IDENTIFICATION OF THE DEFENDANT/ MANUFACTURER IN GENERIC PRODUCT CASES: ISSUES AND QUESTIONS*

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To this date, there have been no definitive New Jersey Supreme Court cases addressing the problems faced by a plaintiff who is unable to identify the manufacturer of an injury-producing product. Frequently this problem arises when a product is distributed generically, when it is mixed with the products of several manufacturers before it reaches the public, or when it may be otherwise impossible to identify which of several manufacturers produced the particular product. The problem has appeared in New Jersey cases with respect to generic drugs, in which the effects of the alleged defect are manifested many years later, and to chemicals under circumstances in which the source may be difficult (if not impossible) to prove. This issue, however, can appear in many contexts.

The most frequently reported national example involves the drug diethylstilbestrol, known as DES. The DES cases involve a plaintiff who is generally unable to identify the precise manufacturer of the drug ingested by her mother a generation earlier. The New Jersey Superior Court, Appellate Division, in *Namm v. Charles E. Frosst & Co.*,[1] determined that this issue must be left to the Supreme Court[2] and, in any event, none of the then-existing theories of collective responsibility would be applied in New Jersey.[3]

Since *Namm*, most New Jersey controversies raising the issue have been settled before they could engender a contrary appel-

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* This article in no way is to be considered an official position either of the author or of the New Jersey courts.

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[1] 178 N.J. Super. 19, 427 A.2d 1121 (App. Div. 1981).

[2] *Id.* at 35, 427 A.2d at 1129. The appellate division asserted that they were "bound by the principles of law developed and declared by our Supreme Court. Extensive policy shifts of this magnitude should not be initiated by an intermediate appellate court. The appropriate tribunal to accomplish such drastic changes is either the Supreme Court or the Legislature." *Id.*

[3] Specifically, the plaintiffs in *Namm* advocated the alternative liability theory and the enterprise liability or industry-wide liability theories. *Id.* at 27, 427 A.2d at 1125. *See infra* notes 19-43 and accompanying text (discussion of theories).

late opinion. Two DES cases, however, which have reached the New Jersey Supreme Court are *Salomon v. Eli Lilly and Co.*,[4] and *Wolfsbruck v. Dow Chemical Co.*[5] *Salomon*, like *Namm*, was a DES action in which the defendants similarly claimed that the plaintiff could not identify the manufacturer of the particular medication, prescribed generically, that had been ingested by the plaintiff's mother many years before.[6] The trial court dismissed the action on its own motion.[7] The supreme court, in remanding the case, concluded that the complaint should not have been dismissed by the trial court on its own motion, but declined at that time to pass upon the potential validity of any causes of action or defenses.[8]

In *Wolfsbruck*, the plaintiff sued manufacturers and distributors of the industrial chemical perchloroethylene (Perc), which is used to clean dry cleaning machines and laundry.[9] The plaintiff claimed that exposure to the product fatally injured her husband.[10] The decedent's employment required him to service at least twenty-eight stores using Perc.[11] Nine of these stores received Perc from one distributor and two received the chemical from another.[12] The distributor that serviced the nine stores received fifty percent of its Perc from one manufacturer and the balance from other manufacturers.[13] The other distributor received its entire supply from a different manufacturer.[14] The appellate division in *Wolfsbruck* affirmed, with a dissent, the trial court's entry of judgment in favor of defendants as required by *Namm*, following an *in limine* motion.[15] In its opinion, the court, citing *Namm*, declined to adopt any theory of collective responsibility.[16] The New Jersey Supreme Court subsequently remanded the case for an expansion of the record.[17]

As was noted in the appellate division dissent in *Wolfsbruck*, there are four theories upon which some measure of industry-

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4 98 N.J. 58, 484 A.2d 320 (1984).

5 101 N.J. 252, 501 A.2d 924 (1985).

6 *See Salomon*, 98 N.J. at 59-60, 484 A.2d at 321.

7 *Id.* at 61, 484 A.2d at 321.

8 *See id.*, 484 A.2d at 322.

9 *See* Wolfsbruck v. Dow Chemical Co., No. A-970-82T3, slip op. at 2 (N.J. Sup. Ct. App. Div. Mar. 22, 1984), *remanded*, 101 N.J. 252, 501 A.2d 924 (1985).

