

University of Michigan Journal of Law Reform

Volume 24
Issues 3&4

1991

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Recommended Citation

Christopher J. McGuire, *Market-Share Liability After Hymowitz and Conley: Exploring the Limits of Judicial Power*, 24 U. MICH. J. L. REFORM 759 (1991).

Available at: <https://repository.law.umich.edu/mjlr/vol24/iss3/8>

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MARKET-SHARE LIABILITY AFTER *HYMOWITZ* AND *CONLEY*: EXPLORING THE LIMITS OF JUDICIAL POWER

Christopher J. McGuire*

After recent court decisions,¹ roughly 70 million Americans² reside in states that recognize market-share liability.³ California, Florida, and New York, three of the four most populous states,⁴ have adopted the theory in some form—California in 1980,⁵ New York in 1989,⁶ and Florida in 1990.⁷ Although many commentators have written on market-share liability since the California Supreme Court crafted the theory in 1980,⁸ another examination is appropriate

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1. See *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989); see also *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984).

2. See Public Information Office, Economics & Statistics Admin., Bureau of the Census, U.S. Dep't of Commerce, Press Release CB90-232 (table) (Dec. 26, 1990) [hereinafter Press Release] (reporting the following 1990 census population counts: California, 29.8 million; New York, 18.0 million; Florida, 13.0 million; Wisconsin, 4.9 million; and Washington, 4.9 million); Barringer, *Census Bureau Places Population at 249.6 Million*, N.Y. Times, Dec. 27, 1990, at A1, col. 1, B6, cols. 3-6 (table) (reporting the same figures).

3. Roughly, market-share liability holds a manufacturer of a fungible product liable to those injured by the product in proportion to the manufacturer's share of the market for the fungible good. See *infra* Part I.

4. See Press Release, *supra* note 2 (table); Barringer, *supra* note 2, at B6, cols. 3-6 (table).

5. See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

6. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989).

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

8. See, e.g., Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Robinson, *Multiple Causation in Tort Law: Reflections*

because recent New York and Florida cases each raise new questions concerning the power of courts to impose liability through novel tort theories.

This Note surveys the development of market-share liability and examines the limits on the power of state and federal courts to impose liability on defendants through market-share liability. Part I examines briefly the development of market-share liability in the early 1980s. It then explores how the New York Court of Appeals extended market-share liability in *Hymowitz v. Eli Lilly*⁹ and explores this case's ramifications. Part I also draws on a recent Florida case, *Conley v. Boyle Drug Co.*,¹⁰ for further insight into the problems surrounding market-share liability litigation. Part II argues that jurisdictional limitations, such as standing to sue in federal court and the requirements for *in personam* jurisdiction over defendants, should pose significant restraints on judicial power to apply the most expansive versions of market-share liability. Part III urges that Congress enact a law, as an appropriate exercise of its power under the commerce clause, to limit the power of states to create theories of liability that can significantly interfere with interstate commerce.

on the DES Cases, 68 VA. L. REV. 713 (1982); Schwartz & Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941 (1985); Spitz, *From Res Ipsa Loquitur to Diethylstilbestrol: The Unidentifiable Tortfeasor in California*, 65 IND. L.J. 591 (1990); Note, *Sindell v. Abbott Laboratories: Is Market Share Liability the Best Remedy to the DES Controversy?*, 18 CAL. W.L. REV. 143 (1982) (authored by Richard A. Marshack) [hereinafter Note, *Best Remedy*]; Note, *Sindell v. Abbott Laboratories: A Market Share Approach to DES Causation*, 69 CALIF. L. REV. 1179 (1981) (authored by Richard P. Murray) [hereinafter Note, *DES Causation*]; Note, *Market Share Liability and DES—Sindell v. Abbott Laboratories: Square Pegs in Round Holes*, 13 CONN. L. REV. 777 (1981) (authored by Mark V. Connolly) [hereinafter Note, *Square Pegs*]; Comment, *Into the Quagmire: Washington Adopts Market Share Liability in DES Cases*, 21 GONZ. L. REV. 199 (1985/86) (authored by Sharon Novak) [hereinafter Comment, *Into the Quagmire*]; Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981); Comment, *DES: The Patchwork Quilt of Tort Law*, 2 N. ILL. U.L. REV. 369 (1982) (authored by Sharon C. Brennan); Comment, *Market Share Liability: Is California a Mere Gadfly on the Products Liability Scene or Is It a Harbinger of a National Trend?*, 11 OHIO N.U.L. REV. 129 (1984) (authored by Thomas H. Winslow); Casenote, *California Expands Tort Liability Under the Novel "Market Share" Theory: Sindell v. Abbott Laboratories*, 8 PEPPERDINE L. REV. 1011 (1981) (authored by N. Denise Taylor) [hereinafter Casenote, *California Expands Tort Liability*]; Case Comment, *Refining Market Share Liability: Sindell v. Abbott Laboratories*, 33 STAN. L. REV. 937 (1981) (authored by Robert A. Kors) [hereinafter Case Comment, *Refining Market Share Liability*].

9. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, cert. denied, 493 U.S. 944 (1989).

10. 570 So. 2d 275 (Fla. 1990).

I. MARKET-SHARE LIABILITY: THE FIRST TEN YEARS

Although the various forms of market-share liability all originated in the context of diethylstilbestrol¹¹ (DES) product-liability lawsuits,¹² one should not conclude that the theory of recovery is limited to a single type of product. Rather, the theory encompasses a particular set of defendant identification problems.¹³ Courts have applied the market-share theory in cases dealing with vaccines,¹⁴ asbestos,¹⁵ and

11. Doctors prescribed the drug diethylstilbestrol to prevent miscarriages. Downey & Gulley, *Theories of Recovery for DES Damage*, 4 J. LEGAL MED. 167, 170 (1983). For a basic discussion of the drug's origins, testing, and uses, see *id.* at 168-72; Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 963-67 (1978) (authored by Naomi Sheiner).

12. See *Conley v. Boyle Drug Co.*, 570 So. 2d 275 (Fla. 1990); *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989); see also *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 689 P.2d 368 (1984); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 342 N.W.2d 37, *cert. denied*, 469 U.S. 826 (1984).

13. Courts have recognized explicitly that the scope of market-share liability may extend beyond DES cases. See, e.g., *Collins*, 116 Wis. 2d at 191, 342 N.W.2d at 49 (noting that "this method of recovery could apply in situations which are factually similar to the DES cases"). Commentators also have made this observation. See, e.g., Schwartz & Mahshagian, *supra* note 8, at 941-42 (recognizing DES cases as a subset of the cases involving defendant identification problems).

14. See *Morris v. Parke, Davis & Co.*, 667 F. Supp. 1332, 1342-43 (C.D. Cal. 1987). If the allegation merely asserts that a particular dose of a vaccine was defective, however, a market-share theory will be inapplicable. *Sheffield v. Eli Lilly & Co.*, 144 Cal. App. 3d 583, 594, 192 Cal. Rptr. 870, 876 (1983). Another court has refused to apply market-share liability to cases involving vaccines, arguing that it is contrary to the public policy of providing them. See *Shackil v. Lederle Laboratories, Div. of Am. Cyanamid Co.*, 116 N.J. 155, 188, 561 A.2d 511, 528 (1989).

