smith Laboratories, No. S-87-33 (Ohio Ct. App., 6th Dist. Dec. 16, 1988) (1988 Ohio App. LEXIS 4941) (alternative liability not applicable when one of two possible tortfeasors is not named as defendant and tortious conduct is not demonstrated); Tirey v. Firestone Tire & Rubber Co., 33 Ohio Misc.2d 50, 513 N.E.2d 825 (1986) (alternative liability not applicable where all defendants are not shown to have acted tortiously; market share, enterprise and concert-of-action theories not applicable).

[144] Arrico v. Wessel Enterprises, Inc., No. CA87-06-079 (Ohio Ct. App., 12th Dist. Dec. 31, 1987) (WESTLAW, OH-CS database) (alternative liability will shift burden of proof to three negligent defendants); Ruiz v. Greater Cleveland Transit Authority, No. 50100 (Ohio Ct. App., 8th Dist. Feb. 6, 1986) (WESTLAW, OH-CS database) (alternative liability not applicable when defendants have not acted tortiously); Pang v. Minch, No. 54729 (Ohio Ct. App., 8th Dist. Jan. 12, 1989) (1989 Ohio App. LEXIS 105) (burden of proof of damage apportionment shifted to defendants by analogy to rationale for alternative liability).

[145] This portion of the Tort Reform Act has been summarized:

> Ohio Revised Code sections 2307.71 through 2307.80 and 2315.20 create a comprehensive program governing product liability litigation. These provisions codify and modify prior law. The consolidation addresses, among other areas:

standards for a manufacturer's liability for compensatory damages, with specifications as to proximate causation and proof of defect in a destroyed product.[146] The absence of a causation in fact provision, in light of the decision in *Goldman* and the litigation occurring in other jurisdictions, may indicate the legislature's intent to leave the area open for judicial resolution. Regardless of whether the legislature's omission was intentional, for the present it has left the formulation of an approach to the issue of causation in fact to the Ohio courts. Although the Supreme Court has rejected market share liability within the narrow ambit of asbestos litigation in *Goldman*, it has left open the possibility of adopting a modified theory for the proof of causation in fact in other situations.[147] As the legislature has effectively rejected the court's plea for a legislative solution, the likelihood of judicial alternatives is enhanced.

Although Ohio has not experienced the large scale problems with DES litigation that some other states have faced, it is clear that similar issues will arise in the future.[148] Mass marketing, the public's need for new products, competition among suppliers and economically reasonable limitations on quality control will all contribute to other situations where

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a. Definition of design and non-design defects;
b. A unified liability standard;
c. Affirmative defenses and comparative fault;
d. Warnings, claims and defenses;
e. Distinctions as to ethical drugs and medical devices;
f. Distinctions between manufacturer and supplier liability standards; and
g. Compensatory and punitive damages.

S. WERBER, TORT REFORM: CHANGES IN THE OHIO LAW OF PRODUCT LIABILITY xiv (1988). In addition, the legislature provided for further study in a number of key areas, including regulation of plaintiffs' attorneys' fees, subrogation rights and the workings of the Ohio Department of Insurance. *Id.* None of these areas of investigation specifically addressed the issue of the indeterminate defendant.

[146] The plaintiff must show by a preponderance of the evidence that his injury was proximately caused by a product defect. OHIO REV. CODE ANN. § 2307.73(A)(2) (Anderson 1988). The defect may be due to manufacture, design, inadequate warning or nonconformance to the manufacturer's representation. *Id.* at § 2307.73(A)(1). If the product was destroyed, or if the plaintiff cannot establish the defect by direct evidence for some other reason, circumstantial evidence of the defect may be used. *Id.* at § 2307.73(B).

[147] For a discussion of Ohio's rejection of market share liability, see *supra* notes 136-142 & accompanying text. Goldman v. Johns-Manville Sales Corp., 33 Ohio St. 3d 40, 514 N.E.2d 691 (1987), represented the rejection of a specific theory, market share liability, in light of the extraordinary difficulties presented by asbestos litigation. The development of other theories, in non-asbestos cases, is compatible with the *Goldman* holding. *See*, Beshada v. Johns-Manville Products Corp., 90 N.J. 191, 204, 447 A.2d 539, 542 (1982) (disallowing the state-of-the-art defense in failure to warn cases); Feldman v. Lederle Laboratories, 97 N.J. 429, 454, 479 A.2d 374, 388 (1984) (limiting the applicability of *Beshada* to the facts upon which it arose).

[148] DES was not prescribed to pregnant women after 1971, and most women who were exposed in utero develop noticeable abnormalities by their early twenties. *See supra* note 65. Thus, the large number of cases brought by DES daughters are likely to decrease in the 1990's. It is possible, however, that DES will be the focus of a new wave of litigation by mothers and sons affected by the drug. *Id.*

injuries are caused by the substantially similar products of a number of suppliers.[149] Adherence to only the conceptually limited theory of alternative liability in these situations will place an unfair burden on plaintiffs, who are least able to pay the costs of their injuries. Furthermore, because Ohio residents will have no recourse in their own state, an additional caseload is likely to be placed on more favorable forums, such as New York and California.[150] To avoid this result, either the legislature, or the courts, if the appropriate case arises before the legislature has acted, will need to adopt a theory that strikes a balance between protecting consumers and placing reasonable burdens on industry.