10 *Id.* at 4.

11 *Id.* at 3.

12 *Id.*

13 *Id.*

14 *Id.*

15 *See id.* at 7.

16 *Id.* at 4-6.

17 *Wolfsbruck*, 101 N.J. at 252, 501 A.2d at 924.

wide responsibility is based.[18] The dissent delineated the four theories as (1) concert of action, (2) alternative liability, (3) enterprise or industry-wide liability, and (4) "market share" modification of enterprise liability.[19]

The concert of action theory is "based upon the substantial assistance of various producers of a product to each other to accomplish a tortious result."[20] This theory has been explained as allocating responsibility upon parties who "in pursuance of a common plan or design to commit a tortious act, actively take part in it, or further it by cooperation or request, or who lend aid or encouragement to the wrongdoer, or ratify and adopt the wrongdoer's acts done for their benefit. . . ."[21] The concert of action theory finds acceptance in the *Second Restatement of Torts*,[22] as well as in a number of products liability cases.[23]

The alternative liability theory holds that when "one of a group is responsible . . . the burden shifts to the other defendants to exculpate themselves."[24] For example, in *Anderson v. Somberg*,[25] while undergoing spinal surgery, the tip of a metallic instrument was broken off and left inside the plaintiff.[26] Since the plaintiff was unable to discover the identity of the party who caused the damage, he named a number of defendants who might be subject to liability.[27] The court, finding that a duty to the patient was breached, held that the burden of proof shifted to the defendants to show their freedom from liability.[28] This theory has been utilized in a number of cases involving products liability claims,[29] and is supported in the *Second Restatement of*

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18 *See Wolfsbruck*, slip op. at 7-9 (Dreier, J., dissenting).

19 *Id.*

20 *Id.* at 7 (Dreier, J., dissenting).

21 W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 46, at 323 (5th ed. 1984).

22 RESTATEMENT (SECOND) OF THE LAW OF TORTS § 876 (1979) [hereinafter RESTATEMENT SECOND].

23 *See, e.g.*, Abel v. Eli Lily & Co., 418 Mich. 311, 336-39, 343 N.W.2d 164, 176 (1984); Bichler v. Eli Lily & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982).

24 *Wolfsbruck*, slip op. at 7 (Dreier, J., dissenting).

25 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975).

26 *Id.* at 294, 338 A.2d at 3.

27 *Id.* at 295, 338 A.2d at 3. Specifically, the plaintiff named as defendants his doctor, the hospital, the hospital's medical supply distributor, and the manufacturer of the medical instrument (a rongeur). *Id.*

28 *Id.* at 302, 338 A.2d at 6-7.

29 *See, e.g.*, Bottazzi v. Petroleum Helicopters, Inc., 664 F.2d 49 (5th Cir. 1981); Abel v. Eli Lily & Co., 418 Mich. 311, 343 N.W.2d 164 (1984); Anderson v. Somberg, 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975); NOPCO v.

Torts.[30]

The enterprise or industry-wide liability theory imposes liability upon all members of an industry producing a product which causes harm; then, the theory gives the defendants the opportunity to exculpate themselves. Though this theory has been described as a hybrid of the concert of action and alternative liability theories,[31] the theory specifically allocates

> the industrywide (sic) standard . . . [as] the cause of the plaintiffs' injury, just as defendants' joint plan is the cause of injury in the traditional concert of action plea. Each defendant's adherence perpetuates this standard, which results in the manufacture of the particular, unidentifiable injury-causing product. Therefore, each industry member has contributed to plaintiff's injury.[32]

Use of the enterprise or industry-wide liability theory is exemplified in *Hall v. E.I. du Pont de Nemours & Co., Inc.*,[33] in which a number of children suffered injuries as a result of blasting caps that exploded.[34] The defendants in this case were the six companies who manufactured nearly all of the blasting caps in the United States.[35] The defendants, through their common trade association,[36] chose not to place warnings directly on each blasting cap and neglected to utilize other safety measures.[37] Though the complaint did not identify a specific manufacturer, it alleged that the *industry*, by its uniform practices, created the risk of harm.[38] The United States District Court for the Eastern District of New York, in denying the defendant's motion to dismiss, noted the viability of the plaintiff's claims as a result of the defendants' "joint control of risk."[39] Specifically, the court held that if the plaintiffs could prove by a preponderance of the available evidence that the caps causing the accident were the product of one of the defendants, then the burden of proof regard-