15. See *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1359-60 (E.D. Tex. 1981) (allowing discovery to proceed based upon a market-share theory of liability), *rev'd in part on other grounds*, 681 F.2d 334 (5th Cir. 1982). Courts, however, have consistently rejected the use of market-share liability for determining liability or apportioning damages in asbestos cases. See, e.g., *Hannon v. Waterman Steamship Corp.*, 567 F. Supp. 90, 92-93 (E.D. La. 1983); *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 186-87 (S.D. Ga. 1982). Generally, they reject it because plaintiffs fail to assert which of the different types of asbestos was responsible for their injuries. In particular, the plaintiffs fail to establish that they were injured by a fungible product. See, e.g., *Mullen v. Armstrong World Indus., Inc.*, 200 Cal. App. 3d 250, 255-56, 246 Cal. Rptr. 32, 36-37 (1988); see also Schwartz & Mahshagian, *supra* note 8, at 959 n.96. Courts have found that these failures by plaintiffs are fatal to their market-share theory claims because different companies have varying market shares of each of the different types of asbestos. See, e.g., *Marshall v. Celotex Corp.*, 651 F. Supp. 389, 392-94 (E.D. Mich. 1987); *Vigiolto v. Johns-Manville Corp.*, 643 F. Supp. 1454, 1462-65 (W.D. Pa. 1986), *aff'd without op.* 826 F.2d 1058 (3d Cir. 1987); *In re Related Asbestos Cases*, 543 F. Supp. 1152, 1158 (N.D. Cal. 1982).

plasma products.¹⁶ Lawyers have advocated market-share liability's expansion to products as disparate as multipiece tire rims¹⁷ and electrical heat tape.¹⁸ Commentators have suggested applying the theory to combat air pollution,¹⁹ in particular acid rain,²⁰ and to a variety of other circumstances.²¹

A. *The Development of Market-Share Liability in the Early 1980s*

In the early 1980s, courts developed three different versions of market-share liability. In *Sindell v. Abbott Laboratories*²² the California Supreme Court developed the original theory. No court outside California, however, has adopted the complete *Sindell* rationale.²³ Four years later, the Wisconsin Supreme Court, in *Collins v. Eli Lilly Co.*,²⁴ borrowed from the *Sindell* decision and developed a distinct theory of liability that included market shares in apportioning damages.²⁵ Shortly thereafter, the Washington Supreme Court, in *Martin*

16. See *Ray v. Cutter Laboratories, Div. of Miles, Inc.*, 754 F. Supp. 193, 194 (M.D. Fla. 1991) (applying market-share liability to Factor VIII, a blood plasma product used by hemophiliacs).

17. See *Bradley v. Firestone Tire & Rubber Co.*, 590 F. Supp. 1177, 1181 (D.S.D. 1984); *Tirey v. Firestone Tire & Rubber Co.*, 33 Ohio Misc. 2d 50, 51, 513 N.E.2d 825, 827 (C.P. Montgomery County 1986); *Cummins v. Firestone Tire & Rubber Co.*, 344 Pa. Super. 9, 24-27, 495 A.2d 963, 971-72 (1985).

18. See *Kinnett v. Massachusetts Gas & Elec. Supply Co.*, 716 F. Supp. 695, 697 n.7 (D.N.H. 1989).

19. See Note, *Pollution Share Liability*, 9 COLUM. J. ENVTL. L. 297, 312-20 (1984) (authored by Ellen Friedland) (suggesting a variation on market-share liability).

20. See Comment, *Proof of Causation in a Private Action for Acid Rain Damage*, 36 ME. L. REV. 117, 141-50 (1984) (authored by Patrick J. Scully).

21. See Endress & Sozio, *Market Share Liability: A One Theory Approach Beyond DES*, 1983 DET. C.L. REV. 1, 18-24 (advocating expansive use of the market-share liability theory).

22. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980); see also *infra* notes 29-42 and accompanying text (discussing *Sindell*).

23. One court outside of California has followed part of the *Sindell* decision without altering California's version of market-share liability in some fashion. See *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265 (D.S.D. 1983). Even so, the *McElhaney* court mentioned *Sindell* only in denying a motion for summary judgment and discussed only the identification aspects and not the apportionment aspects of the decision. See *id.* at 270-71.

24. 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied, 469 U.S. 826 (1984); see also *infra* notes 43-56 and accompanying text (discussing *Collins*).

25. 116 Wis. at 190, 342 N.W.2d at 49.

v. Abbott Laboratories,²⁶ developed a third version of market-share liability²⁷ that was adopted in other states.²⁸ A brief examination of these three theories is useful to understand some of the issues involved in suits involving indeterminate defendants.

1. *The California variation*—In *Sindell*, the plaintiff alleged that she developed a malignant bladder tumor and adenosis as a result of exposure to DES before birth.²⁹ She sought damages from five drug companies that manufactured DES during the period when her mother ingested the drug.³⁰ The plaintiff stated that she was unable to identify the particular manufacturer of the DES taken by her mother.³¹

Although the court rejected three theories of liability proposed by the plaintiff,³² it nevertheless found that, given the circumstances of the case, a modified version of the rule of *Summers v. Tice*³³ should be applied.³⁴ The court justified

26. 102 Wash. 2d 581, 689 P.2d 368 (1984); see also *infra* notes 57-73 and accompanying text (discussing *Martin*).

27. 102 Wash. at 602-07, 689 P.2d at 381-83.

28. Two other courts adopted the *Martin* rationale. See *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1526 (D. Mass. 1985); *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 286 (Fla. 1990). An Illinois state court of appeals also adopted the *Martin* rationale, but was later reversed by the Illinois Supreme Court. *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 18-20, 527 N.E.2d 333, 344-45 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

29. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 594-95, 607 P.2d 924, 926, 163 Cal. Rptr. 132, 134, *cert. denied*, 449 U.S. 912 (1980).

30. Although ten companies were named in *Sindell*'s original complaint, only five—Abbott Laboratories, E.R. Squibb & Sons, the Upjohn Company, Eli Lilly & Co., and Rexall Drug Company—were involved in the appeal to the California Supreme Court. *Id.* at 596 n.4, 607 P.2d at 927 n.4., 163 Cal. Rptr. at 135 n.4. The action was dismissed or the appeal abandoned on various grounds as to the other five defendants. *Id.* In one particular situation, the action was dismissed against the defendant because the defendant demonstrated that it had not manufactured DES during the period when the plaintiff's mother ingested the drug. *Id.*; see also *id.* at 602, 607 P.2d at 930, 163 Cal. Rptr. at 138.

31. Allegedly, doctors customarily prescribed DES by its generic rather than its brand name, and pharmacists filled orders with whatever brand was in stock. *Id.* at 595, 607 P.2d at 926, 163 Cal. Rptr. at 134. Therefore, it is possible that the plaintiff's mother actually ingested the product of more than one manufacturer.

32. The court rejected alternative liability, concert of action, and enterprise theory as bases for recovery. See *id.* at 598-610, 607 P.2d at 928-35, 163 Cal. Rptr. at 136-143. I will not elaborate on this point because it has already been discussed extensively. See, e.g., Note, *Square Pegs*, *supra* note 8, at 784-99; Comment, *Into the Quagmire*, *supra* note 8, at 212-24; Casenote, *California Expands Tort Liability*, *supra* note 8, at 1021-31.

33. 33 Cal. 2d 80, 86-87, 199 P.2d 1, 4-5 (1948) (recognizing what is now called the theory of "alternative liability" and applying it in a case in which two hunters negligently shot at a third hunter, who was struck with only a single bullet).