B. A Suggested Approach for Ohio

A proper approach to proof of causation in fact combines elements of risk share theory[151] and alternative liability[152] with the concept of apportionment of damages found in Ohio's comparative fault statute.[153] This theory would be available only to those plaintiffs who were unable to identify one defendant from a number of manufacturers of substantially similar products. It follows that this theory would supplement rather than replace alternative liability.[154] If adopted by the Ohio Supreme Court, this theory would be available only in limited product liability fact patterns.

Under the suggested theory, the plaintiff may initiate an action by suing only one supplier of the type of product that caused his injury. However, the plaintiff has the option of suing more than one defendant, and is actually encouraged to do so to avoid other possible actions being

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[149] A number of product types may give rise to suits involving indeterminate defendants. Workplace chemicals, pesticides, hazardous wastes and second-hand smoke can all cause injuries in such a way as to make defendant identification difficult or impossible. For a discussion of some of these possibilities, see Rheingold, *The Future of Product Liability: The Plaintiff's Perspective*, PROD. SAFETY & LIAB. REP. (BNA) 711 (July 21, 1989). Generic drugs are also likely to continue to raise issues of defendant identification and causation, but many of these suits may be limited to less viable negligence actions. Ohio, like many other states, recognizes an exception to strict liability for the manufacturers of unavoidably unsafe products. White v. Wyeth Laboratories, 40 Ohio St.3d 390, 394, 533 N.E.2d 748, 752 (1988) (recognizing RESTATEMENT (SECOND) OF TORTS § 402A comment k (1965)).

[150] *See supra* note 104 & accompanying text.

[151] *See supra* notes 86-93 & accompanying text.

[152] *See supra* notes 14-26 & accompanying text.

[153] OHIO REV. CODE ANN. § 2315.19 (Anderson 1988).

[154] Alternative liability would still be available in some products liability actions involving indeterminate defendants. If the plaintiff were able to bring all possible tortfeasors before the court, if the defendant group was very small and if the plaintiff proved the other necessary elements, alternative liability could be the most efficient and equitable theory available. No attempt is made here to define all of the situations when alternative liability would still be applicable, as its criteria are not altered by the proposed theory.

barred by the statute of limitations.[155] After the plaintiff has initiated the action, the defendants may implead other manufacturers of the product as third party defendants.

Allowing the plaintiff to proceed in this manner has several advantages. First, the plaintiff is relieved of the necessity of joining all possible manufacturers, as currently required under Ohio's pure alternative liability theory. This avoids denying compensation to injured parties in those instances where more than a few manufacturers have acted tortiously. Second, the court is relieved of the costs and potential inaccuracies of determining the appropriate defendant group.[156] A third advantage is obtained by the plaintiff's incentives to make every effort to join as many suppliers as he reasonably can. Finally, the defendants are prompted to use their superior knowledge of the industry to implead other manufacturers. Utilizing this industry knowledge decreases the likelihood of the actual tortfeasor escaping liability, and thus helps to maintain a substantial link to causation in fact.

The plaintiff, or the third party plaintiffs, must establish a prima facie case against each defendant by establishing two factors by a preponderance of the evidence. First, the plaintiff must establish that the defendant made the type of product in question, and that the product was defective.[157] The plaintiff then must show that his injury was proximately caused by the product defect.[158] Consistent with the alternative liability theory, each defendant may exculpate itself by showing either that it did not produce the product at all, that it did not produce the product at the time relevant to the plaintiff, or that it did not supply the product in the geographical area relevant to the plaintiff.[159]

Allowing defendants to escape liability in this manner avoids the insurance approach taken by the New York courts, and maintains a focus on causation in fact. The fairness of allocating risk for only those activities which actually benefited the manufacturer is coupled with a practical consideration. The opportunity for exculpation tends to make manufacturers liable only for the risks imposed upon a known market. Because

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[155] This is the same method used in Wisconsin's risk share theory, which was set out in Collins v. Eli Lilly Co., 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied sub nom.* E.R. Squibb & Sons v. Collins, 469 U.S. 826 (1984). *See supra* note 88 & accompanying text.

[156] The long run efficiency of requiring the plaintiff to sue only one defendant may, initially, appear to be negated by the extra time required for the defendants to implead other manufacturers. However, this delay may be offset by the fact that plaintiffs will be able to bring their suits much sooner.

[157] This requirement is consistent with OHIO REV. CODE ANN. § 2307.73(A)(1) (Anderson 1988). *See supra* note 146.

[158] This proximate causation requirement is consistent with OHIO REV. CODE ANN. § 2307.73(A)(2) (Anderson 1988). *See supra* note 146.

[159] Allowing a manufacturer to exculpate itself on the basis of geographical area could permit a potentially culpable party to avoid liability if a product was transported across a state line. For this reason, the relevant geographical area may be established by the plaintiff, and is not necessarily the place where the suit is brought.

a known risk can be anticipated, industry is then able to provide for its liability through insurance and by passing the costs on to consumers through product prices.