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Blaw-Knox Co., 59 N.J. 274, 272 A.2d 549 (1971). *See also* Summers v. Tice, 33 Cal. 2d 80, 199 P.2d 1 (1948) (applying alternative liability principles in pure negligence action).

30 RESTATEMENT SECOND, *supra* note 22, § 433 B(3).

31 *See* Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 974 (1978).

32 *Id.* at 997.

33 345 F. Supp. 353 (E.D.N.Y. 1972).

34 *Id.* at 359.

35 *Id.* at 358.

36 The defendants' common trade association, the Institute of Makers of Explosives (I.M.E.), was also named as a defendant. *Id.*

37 *Id.* at 359.

38 *See id.*

39 *See id.* at 375-76.

ing causation would shift to them.[40] Reflecting on *Hall*'s applicability to subsequent cases, the court posited that although its holding seemed fair given the facts before it, the reasoning "might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers."[41]

In the "market share" modification of enterprise liability, each defendant is liable to the plaintiff for a *pro rata* portion of the damages caused by the product, limited to the percentage share that defendant held of the relevant market. This theory was introduced by the California Supreme Court in the landmark case of *Sindell v. Abbott Laboratories*.[42] In *Sindell*, the court ruled that all of the defendants who manufactured DES "will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries."[43]

Although the "market share" theory has been criticized,[44] some courts have implied their willingness to utilize the theory.[45] In *Payton v. Abbott Labs*,[46] the plaintiffs were a class alleging injury as a result of DES intake by their mothers, but, similar to other cases, were unable to identify a specific manufacturer.[47] Although the Massachusetts Supreme Judicial Court chose not to follow *Sindell* be-

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40 *Id.* at 379.

41 *Id.* at 378.

42 26 Cal.3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980).

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

44 The initial criticism of the *Sindell* holding emanated from the dissent in that case which stated that this type of liability "represents a new high water mark in tort law" and may impose liability exceeding absolute liability. *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting). The California Supreme Court subsequently explained *Sindell* in Murphy v. E.R. Squibb & Sons, Inc., 40 Cal.3d 672, 710 P.2d 247, 221 Cal. Rptr. 447 (1985). In *Murphy*, the court found that a 10% DES market share by the defendant was insufficient to trigger the market share alternative liability theory. *Id.* at 684, 710 P.2d at 255, 221 Cal. Rptr. at 455. In sum, the court held that a "substantial" share of the market must be joined in an action before the burden of proof as to causation will shift to the defendants. *See id.* For general criticisms of *Sindell*, see Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623 (1981); Comment, *Market Share Liability for Defective Products: An Ill-Advised Remedy for the Problem of Identification*, 76 NW.U.L.REV. 300 (1981).

45 *See, e.g.*, McCormack v. Abbott Laboratories, 617 F. Supp. 1521 (D. Mass. 1985); Morris v. Parke, Davis & Co., 573 F. Supp. 1324 (C.D. Cal. 1983); McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D. 1983); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex 1981), *rev'd on other grounds*, 681 F.2d 334 (5th Cir. 1982); Payton v. Abbott Labs, 386 Mass. 540, 437 N.E.2d 171 (1982); Martin v. Abbott Laboratories, 102 Wash.2d 581, 689 P.2d 368 (1984) (en banc).

46 386 Mass. 540, 437 N.E.2d 171 (1982).