34. *Sindell*, 26 Cal. 3d at 610-11, 607 P.2d at 936-37, 163 Cal. Rptr. at 144.

its holding that the plaintiff had a cause of action on the basis of three public policy arguments: (1) between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury; (2) defendants are better able to bear the cost of injury resulting from the manufacture of a defective product; and (3) the manufacturer is in the best position to discover and prevent defects and to warn of harmful effects.³⁵

To prevail under this theory, a plaintiff must join as defendants in the action the manufacturers of a substantial share³⁶ of the DES that her mother might have taken, otherwise known as the "appropriate" market.³⁷ After the plaintiff establishes that the defendants were negligent or strictly liable in their manufacture of the product, the burden of proof shifts to defendants to exculpate themselves.³⁸

In decisions following *Sindell*, California courts clarified the cause of action in three respects. First, the courts stated that the substantial share requirement is not met when only ten percent of the relevant market is joined in an action.³⁹ Second, resolving a point of considerable controversy,⁴⁰ the California Supreme Court stated that under a market-share liability theory, liability among the defendants is several but

35. *Id.*

36. In choosing the substantial share requirement, the court noted that it was not setting the threshold as high as the 75 to 80 percent of the market suggested by one author. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145 (citing Comment, *supra* note 11, at 996 (1978) (authored by Naomi Sheiner)). The plaintiff in *Sindell* alleged that the defendants produced 90% of the DES market, *id.*, which would easily meet this requirement if it were proven at trial. Other plaintiffs have failed to meet the substantial share requirement, a requirement that the court acknowledges has not been established as a specific percentage of the market. See *Murphy v. E.R. Squibb & Sons, Inc.*, 40 Cal. 3d 672, 684, 710 P.2d 247, 255, 221 Cal. Rptr. 447, 455 (1985) (holding that a plaintiff fails to meet the substantial share requirement when only 10% of the market is joined).

37. *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court readily acknowledged the practical problems in defining markets and determining market shares but dismissed them as "largely matters of proof." *Id.* at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 146.

38. *Id.* at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

39. *Murphy v. E.R. Squibb & Sons, Inc.*, 40 Cal. 3d 672, 684, 710 P.2d 247, 255, 221 Cal. Rptr. 447, 455 (1985).

40. Some people reading *Sindell* believed that it made defendants jointly liable. See, e.g., *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 601-02, 689 P.2d 368, 380-81 (1984); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 190 n.9, 342 N.W.2d 37, 48 n.9, *cert. denied*, 469 U.S. 826 (1984); Note, *Best Remedy*, *supra* note 8, at 163. Other people believed the decision did not impose joint liability. See, e.g., *Fischer*, *supra* note 8, at 1635-36; *Robinson*, *supra* note 8, at 725. Some commentators decided that it was simply unclear. See, e.g., Note, *DES Causation*, *supra* note 8, at 1194-96; Case Comment, *Refining Market Share Liability*, *supra* note 8, at 941-42.

not joint.⁴¹ Third, the court in which California's DES cases are consolidated for trial accepted the parties' stipulation defining the appropriate market for analysis as the national market of DES for pregnancy use, thus removing determination of the relevant market from the facts of each individual case.⁴²

2. *The Wisconsin variation*—Four years after *Sindell*, the Wisconsin Supreme Court, in *Collins v. Eli Lilly Co.*,⁴³ confronted a similar claim. The Wisconsin court, however, rejected the particular market-share theory adopted in *Sindell*.⁴⁴

The court declined to adopt the *Sindell* theory for three reasons. The "primary" factor for not adopting the California court's theory was "the practical difficulty of defining and proving market share,"⁴⁵ which the court characterized as "a near impossible task if it is to be done fairly and accurately."⁴⁶ The court also objected to inflating proportionately the damages of the defendants to ensure that a plaintiff could recover fully in a case in which some defendants were absent,⁴⁷ an interpretation of *Sindell* that later proved erroneous.⁴⁸ Furthermore, the court believed that the determination of market shares would involve a "waste of judicial resources."⁴⁹

Yet, the court did find some value in the market-share theory.⁵⁰ The Wisconsin scheme includes market share as "a relevant factor in apportioning liability among defendants."⁵¹ Moreover, the Wisconsin Supreme Court clearly intended its theory of recovery to apply to products other than DES.⁵²

41. See *Brown v. Superior Ct.*, 44 Cal. 3d 1049, 1072-75, 751 P.2d 470, 485-87, 245 Cal. Rptr. 412, 426-28 (1988).

42. See General Order No. 12, at 8, In re DES Litigation, No. 830-109 (Cal. Sup. Ct., City and County of San Francisco Aug. 16, 1985).

43. 116 Wis. 2d 166, 342 N.W.2d 37, cert. denied, 469 U.S. 826 (1984).

44. *Id.* at 189, 342 N.W.2d at 48.

45. *Id.*

46. *Id.* at 190, 342 N.W.2d at 48.

47. See *id.* at 190 n.9, 342 N.W.2d at 48 n.9.

48. See *Brown v. Superior Ct.*, 44 Cal. 3d 1049, 1072-73, 751 P.2d 470, 485, 245 Cal. Rptr. 412, 426-27 (1988).

49. *Collins*, 116 Wis. 2d at 190, 342 N.W.2d at 49.

50. *Id.* ("We emphasize, however, that we do not totally reject the market share theory."). Other courts have recognized *Collins* as a variation of market-share liability. See, e.g., *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, 493 U.S. 944 (1989).

51. *Collins*, 116 Wis. 2d at 190, 342 N.W.2d at 49.

52. *Id.* at 191, 342 N.W.2d at 49 ("We note that this method of recovery could apply in situations which are factually similar to the DES cases.")

Under the Wisconsin variant of market-share liability in DES litigation, a plaintiff can make out a prima facie case against at least one defendant by alleging that: (1) the plaintiff's mother took DES; (2) the DES caused the plaintiff's injuries; (3) the defendant's conduct breached a legally recognized duty to the plaintiff; and (4) the defendant produced or marketed the type (color, shape, markings, size, or other characteristics) of DES taken by the plaintiff's mother or, if this cannot be alleged, that the defendant produced or marketed DES as a miscarriage preventative.⁵³

Once the plaintiff makes out a prima facie case under either a negligence or strict liability theory, the burden of proof shifts to the defendants.⁵⁴ A defendant can exculpate itself by proving "by a preponderance of the evidence that it did not produce or market the subject DES either during the time period the plaintiff was exposed to DES or in the relevant geographical market area in which the plaintiff's mother acquired the DES."⁵⁵ The jury then apportions liability among the unexculpated defendants using a comparative negligence method that considers several factors, including market share.⁵⁶

3. *The Washington variation*—Shortly after the Wisconsin decision, the Supreme Court of Washington, in *Martin v. Abbott Laboratories*,⁵⁷ developed a third version of market-share liability. The *Martin* court specifically rejected the California theory of market-share liability for two reasons.⁵⁸ First, the theory fails to define a "substantial" share of the market.⁵⁹ Second, the theory contains an "inherent distortion of liability" when courts inflate defendants' market shares to provide a full recovery for the plaintiff.⁶⁰

As a response, the *Martin* court developed the theory of "market-share alternate liability."⁶¹ Similar to the Wisconsin

53. *Id.* at 193-94, 342 N.W.2d at 50.

54. *Id.* at 195-98, 342 N.W.2d at 51-52.

55. *Id.* at 198, 342 N.W.2d at 52.

56. *Id.* at 200, 342 N.W.2d at 53.

57. 102 Wash. 2d 581, 689 P.2d 368 (1984).

58. *Id.* at 602, 689 P.2d at 381.

59. *Id.*

60. *Id.* at 601, 689 P.2d at 380-81.

61. *Id.* at 602-07, 689 P.2d at 381-83.

theory,⁶² this theory allows suit against a single defendant.⁶³ As in the California and Wisconsin theories, defendants can exculpate themselves.⁶⁴

In contrast to the Wisconsin approach,⁶⁵ this theory creates a rebuttable presumption that the remaining defendants have equal market shares and are proportionately liable.⁶⁶ If all of the defendants establish by a preponderance of the evidence that their market shares amount to less than one hundred percent, the plaintiff does not recover the entire judgment.⁶⁷

The Washington variation was developed further in *George v. Parke-Davis*.⁶⁸ In *George*, the Washington Supreme Court decided that the determination of market shares, including whether to admit local, state, or national data, is within the discretion of the trial court.⁶⁹ The court also reaffirmed its holding in *Martin* that liability is only several in nature, not joint and several.⁷⁰

The *Martin* theory has been popular beyond Washington's borders. Three courts outside Washington adopted its market-share liability theory: a Massachusetts federal district court,⁷¹ an Illinois state court of appeals,⁷² and the Florida Supreme Court.⁷³ Because the Illinois Supreme Court rejected completely the theory of market-share liability, however, it reversed the Illinois state court of appeals.⁷⁴

62. See *supra* note 53 and accompanying text. Indeed, the opinions are not only similar, but verbatim in parts. Compare *Martin*, 102 Wash. 2d at 604-05, 689 P.2d at 382 with *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 191-94, 342 N.W.2d 37, 49-50, cert. denied, 469 U.S. 826 (1984).