Finally, damages are apportioned by importing the distinction between economic and noneconomic loss expressed in Ohio's comparative fault statute.[160] In this application, the trier of fact separates the plaintiff's total damages into categories of economic loss, including lost wages, medical expenses and other special damages, and noneconomic loss, including pain and suffering and other intangible damages.[161] All of the remaining defendants are jointly and severally liable for the plaintiff's economic harm, but are only severally liable for the noneconomic harm.[162] The trier of fact apportions liability for noneconomic harm among the defendants by considering a number of factors including relative market share, participation in industry-wide standards, role in determining such standards, and individual marketing techniques.[163]

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[160] The language of Ohio's comparative fault statute refers to actions in negligence, rather than to strict liability. OHIO REV. CODE ANN. § 2315.19 (Anderson 1988). However, this does not preclude the adoption of elements of the statute for use in a products liability action. It is notable that other states, in strict liability actions, have applied contributory negligence statutes to apportion liability among defendants. *See supra* note 92 & accompanying text. Similarly, only the method of apportioning fault among defendants set out in § 2315.19 of the Ohio Revised Code is applied here. *See infra* notes 160, 161 & accompanying text.

The suggested use of Ohio's comparative fault statute is also compatible with existing Ohio caselaw. In Bowling v. Heil, 31 Ohio St. 3d 277, 511 N.E.2d 373 (1987), § 2315.19 was held to be inapplicable to strict liability actions when it was applied for the purpose of comparing the fault of the plaintiff to the fault of the defendant. The proposed application of the statute does not involve that comparison.

Finally, even if *Bowling* is interpreted to prohibit all use of the comparative negligence statute in strict liability cases, it would not pose a bar to future judicial action. Ohio courts have recognized that, in some instances, the best decisions require a departure from recent precedent:

> So often . . . we find . . . nonsense about a revolving door treatment of *stare decisis*. The implication in such view is that any recent legal precedent of this court containing bad law should not be overruled. This is not the correct meaning of *stare decisis*. Bad law created by a court, even though only a day old, should be overruled . . . .

Wilfong v. Batdorf, 6 Ohio St. 3d 100, 105, 451 N.E.2d 1185, 1189-90 (1983) (Celebrezze, J. concurring) (overruling recent precedent to allow the retrospective application of Ohio's comparative negligence statute). In products cases involving indeterminate defendants, the combination of strict liability and relaxed causation criteria create a new type of insurer liability among manufacturers. Correspondingly, a new method of apportioning fault through the application of comparative principles is necessary to prevent the imposition of absolute liability.

[161] This division of damages by the trier of fact is consistent with OHIO REV. CODE ANN. §§ 2315.19(B)(2), (B)(3) (Anderson 1988). Revised Code §§ 2315.19(E)(l)(a), (E)(l)(c) define economic loss. A partial list of damages that qualify as noneconomic loss is set out in Revised Code § 2315.19(E)(3).

[162] This division of where liability will be joint and several or only several is found in OHIO REV. CODE ANN. §§ 2315.19(D)(l)(b)-(D)(l)(c) (Anderson 1988).

[163] This list is not exclusive. The particular factors considered by the trier of fact will depend, in part, on the nature of the product involved. For example, this apportionment process could take into account some of the smaller differences in risk that occur when products of the manufacturers are not truly generic.

This method of damage apportionment is critical to the balance achieved by the proposed method of altering the burden of causation in fact. By providing the injured plaintiff with assured complete recovery of actual monetary loss, the problems of inadequate compensation that may be encountered in market share or national market share liability are avoided.[164] At the same time, limiting joint and several liability to this liquidated amount minimizes the departure from causation in fact and goals of fair risk apportionment. Finally, imposing only several liability for noneconomic loss will not substantially detract from the goals of strict liability. Maintenance of joint and several liability for economic loss should adequately serve as a safety incentive, and thus reduce the costs associated with injuries.

V. CONCLUSION

Fungible products have created substantial difficulties for injured consumers who cannot identify their source. At this time, the problem has been highlighted primarily by litigation involving diethylstilbestrol, other drugs and workplace hazards. The realities of mass production in competitive industries, and society's need for reasonably priced products ensure that the issue will continue to arise in the future.

The problem posed by the indeterminate defendant has required courts to juxtapose two distinct concepts. Traditional tort principles, perceptions of fairness and the necessity of reasonable limits on industry's obligations require that liability be strongly linked to causation. The policies of reducing injury costs and protection of the consumer, which fostered the development of strict liability, must also be considered.

Several modified causation theories have been developed and tested in other jurisdictions. The experiences of those jurisdictions provide a background against which a balanced and effective approach can be applied when the causation in fact issue next arises. The theory proposed for Ohio seeks to strike a balance between the two fundamental policy considerations, and to provide a flexible framework for achieving equitable results.

REBECCA J. GREENBERG

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[164] *See supra* notes 85,,99 & accompanying text.