47 *See id.* at 542-43, 437 N.E.2d at 173.

cause of its concern with the ability of a non-negligent defendant, or one who could prove a lack of causation to exculpate itself,[48] the court did indicate:

> In both their reply brief and in oral argument, the plaintiffs suggest that if particular aspects of their market share theory create difficulties, we should excise, reformulate, and rewrite to create a theory under which they could recover without meeting the identification requirement. The posture of the case and consequence state of the record, the magnitude of the ramifications of our decision with respect to this certified question, and our view of the judicial process combine to convince us that such a course of action is imprudent at this time.
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> *That is not to say that on an adequate record this court would not recognize some relaxation of the traditional identification requirement in appropriate circumstances so as to allow recovery against a negligent defendant of that portion of a plaintiff's damages which is represented by that defendant's contribution of DES to the market in the relevant period of time.*[49]

In summarizing, the Massachusetts court explained:

> [W]e are unable to give a definitive answer on this record whether the manufacturers of DES named as defendants (who probably supplied some of the DES ingested by the mothers of the plaintiffs) can or cannot be held liable to the members of the plaintiffs' class when neither the plaintiffs nor the defendants can identify which manufacturers' DES was ingested by which mothers and where the named defendants are only some of the manufacturers of DES ingested by the mothers of the plaintiffs. *We have indicated, however, the view that we might permit recovery from those defendants shown to be negligent to the extent of their participation in the DES market, even though the plaintiffs cannot identify the particular source of DES which their mothers ingested.*[50]

The case of *McCormack v. Abbott Laboratories*[51] provided the Federal District Court in Massachusetts with the factual scenario envisioned in the *Payton* dictum. In *McCormack*, the court utilized a market share theory, presuming all of the named defendants held equal shares of the market; however, the court gave the defendants an opportunity to prove their actual market share.[52]

Federal courts have generally split on whether to adopt any of

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[48] *Id.* at 572-73, 437 N.E.2d at 189.
[49] *Id.* at 574, 437 N.E.2d at 190 (emphasis added).
[50] *Id.* at 575, 437 N.E.2d at 190 (emphasis added).
[51] 617 F. Supp. 1521 (D. Mass. 1985).
[52] *Id.* at 1526-27.

the four theories.[53] A number of federal courts have declined to use these theories because the states in which they sit had not yet adopted them.[54] Other federal courts have rejected these theories "on the basis that the product involved does not lend itself to market share or other [collective responsibility] analysis."[55] For example, in *In re Related Asbestos Cases*,[56] the District Court for the Northern District in California, recognizing the practical difficulties in determining the market share, held that California's "market share" theory should not be applied in all contexts.[57] Additionally, the court noted that in asbestos cases:

> numerous factors would make it exceedingly difficult to ascertain an accurate division of liability along market share lines. For example, unlike DES, which is a fungible commodity, asbestos fibers are of several varieties, each used in varying quantities by defendants in their products, and each differing in its harmful effects. Second, defining the relevant product and geographic markets would be an extremely complex task due to the numerous uses to which asbestos is put, and to the fact that some of the products to which the plaintiffs were exposed were undoubtedly purchased out of state sometime prior to the plaintiffs' exposure. A third factor contributing to the difficulty in calculating market shares is the fact that some plaintiffs were exposed to asbestos over a period of many years, during which time some defendants began or discontin-

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[53] For federal cases adopting at least one of the theories, see, *e.g.*, Bottazzi v. Petroleum Helicopters, Inc., 664 F.2d 49 (5th Cir. 1981) (alternative liability theory); Borel v. Fibreboard Paper Prod. Corp., 493 F.2d 1076 (5th Cir. 1973) (enterprise liability theory); McCormack v. Abbott Laboratories, 617 F. Supp. 1521 (D. Mass. 1985) (market share theory); McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D. 1983) (alternative liability theory); Hardy v. Johns-Mansville Sales Corp., 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd on other grounds*, 681 F.2d 334 (5th Cir. 1982) (market share theory); Morris v. Parke, Davis & Co., 573 F. Supp. 1324 (C.D. Cal. 1983) (market share theory); Hall v. E.I. du Pont de Nemours & Co., Inc., 345 F. Supp. 353 (E.D.N.Y. 1972) (enterprise liability theory).

For federal cases rejecting all of the theories, see, *e.g.*, In re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982); Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982); Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981).

[54] *See, e.g.*, Morton v. Abbott Laboratories, 538 F. Supp. 593 (M.D. Fla. 1982); Starling v. Seaboard Coast Line R.R. Co., 533 F. Supp. 183 (S.D. Ga. 1982); Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981).