63. *Martin*, 102 Wash. 2d at 604, 689 P.2d at 382.

64. *Id.* at 605, 689 P.2d at 383.

65. *Collins*, 116 Wis. 2d at 200, 342 N.W.2d at 53.

66. *Martin*, 102 Wash. 2d at 605, 689 P.2d at 383.

67. *Id.* at 606, 689 P.2d at 383.

68. 107 Wash. 2d 584, 733 P.2d 507 (1987).

69. *Id.* at 593, 733 P.2d at 512.

70. *Id.* at 594-97, 733 P.2d at 513-15.

71. See *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1526-27 (D. Mass. 1985).

72. See *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 18-19, 527 N.E.2d 333, 344 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990).

73. See *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 283 (Fla. 1990).

74. *Smith*, 137 Ill. 2d at 251, 560 N.E.2d at 337.

B. *New York and Florida Adopt Market-Share Liability*

With the acceptance of market-share liability by both New York⁷⁵ and Florida,⁷⁶ one can no longer consider the theory to be merely the legal equivalent of the latest fad from California. Moreover, these cases are important in their own right. New York's theory is the most expansive of any market-share theory yet adopted.⁷⁷ Meanwhile, Florida's theory was applied almost immediately outside the DES context,⁷⁸ which is a significant development.

1. *The New York variation*—When it decided *Hymowitz v. Eli Lilly & Co.*⁷⁹ in 1989, New York's highest court could have chosen to apply any one of the existing several formulations of market-share liability⁸⁰ or even a concert of action theory developed by the Michigan Supreme Court in a DES case.⁸¹ Indeed, seven years earlier the New York court itself had affirmed the judgment in a DES case based on a concert of action theory.⁸² Even with these extensions of traditional tort law already available to the court, the decision was novel enough that one judge sitting on the court—a judge who agreed that market-share liability was appropriate⁸³—characterized it as “a radical departure from fundamental tenets of tort law.”⁸⁴ As a result, the decision immediately drew attention from outside the legal community. For example, an article in the *New York Times* characterized *Hymowitz* as “one of the most far-reaching product-liability rulings ever issued by an

75. See *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989).

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

77. See *infra* notes 83-100 and accompanying text.

78. See *infra* notes 108-09 and accompanying text.

79. 73 N.Y.2d 487, 539 N.E.2d 1069, 541 N.Y.S.2d 941, *cert. denied*, 493 U.S. 944 (1989).

80. *Id.* at 509-11, 539 N.E.2d at 1076-77, 541 N.Y.S.2d at 948-49 (recognizing the alternatives).

81. See *Abel v. Eli Lilly & Co.*, 418 Mich. 311, 336-39, 343 N.W.2d 164, 175-76, *cert. denied*, 469 U.S. 833 (1984).

82. See *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 584-85, 436 N.E.2d 182, 188-89, 450 N.Y.S.2d 776, 782-83 (1982).

83. *Hymowitz*, 73 N.Y.2d at 516, 539 N.E.2d at 1081, 541 N.Y.S.2d at 953 (Mollen, J., concurring in part and dissenting in part).

84. *Id.* at 520, 539 N.E.2d at 1083, 541 N.Y.S.2d at 955 (Mollen, J., concurring in part and dissenting in part).

American court."⁸⁵ The case, not surprisingly, also has provoked a fair amount of legal commentary.⁸⁶

In *Hymowitz*, the court found that existing common-law doctrines provided no relief for the plaintiff.⁸⁷ The court refused to apply the theory of alternative liability given (1) the great number of possible manufacturers, (2) the corresponding remote possibility that any particular manufacturer caused the injury, (3) the lack of any real prospect of having all possible tortfeasors before the court, and (4) the prospect that the defendants would not be in any better position than the plaintiffs to identify the responsible tortfeasors.⁸⁸ It also rejected the theory of concert of action because the record did not contain evidence of an agreement, tacit or otherwise, among the drug companies regarding the development or marketing of DES.⁸⁹ The court next considered the modified form of concert of action used in *Bichler v. Eli Lilly & Co.*⁹⁰ but refused to adopt it as the law of New York.⁹¹

The court then considered and refused to adopt each of the three extant versions of market-share liability.⁹² Instead, unlike courts in other states, the New York Court of Appeals adopted a theory that holds a manufacturer liable for damages regardless of proof that its product did not cause the plaintiff's injury.⁹³ In so doing, New York created a more expansive form of liability by enabling market-share liability to serve as

85. Greenhouse, *Product-Liability Ruling Untouched*, N.Y. Times, Oct. 31, 1989, at 11, col. 4 (nat'l ed.).

86. See, e.g., *The Problem of the Indeterminate Defendant: Market Share Liability Theory—Hymowitz v. Eli Lilly and Co.*, 55 BROOKLYN L. REV. 863 (1989) (consisting of a symposium of three articles); Note, *Market Share Liability New York Style: Negligence in the Air?*, 55 MO. L. REV. 1047 (1990) (authored by Mike D. Murphy); Comment, *Market Share Liability—Did New York Go Too Far?*: Hymowitz v. Eli Lilly & Co., 64 ST. JOHN'S L. REV. 363 (1990) (authored by William D. Wilson).

87. *Hymowitz*, 73 N.Y.2d at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947.

88. *Id.* at 506, 539 N.E.2d at 1074, 541 N.Y.S.2d at 946.

89. *Id.*

90. 55 N.Y.2d 571, 582, 436 N.E.2d 182, 187, 450 N.Y.S.2d 776, 781 (1982).

91. *Hymowitz*, 73 N.Y.2d at 508, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948. The court noted that *Bichler* was decided on the basis of an unusual jury instruction that the defense counsel did not object to in that case. *Id.*

92. *Id.* at 509-11, 539 N.E.2d at 1076-78, 541 N.Y.S.2d at 948-50.

93. *Id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The court attempted to limit the scope of its holding by noting that "the DES situation is a singular case" involving an "unusual scenario." *Id.* at 508, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947. Such attempts to limit market-share liability can be quite ineffective. See *infra* notes 107-09 and accompanying text.

more than a mere burden-shifting device.⁹⁴ The stunning aspect of the New York theory is that it denies a defendant the opportunity to exculpate itself,⁹⁵ which is an integral part of each of the other three variants.⁹⁶ A defendant's share of the national market of DES for use during pregnancy determines, not as a rebuttable presumption but absolutely, its proportion of the damages owed to the plaintiff.⁹⁷

In developing its own version of market-share liability, the *Hymowitz* court noted that its theory is *not* based on a belief that, in the long run, liability will approximate causation.⁹⁸ Furthermore, the court stated explicitly that the theory does not provide a reasonable link between a defendant and the risk it created toward a particular plaintiff.⁹⁹ The court offered this rationale for its theory:

Instead, we choose to apportion liability so as to correspond to the over-all culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large. . . .

. . . [A defendant who sold DES for pregnancy use cannot exculpate itself] because liability here is based on the over-all risk produced, and not causation in a single case It is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drugstores. These fortuities in no way

94. See, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612, 607 P.2d 924, 937, 163 Cal. Rptr. 132 (noting that the theory only serves to shift the burden of proof), 145, cert. denied, 449 U.S. 912 (1980).

95. *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. The only way for a defendant to exculpate itself under *Hymowitz* is to demonstrate that it was not a member of the national market of DES sold for pregnancy use. *Id.* at 512 n.2, 539 N.E.2d at 1078 n.2, 541 N.Y.S.2d at 950 n.2.

96. See *Sindell*, 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145; *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 197-98, 342 N.W.2d 37, 52, cert. denied, 469 U.S. 826 (1984); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 605, 689 P.2d 368, 382 (1984).

97. *Hymowitz*, 73 N.Y.2d at 511-12, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.

98. *Id.* A professed goal of *Sindell*-type liability was to have liability approximate causation. See *Sindell*, 26 Cal. 3d at 611-13, 607 P.2d at 937, 163 Cal. Rptr. at 145; see also *Brown v. Superior Ct.*, 44 Cal. 3d 1049, 1074, 751 P.2d 470, 486, 245 Cal. Rptr. 412, 428 (1988).

99. *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. This approach defeats the Wisconsin Supreme Court's goal of providing a reasonable link between the defendant and the risk created to a particular plaintiff. See *Collins*, 116 Wis. 2d at 191-92, 342 N.W.2d at 49.

diminish the culpability of a defendant for marketing the product, which is the basis of liability here.¹⁰⁰

In this passage, the court mentions two kinds of exculpatory evidence—evidence based on the type of pill ingested and evidence based on the geographical area where the defendant marketed a pill. A third kind of exculpatory evidence, which the court neglects to discuss explicitly, is perhaps the most fundamental—the time period when the plaintiff's mother ingested the pills.¹⁰¹ The reasoning of the decision indicates that the court also would disallow a defendant's attempt to exculpate itself based on this type of evidence. A theory that leads a court to hold defendants who marketed only blue pills liable to plaintiffs injured only by red pills or to hold defendants who marketed DES only in California liable to those who purchased it only in New York, also would lead a court to consider it a "mere windfall" or "fortuit[ly]" if defendants that marketed DES only after 1965 could exculpate themselves from claims by the plaintiffs who were injured by DES marketed before 1960. Because liability is not based on the "single case," following the court's logic, it is irrelevant when the defendant sold the DES, because the sale had nevertheless contributed to the "over-all risk produced" to the "public-at-large."

The concept of a market share, however, demands at least three parameters—what the product was, where it was being sold, and when it was sold.¹⁰² If any of these three parameters is missing, a measure of market share becomes conceptually meaningless. If New York adheres to its own logic, it must calculate the national market share of a defendant based on the defendant's share of DES for pregnancy use *ever sold* in the United States.

100. *Hymowitz*, 73 N.Y.2d at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950. Upjohn marketed a type of pill that was distinguishable from the type ingested by the plaintiff. *Id.* at 523-24, 539 N.E.2d at 1085, 541 N.Y.S.2d at 957 (Mollen, J., concurring in part and dissenting in part). Rexall Drug Co. had sold only to its own drugstores, while the plaintiff had established only purchases from other stores. *Id.*

101. The timing of a sale of DES is mentioned as possible exculpatory evidence in a number of other cases. See, e.g., *Smith v. Eli Lilly & Co.*, 173 Ill. App. 3d 1, 19, 527 N.E.2d 333, 345 (1988), *rev'd*, 137 Ill. 2d 222, 560 N.E.2d 324 (1990); *Burnside v. Abbott Laboratories*, 351 Pa. Super. 264, 288-89, 505 A.2d 973, 986 (1985).

102. See, e.g., Note, *DES Causation*, *supra* note 8, at 1189-93 (recognizing these factors); Keeton, *Annual Survey of Texas Law: Torts*, 36 Sw. L.J. 1, 14 (1983) (same); *cf.* *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (noting the importance of time, geography, and especially product definition in antitrust cases).

2. *Florida adopts Washington's theory*—In 1985, the Florida Supreme Court refused to apply market-share liability in *Celotex Corp. v. Copeland*.¹⁰³ The court stated that because the plaintiff could identify several suppliers of the asbestos to which he had been exposed, it did not find it necessary to accept or reject a market-share theory.¹⁰⁴

Five years later, however, the court adopted Washington's market-share alternate liability theory when it decided a DES case, *Conley v. Boyle Drug Co.*¹⁰⁵ Although the court adopted the theory, it set an additional requirement that reflected its experience in *Celotex*. Before using the market-share theory, "a plaintiff must make a showing that she has made a genuine attempt to locate and to identify the manufacturer responsible for her injury."¹⁰⁶

In adopting market-share alternate liability, the *Conley* court "recognized the unique circumstances surrounding the injury suffered by the DES plaintiff."¹⁰⁷ Courts in Florida, however, wasted no time in expanding the use of market-share liability beyond the DES context. On January 10, 1991, only one day after the denial of a motion for rehearing in *Conley*,¹⁰⁸ a federal district court in Florida relied on *Conley's* market-share theory to reverse a summary judgment for defendants in a product-liability case involving Factor VIII, a blood plasma product used by hemophiliacs.¹⁰⁹ Apparently, the DES scenario is not as "unique" as some have believed.

II. JURISDICTIONAL LIMITS ON JUDICIAL POWER

After surveying the development of market-share liability, it is reasonable to ask what the limits on judicial power in imposing liability are under the American system of government.

103. 471 So. 2d 533, 534 (Fla. 1985).

104. *Id.* at 539.

105. 570 So. 2d 275, 286 (Fla. 1990).

106. *Id.* In developing this requirement, the court apparently drew not only on its own experience in *Celotex*, but also on similar proposals in the legal literature. *See id.* at 285 (citing Note, *The Application of a Due Diligence Requirement to Market Share Theory in DES Litigation*, 19 U. MICH. J.L. REF. 771 (1986) (authored by Thomas C. Willcox)).

107. *Id.* at 283.

108. *See id.* at 275.

109. *See Ray v. Cutter Laboratories, Div. of Miles, Inc.*, 754 F. Supp. 193, 196 (M.D. Fla. 1991).

Such an inquiry, in its broadest sense, easily deserves an article or book of its own. Therefore, in this setting, I will narrow the question to a brief examination of how the doctrines involving standing to sue in federal court and the requirements of *in personam* jurisdiction interact with market-share liability theory.

A. *The Plaintiff's Standing to Sue in Federal Court*

Although some market-share liability cases have been litigated in federal courts,¹¹⁰ I question whether a federal court, even one in New York, could adjudicate a case based on the *Hymowitz* theory. Surely, this inability to apply *Hymowitz* would be an exceptional situation because federal courts sitting in diversity apply the substantive law of the state in which they sit.¹¹¹ A plaintiff proceeding under the *Hymowitz* theory, however, may lack standing to sue in federal court.¹¹²

Under article III of the Constitution, a litigant must have standing to invoke the power of a federal court.¹¹³ The standing doctrine serves a crucial role in our federal government. As the Supreme Court stated: "[T]he law of Art. III standing is built on a single basic idea—the idea of separation of powers."¹¹⁴ In essence, standing doctrine defines the judicially recognized boundary between adjudicative functions and legislative or executive functions. The doctrine, therefore, is designed "to prevent the virtually limitless spread of judicial authority."¹¹⁵

110. See, e.g., *Morris v. Parke, Davis & Co.*, 667 F. Supp. 1332 (C.D. Cal. 1987); *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521 (D. Mass. 1985).

111. *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

112. I recognize that the implications of the analysis that follows also could extend to other situations involving indeterminate defendants, but I will confine this discussion to *Hymowitz* because I believe that it offers the starkest example.

113. See *Allen v. Wright*, 468 U.S. 737, 750-51 (1984); see also E. CHERMERINSKY, *FEDERAL JURISDICTION* 51 (1989).

114. *Allen*, 468 U.S. 737, 752; see also *Warth v. Seldin*, 422 U.S. 490, 498 (1975) (stating that standing focuses on "the proper—and properly limited—role of the courts in a democratic society"). Several works on standing address this point at length. See, e.g., Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U.L. REV. 881 (1983); Logan, *Standing to Sue: A Proposed Separation of Powers Analysis*, 1984 WIS. L. REV. 37.