[55] *Wolfsbruck*, slip op. at 11 (Dreier, J., dissenting). *See, e.g.*, Hannon v. Waterman S.S. Corp., 567 F. Supp. 90 (E.D. La. 1983); In re Related Asbestos Cases, 543 F. Supp. 1152 (N.D. Cal. 1982).

[56] 543 F. Supp. 1152 (N.D. Cal. 1982).

[57] *See id.* at 1158.

ued making asbestos products.[58]

State courts, other than New Jersey, have not been hesitant to utilize the four theories.[59] Courts in only two states, Missouri and Iowa, have unqualifiedly rejected the theories. In *Zafft v. Eli Lilly & Co.*,[60] a DES case, the Missouri Supreme Court rejected all of the theories of collective responsibility on a public policy basis,[61] stating:

> Competing with the interests of appellants are legitimate concerns that liability will discourage desired pharmaceutical research and development while adding little incentive to production of safe products, for all companies face potential liability regardless of their efforts. . . . And the consequences of imposing liability without identification extend to other areas of products liability law.[62]

In *Mulcahy v. Eli Lilly & Co.*,[63] another DES case, the Iowa Supreme Court declined to recognize any of the three theories contained in its certified question.[64] Noting the inapplicability of the alternative liability and enterprise liability theories to DES cases,[65] and rejecting the market share theory on policy grounds,[66] the court stated:

> We believe . . . that awarding damages to an admitted innocent party by means of a court-constructed device that places liability on manufacturers who were not proved to have caused the injury involves social engineering more appropriately within the legislative domain. . . . Plaintiffs request that we make a substantial departure from our fundamental negligence requirement of proving causation, without previous warning or guidelines. The imposition of liability upon a manufacturer for harm that it may not have caused is the very legal legerdemain, at least by our long held traditional standards, that we believe the courts should avoid unless prior warnings remain

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58 *Id.*

59 *See, e.g.*, Sindell v. Abbott Laboratories, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 449 U.S. 912 (1980) (market share theory); Abel v. Eli Lilly & Co., 418 Mich. 311, 343 N.W.2d 164 (1984) (alternative liability and concert of action theories); Bichler v. Eli Lilly & Co., 55 N.Y.2d 571, 436 N.E.2d 182, 450 N.Y.S.2d 776 (1982) (concert of action theory); Martin v. Abbott Laboratories, 102 Wash. 2d 581, 689 P.2d 368 (1984) (modified market share theory).

60 676 S.W.2d 241 (Mo. 1984) (en banc).

61 *See id.* at 244-47.

62 *Id.* at 247 (citations omitted).

63 386 N.W.2d 67 (Iowa 1986).

64 *See id.* at 70, 76. The theories advanced were the market share liability theory, the alternative liability theory, and the enterprise liability theory. *Id.* at 70.

65 *Id.* at 72, 74.

66 *Id.* at 75.

> unheeded. It is an act more closely identified as a function assigned to the legislature under its power to enact laws.[67]

In *Martin v. Abbott Laboratories*,[68] the Supreme Court of Washington chose not to recognize any of the established approaches by label, and instead adopted a modified market share liability theory—extending even beyond *Sindell*.[69] First, the court required a plaintiff utilizing its theory to join one or more defendants and prove that such defendant(s) manufactured or marketed the DES that caused the injury.[70] Next, the court held that any defendant may implead other defendants to reduce its presumptive share of the market and, further, may show its actual share of the market in order to reduce potential liability.[71] Finally, those defendants remaining in the case are presumed to have produced the entire market upon which the final percentages of liability are to be based.[72]

As earlier noted, the appellate division in *Wolfsbruck*, relying on its interpretation of *Namm*, affirmed a trial court decision which refused to apply any theory of collective responsibility.[73] Is *Wolfsbruck*, however, so different from the landmark alternative liability theory case of *Summers v. Tice*?[74] In *Summers*, the plaintiff sustained injuries when his eye was struck by shotgun pellets emanating from the gun of one of the two defendants, neither of whom saw him in their field of fire.[75] The injured plaintiff, however, was unable to prove which of the defendants fired the pellets which struck him.[76] The *Summers* court held that the two defendants were equally responsible for the injuries and shifted the burden of proof to the defendants to determine the actual tortfeasor.[77] The *Summers* principle was subsequently codified in the *Second Restatement of Torts*, section 433 B(3), which reads:

> Where the conduct of two or more actors is tortious, and it is proved that 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

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67 *Id.* at 76.