115. *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 805 (D.C. Cir. 1987). Justice Scalia has made the same point. See Scalia, *supra* note 114, at 881 (stating that standing doctrine prevents the "overjudicialization of the processes of self-governance").

In a recent case, the Supreme Court stated: “[S]tanding . . . has a core component derived directly from the Constitution. A plaintiff must allege personal injury *fairly traceable* to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”¹¹⁶ A clearly distinct, “fairly traceable” causation test for standing evolved¹¹⁷ only recently, in 1984.¹¹⁸

Obviously, what constitutes a “fairly traceable” cause is open to interpretation.¹¹⁹ Recently, several federal courts of appeals and federal district courts have articulated the test in terms of “but for” causation.¹²⁰ The implication for a plaintiff

116. *Allen*, 468 U.S. at 751 (emphasis added). One commentator argues that the causation requirement in particular serves the goal of maintaining the separation of powers. See Logan, *supra* note 114, at 46.

117. “Evolved” is a generous term in describing standing jurisprudence, an area of judicial decision making that one commentator has described as “permeated with sophistry.” 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 24:35, at 342 (2d ed. 1983). Other commentators have called various decisions in this area “bizarre,” L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-18, at 134 (2d ed. 1988), “erratic, even bizarre,” J. VINING, LEGAL IDENTITY 1 (1978), and “perverse,” Chayes, *The Supreme Court, 1981 Term—Foreword: Public Law Litigation and the Burger Court*, 96 HARV. L. REV. 4, 18 (1982).

118. E. CHEREMINSKY, *supra* note 113, at 64 (citing *Allen*). Previously, the Court treated causation and redressability as one inquiry, but courts now recognize them as distinct inquiries. *Id.*; see also *Jaimes v. Toledo Metro. Hous. Auth.*, 758 F.2d 1086, 1093 n.16 (6th Cir. 1985); *Martin v. International Dryer Corp.*, 637 F. Supp. 101, 102 n.1 (E.D.N.C. 1986).

119. *Cf. Connecticut Gen. Life Ins. Co. v. Aguilar*, 579 F. Supp. 1201, 1205 (N.D. Ill. 1983) (“Legal causation is a kind of shorthand used by courts to explain results reached by the application of a largely unspecified set of moral, economic, legal and social principles to the competing interests involved.”) (interpreting a contract); *Robinson, supra* note 8, at 713 (“As every freshman student of tort law soon learns to his discomfort, ‘causation’ is an inscrutably vague notion, susceptible to endless philosophical argument, as well as practical manipulation.”); Zwier, “*Cause in Fact*” in *Tort Law—A Philosophical and Historical Examination*, 31 DE PAUL L. REV. 769, 776 (1982) (“Each trier of fact must deduce a cause from evidentiary facts, and this deduction is dependent upon the trier’s past experience.”).

120. See, e.g., *United Transp. Union v. ICC*, 891 F.2d 908, 915 (D.C. Cir. 1989) (“[T]he exemption challenged here might not even constitute ‘but for’ causation.”); *Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir. 1989) (“*But for* the government’s refusal to revoke the League’s tax-exempt status, then, the League, as a practical matter, would have been unable to sponsor the . . . debates which [allegedly] caused the injury”); *FDIC v. Morley*, 867 F.2d 1381, 1388 (11th Cir. 1989) (“[T]he appropriate analysis considers whether ‘but for’ the FDIC’s infusion of capital [the plaintiff would have been injured].”); *Martin*, 637 F. Supp. at 102-03 (“A plaintiff establishes a sufficient causal connection between injury and challenged action if he can make a reasonable showing that the alleged injury would not have occurred ‘but for’ the defendant’s challenged conduct.”).

Several cases dealing with this issue seem to rule out allowing standing for a cause of action based on *Hymowitz*. See, e.g., *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 818 (D.C. Cir. 1987) (“[The injury] is alleged almost as an abstraction,

relying on *Hymowitz* is clear: Because the *Hymowitz* theory has discarded the notion of "traceability" between the plaintiff's injury and the defendant's conduct in the individual case,¹²¹ the plaintiff cannot meet the standing requirements of article III and the case will fall outside the jurisdiction of a federal court. Not only does this mean that a plaintiff could not properly file the case in federal court, but it also would prevent a defendant from removing the case from state court to federal court because removal jurisdiction requires that the case fall within the original jurisdiction of a federal court.¹²²

Already, a federal district court has ruled that the plaintiffs in a product-liability suit lacked standing to sue when seeking recovery under both concert of action and market-share liability theories.¹²³ The inquiry is independent of whether or not state law recognizes the injury.¹²⁴

because the complaint omits allegation of any direct link, causal or otherwise, between the asserted harm and the challenged actions.") (Buckley, J., concurring); *Northwest Airlines v. FAA*, 795 F.2d 195, 201 (D.C. Cir. 1986) ("The injury requirement will not be satisfied simply because a chain of events can be hypothesized in which the action challenged eventually leads to actual injury."); *Coker v. Bowen*, 715 F. Supp. 383, 388 (D.D.C. 1989) ("The mere possibility that causation is present is not enough . . .").

121. See *supra* notes 93-100 and accompanying text. The court noted that it adopted the theory with "full knowledge that it concedes the lack of a logical link between liability and causation in a single case." *Hymowitz v. Eli Lilly & Co.*, 73 N.Y.2d 487, 513 n.3, 539 N.E.2d 1069, 1078 n.3, 541 N.Y.S.2d 941, 950 n.3, cert. denied, 493 U.S. 944 (1989). To the extent that *Hymowitz* recognizes the injury itself as the "over-all risk produced" to the "public-at-large," *id.* at 512, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950, there is not a problem with traceability. There is, however, still a problem. Such an injury would not be cognizable because it does not meet the requirement that the injury be "distinct and palpable," *Warth v. Seldin*, 422 U.S. 490, 501 (1975), and a "personal" injury, *Allen v. Wright*, 468 U.S. 737, 751 (1984).

122. 28 U.S.C. § 1441 (a) (1988); see, e.g., *Jackson v. Southern Cal. Gas Co.*, 881 F.2d 638, 641 (9th Cir. 1989) ("A suit may be removed to federal district court only if it could have been brought there originally.").

123. See *Herlihy v. Ply-Gem Indus., Inc.*, 752 F. Supp. 1282, 1290-91 (D. Md. 1990). Although *Herlihy* reaches the right conclusion, I believe its analysis is faulty because it examines state law in a manner far more appropriate for deciding a motion under Federal Rule of Civil Procedure 12(b)(6) than in a manner appropriate for standing. See *infra* note 124 and accompanying text.

124. Even under the old "legal interest" test, see *Tennessee Elec. Power Co. v. Tennessee Valley Auth.*, 306 U.S. 118, 137-38 (1939), federal courts were not bound to the decisions of state courts recognizing injury for the purposes of standing in federal court. In a case decided the same term as *Tennessee Electric*, Justice Frankfurter stated: "[I]t by no means follows that a state court ruling on adequacy of legal interest is binding here. . . . Nor can recognition by a state court of . . . an undifferentiated, general interest confer jurisdiction on us." *Coleman v. Miller*, 307 U.S. 433, 466 (1939) (Frankfurter, J., separate opinion). Even earlier, the Supreme Court had recognized that "state law cannot alter the essential character or function of a federal court." *Herron v. Southern Pac. Co.*, 283 U.S. 91, 94 (1931); see also *Byrd*

B. In Personam Jurisdiction over Defendants

The Constitution requires that a court have personal jurisdiction over a defendant:

The requirement that a court have personal jurisdiction flows . . . from the Due Process Clause. The personal jurisdiction requirement recognizes and protects an individual liberty interest. It represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty. Thus, the test for personal jurisdiction requires that "the maintenance of the suit . . . not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U. S. 310, 316 (1945), quoting *Milliken v. Meyer*, 311 U. S. 457, 463 (1940).¹²⁵

In deciding whether a court may exercise personal jurisdiction over a nonresident defendant, the Supreme Court has developed a test evaluating the defendant's "minimum contacts" with the forum state.¹²⁶ The Court has stated that these minimum contacts "must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'"¹²⁷

v. Blue Ridge Elec. Coop., 356 U.S. 525, 538-39 (1958) (discussing the continuing vitality of *Herron* on this point).

Under the current "injury in fact" test, see *Association of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153-55 (1970), it is even clearer that the standing inquiry is independent of state law: "Standing, which derives from the article III case or controversy requirement, is met when the plaintiff can demonstrate 'injury in fact.' To what extent that injury is legally cognizable under the laws of the various jurisdictions is a separate inquiry." *In re Asbestos School Litigation*, 104 F.R.D. 422, 425 n.1 (E.D. Pa. 1984), amended on other grounds, 107 F.R.D. 215 (E.D. Pa. 1985) (citation omitted). Therefore, the "injury in fact" requirement establishes a floor for what injuries a federal court can recognize, which is why the inquiry is independent of state law. *But see Herlihy*, 752 F. Supp. at 1290-91 (analyzing state law in a federal standing inquiry).

125. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702-03 (1982) (footnote omitted).

126. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-94 (1980); *Hanson v. Denckla*, 357 U.S. 235, 250-55 (1958); *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

127. *Asahi Metal Indus. Co. v. Superior Ct.*, 480 U.S. 102, 109 (1987) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985)). The "purposeful availment" concept is over thirty years old and can be traced back to *Hanson*. 357 U.S. at 253.

The minimum contacts test could prevent a court from exercising jurisdiction over a defendant in a variety of market-share liability scenarios in which the defendant would be unable to exculpate itself otherwise.¹²⁸ Generally, the burden of proving the existence of jurisdiction in these situations involving long-arm jurisdiction falls on the plaintiff.¹²⁹ To take the most extreme example, a plaintiff relying on the *Hymowitz* theory, which allows no exculpation, still would need to demonstrate that a defendant had purposefully availed itself of the privilege of conducting activities within New York. By contesting jurisdiction, a defendant that had never operated in New York could still avoid the most liability-expanding aspects of the *Hymowitz* theory.

Even under theories that allow exculpation, if the relevant market is defined as an area exceeding or wholly outside of the forum state, a defendant might be unable to exculpate itself and yet escape liability by contesting jurisdiction. For example, if the relevant market encompasses three states and a particular defendant sold in only one of them—but not in the forum state—it would be unable to exculpate itself but could successfully challenge jurisdiction.

The Constitution's restrictions on personal jurisdiction constitute only the bare minimum that courts must recognize. In adjudication involving nonresident defendants, a state can impose additional restraints on its courts through its "long-arm" jurisdiction statute. For example, the statute in New York provides additional restrictions on exercising personal jurisdiction.¹³⁰ The retroactive application of long-arm

128. See Note, *Best Remedy*, *supra* note 8, at 161-63 (discussing a similar point regarding cross-complaints).

129. See, e.g., *Madera v. Hall*, 717 F. Supp. 812, 817 (S.D. Fla. 1989) (applying Florida law), *aff'd in part and vacated in part sub nom. Maclara v. Hall*, 916 F.2d 1510 (11th Cir. 1990); *PPG Indus., Inc. v. Systonetics, Inc.*, 614 F. Supp. 1161, 1164-65 (W.D. Pa. 1985) (applying Pennsylvania law); *Pavlo v. James*, 437 F. Supp. 125, 127 (S.D.N.Y. 1977) (applying New York law).

130. N.Y. CIV. PRAC. L. & R. 302 (McKinney 1990); see also *Talbot v. Johnson Newspaper Corp.*, 71 N.Y.2d 827, 829-30, 522 N.E.2d 1027, 1029, 527 N.Y.S.2d 729, 731 (1988) ("[T]he New York long-arm statute (CPLR 302) does not provide for in personam jurisdiction in every case in which due process would permit it."); *Banco Ambrosiano, S.P.A. v. Artoc Bank & Trust Ltd.*, 62 N.Y.2d 65, 71, 464 N.E.2d 432, 435, 476 N.Y.S.2d 64, 66-67 (1984) ("[The long-arm statute] does not go as far as is constitutionally permissible [in establishing jurisdiction over nonresidents]. Thus, a situation can occur in which the necessary contacts to satisfy due process are present, but in personam jurisdiction will not be obtained in this State because the statute does not authorize it.").

statutes presents another barrier in some instances. Generally, courts have held that when a long-arm statute operates under a theory of the defendant's "implied consent" to be sued in the state, such statutes cannot apply retroactively.¹³¹ Indeed, this argument was made successfully in *Conley v. Boyle Drug Co.*¹³² The plaintiff offered no proof that two of the defendants were operating in Florida at the time her mother consumed DES.¹³³ Therefore, no personal jurisdiction existed under the then-current Florida long-arm statute.¹³⁴ The court held that the broader Florida statute in effect when the suit was filed could not apply retroactively to the defendants and ordered these two defendants dismissed from the case.¹³⁵

III. RESTRAINING THE COURTS THROUGH FEDERAL LEGISLATION UNDER THE COMMERCE CLAUSE

Given inconsistent standards among states, overdeterrence results as companies can be held liable for damages that are several multiples greater than their "actual" liability.¹³⁶ Consider the following example: All of Company A's sales supply 60% of a particular product in a state. These sales represent 5% of the national market. If this state determines market-share liability on a state-wide basis, Company A will be held responsible for 60% of all damages, paying in full what are in essence its actual damages. But in any other state that adopts a national market-share standard, Company A also will be liable for its 5% share of the national market. Company A's liability will thus exceed the damage it actually caused.

Overdeterrence, therefore, is one consequence of inconsistent apportionment schemes, resulting in a reduction in the

131. See, e.g., *Chrischilles v. Griswold*, 260 Iowa 453, 459, 463, 150 N.W.2d 94, 98, 101 (1967); *Mladinich v. Kohn*, 186 So. 2d 481, 483 (Miss. 1966).

132. 570 So. 2d 275 (Fla. 1990).

133. *Id.* at 287-89.

134. *Id.*

135. *Id.* at 288-89.

136. See, e.g., Fischer, *supra* note 8, at 1656-58; Note, *DES Causation*, *supra* note 8, at 1192-93; Comment, *Into the Quagmire*, *supra* note 8, at 237; Casenote, *California Expands Tort Liability*, *supra* note 8, at 1038-39.

marketing of products as well as an increase in their prices.¹³⁷ Overdeterrence also creates an incentive to shift products to separate corporate subsidiaries to minimize chances that liability for a single product would deplete not only all of that product's profits, but also profits from other product lines.¹³⁸ Such behavior sacrifices efficiencies that might otherwise result from integration.¹³⁹ As an alternative, a company might forego development or production of the risky product completely. For example, several vaccine companies have chosen to leave the market rather than face such incalculable possible liability.¹⁴⁰

Hymowitz also reduces the incentive for defendants to retain or develop information concerning the sale of goods,¹⁴¹ an incentive fostered by each of the previous market-share cases, because the information no longer has exculpatory value. The case removes the motivation to have such information available for future use.

Given the common-law heritage of the tort action and the common-law expertise of the states, primary responsibility for reforming market-share liability should rest with the states.¹⁴² The states, however, may develop inconsistent standards or standards that impose costs on other states, thereby interfering with interstate commerce. When this occurs, the federal government may resolve the situation through its powers under the commerce clause.¹⁴³

137. See S. REP. NO. 356, 101st Cong., 2d Sess. 2 (1990); 137 CONG. REC. S3260-61 (daily ed. Mar. 13, 1991) (statement of Sen. Rockefeller).

138. See *Roe, Corporate Strategic Reaction to Mass Tort*, 72 VA. L. REV. 1, 4-5, 39-49 (1986).

139. See *id.* at 5.

140. For a discussion of the impact of such withdrawal on remaining vaccine companies, see *Shackil v. Lederle Laboratories*, 116 N.J. 155, 179, 561 A.2d 511, 523 (1989).

141. See Note, *DES Causation*, *supra* note 8, at 1202 (discussing this incentive).

142. See Reed & Watkins, *Product Liability Tort Reform: The Case for Federal Action*, 63 NEB. L. REV. 389, 461 (1984).

143. U.S. CONST. art. I, § 8, cl. 3. Even if one conceives of a state's tort regime as a form of safety regulation, this alone would not prevent the federal government from invoking the commerce clause. See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 530 (1959) (striking down Illinois safety regulations because they violate the dormant commerce clause by imposing heavy costs on interstate commerce).

A Uniform Market Share Liability Act has been proposed to address the issue of inconsistent state standards. See Leighton, *Market Share Liability: The Need for a Uniform Market Share Liability Act*, TRIAL, Nov. 1985, at 83, 85-87. For a discussion

As an effort to regulate interstate commerce, U.S. Senator Robert Kasten introduced a federal product-liability bill on March 13, 1991.¹⁴⁴ The bill's sponsors do not intend to occupy the field of product liability, but seek to make discrete improvements on the existing tort system.¹⁴⁵ The bill's most significant provisions include:

- (1) establishing procedures encouraging expedited settlements and alternative dispute resolution;¹⁴⁶
- (2) setting a national standard for imposing liability on a defendant who sold, but did not manufacture, a product;¹⁴⁷
- (3) setting a national standard for awarding punitive damages;¹⁴⁸
- (4) establishing a national statute of limitations for product-liability actions;¹⁴⁹
- (5) setting a national standard for coordinating product-liability awards and workers' compensation awards;¹⁵⁰
- (6) eliminating joint liability for noneconomic damages,¹⁵¹ and
- (7) providing a defense against a claimant who is primarily responsible for an injury and was under the influence of alcohol or drugs.¹⁵²

of the relative merits of state and federal action on this question, see Reed & Watkins, *supra* note 142; Schwartz & Mahshigian, *supra* note 8, at 973-74.

144. See S. 640, 102d Cong., 1st Sess., 137 CONG. REC. S3255-60 (daily ed. Mar. 13, 1991). Proposals for federal regulation of product-liability law are not new. See, e.g., Schwartz & Bares, *Federal Reform of Product Liability Law: A Solution that Will Work*, 13 CAP. U.L. REV. 351 (1984) (discussing reform efforts); Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 U. MICH. J.L. REF. 575 (1985) (proposing a limited federal approach).

145. See S. 640, *supra* note 144, § 301, 137 CONG. REC. S3258.

146. *Id.* §§ 201-02, 137 CONG. REC. S3257-58.

147. *Id.* § 302, 137 CONG. REC. S3258.

148. *Id.* § 303, 137 CONG. REC. S3258-59.

149. *Id.* § 304, 137 CONG. REC. S3259.

150. *Id.* § 305, 137 CONG. REC. S3259.

151. *Id.* § 306, 137 CONG. REC. S3259-60.

152. *Id.* § 307, 137 CONG. REC. S3260.

Among the bill's aims are to improve risk assessment¹⁵³ and to promote fairness.¹⁵⁴

Consistent with these goals, adding a small section to the bill could prevent the problems that arise when courts attempt to apportion market-share liability on a national or regional basis. For this reason, I propose the following amendment dealing with market-share liability.¹⁵⁵

LIMITATIONS ON DETERMINING DAMAGES
FOR MARKET-SHARE LIABILITY

(a) When apportioning damages among manufacturers in a manner that includes as relevant the share of the market of goods sold by each manufacturer, the market considered as relevant shall not exceed the boundaries of the State, possession, or territory in which the product was purchased.

(b) If the injury is not attributable to a single purchase of a product and all of the purchases did not take place in the same State, possession, or territory, then the relevant market shall be the State, possession, or territory in which the consumer made the last purchase.¹⁵⁶

153. As Senator Kasten stated: "The uniformity we seek will make the assessment of risk easier, and thus help to stabilize the insurance market." 137 CONG. REC. S3255 (daily ed. Mar. 13, 1991).

154. *Id.* at S3256.

155. Indeed, Senator Kasten included more stringent provisions dealing with market-share liability in earlier versions of federal product-liability reform efforts. *See, e.g.*, S. 2631, 97th Cong., 2d Sess. §§ 4, 9, 128 CONG. REC. 13,774, 13,776 (1982). Proposals for legislation dealing with market-share liability began soon after the *Sindell* court developed the theory. *See, e.g.*, Schwartz & Mahshigian, *supra* note 8, at 964-74 (designing a legislative framework for DES claims and perhaps similar situations dealing with indeterminate defendants); Note, *Market Share Liability for DES (Diethylstilbestrol) Injury: A New High Water Mark in Tort Law*, 60 NEB. L. REV. 432, 446-49 (1981) (authored by Barbara J. Koperski) (advocating a federal insurance plan for products); Note, *Market Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003, 1037-42 (authored by Cynthia L. Chase).

156. There are basically four methods of determining the appropriate boundary in this situation involving multiple purchases: One can determine the boundary based on the first or last place the product was purchased, the place where the plurality of sales occurred, or the purchases can be pro-rated among the different jurisdictions. I chose the last purchase option because the most recent records would be the most complete. In addition, this option conserves judicial resources.

Although this amendment does not address the problems involving constitutional interpretation raised in Part II, it does serve the narrow goal of preventing courts in different jurisdictions from imposing penalties that may be individually rational but, because of inconsistent liability schemes, yield a cumulatively irrational result. To the extent that the amendment prevents courts from proceeding because of insufficient data, this is not an indication of a failure on the part of the judiciary to achieve justice. Rather, I believe that it is more appropriate to see it as an indication that the judiciary is not the appropriate branch of government from which to seek resolution of such claims.¹⁵⁷

IV. CONCLUSION

An examination of the theory of market-share liability offers an interesting perspective on the role of the judiciary because the theory stretches traditional limits that have restrained the exercise of judicial power. For common-law courts to fashion new remedies for new injuries is, of course, nothing new. The problems that market-share liability highlights are whether those new remedies exceed the power delegated to the federal judiciary by the Constitution or violate the notions of fairness and due process contained in the contemporary understanding of the requirements for *in personam* jurisdiction. My efforts here have been to raise and examine the question, not to provide a definitive answer.

Moving to a more practical problem, the development of the different versions of market share liability also illuminates one of the features of living in our federalist system—that under certain circumstances individually rational decisions by

157. Congress has already demonstrated that it can devise an administrative scheme for compensating victims that could be adapted to these circumstances. See National Childhood Vaccine Injury Act of 1986, 42 U.S.C. § 300aa-10 to -17 (1988). The situation has deteriorated to the point that even the manufacturers of products are asking for such a program rather than face incalculable liability. The associate general counsel for Johnson & Johnson, Inc. has supported such a program. See Fine, *A Personal Perspective from the "Manufacturer,"* 55 BROOKLYN L. REV. 899, 903 (1989). Several such proposals already appear in the legal literature. See, e.g., Reed & Watkins, *supra* note 142; Schwartz & Mahshigian, *supra* note 8; Note, *Best Remedy, supra* note 8, at 172-76.

states will not result in a rational decision for the nation as a whole. The legislation that I have proposed seeks to solve this problem through the use of a single standard to replace the inconsistent state standards that are the source of the problem.