68 102 Wash. 2d 581, 689 P.2d 368 (1984) (en banc).

69 *See id.* at 605-06, 689 P.2d at 382-83.

70 *Id.* at 604, 689 P.2d at 382.

71 *See id.*

72 *Id.* at 605-07, 689 P.2d at 383.

73 *See supra* note 16 and accompanying text.

74 33 Cal. 2d 80, 199 P.2d 1 (1948).

75 *Id.* at 82, 199 P.2d at 1-2.

76 *Id.* at 83, 199 P.2d at 2.

77 *See id.* at 86, 199 P.2d at 4.

caused the harm.[78]

In *Wolfsbruck*, the plaintiff's decedent was injured by exposure to allegedly defective perchloroethylene which was introduced into the stream of commerce by several manufacturers.[79] The plaintiff contended that some of the manufacturers' products injured and killed the plaintiff's decedent.[80] Suppose in *Summers* that there was a third hunter who could not be joined in the action. Would it have been unfair then to hold the two defendants responsible for at least a two-thirds share of the plaintiff's damages? As the comment to section 433 B(3) of the *Second Restatement of Torts* explains:

> The cases thus far decided in which the rule stated in Subsection (3) has been applied all have been cases in which all of the actors involved have been joined as defendants. All of these cases have involved conduct simultaneous in time, or substantially so, and all of them have involved conduct of substantially the same character, creating substantially the same risk of harm, on the part of each actor. *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. Since such cases have not arisen, and the situations which might arise are difficult to forecast, no attempt is made to deal with such problems in this Section. *The rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it.*[81]

Suppose there was a fourth hunter in the *Summers* case who could prove that he used different sized shot or that he fired in a different direction and thus could not be responsible for the injuries. It would seem only logical that he be excluded and the remaining hunters held liable for their share as before. This analogy is not really far-fetched, and provides a framework for a liability analysis.

As exemplified by *Anderson v. Somberg*,[82] New Jersey courts have been receptive to a shifting of the burden of proof in appropriate circumstances. This notion was supported by the *Wolfsbruck* dissent, which noted:

Our Supreme Court in *Anderson v. Somberg*, . . . clearly stated

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78 RESTATEMENT SECOND, *supra* note 22, § 433 B(3).

79 *See Wolfsbruck*, slip op. at 3.

80 *Id.* at 4.

81 RESTATEMENT SECOND, *supra* note 22, § 433 comment h (emphasis added).

82 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975). *See supra* notes 25-28 and accompanying text (discussion of *Anderson*).

> that a defendant in an *alternative* liability case has the opportunity to exculpate itself, and is responsible only if it fails so to exculpate itself. . . .
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> This exculpation is a factor that a trial court should consider in a market share (enterprise liability) case in determining the percentages of the market for which a defendant would be responsible. The trial court should define the market depending upon the circumstances of the case. For example, in a drug case the market may be the suppliers to plaintiff's pharmacy or the immediate geographical area if the pharmacy has incomplete records. If a drug company can show by its records that it did not supply the pharmacy or area, as the case may be, it would be exculpated.[83]

Utilization of the above approach in a drug, chemical, or similar case permits the *Summers* rationale, combined with fairness, to allow a defendant to show that its product could not have caused the injury. There is no basis in most cases for a true enterprise liability, or a concert of action, to accomplish a tortious result. The ability to exculpate oneself should be an integral part of any general theory of liability. As was stated in the *Wolfsbruck* dissent:

> I, however, have not suggested adoption of a pure enterprise liability approach. In the interest of fairness to both an injured plaintiff and the affected industry, a more balanced rule is needed that limits liability to the proportion of a culpable defendant's participation in the product's distribution.[84]

Applying *Anderson* and the *Summers* analysis as quoted above appears to require no radical departure in New Jersey for the adoption of a modified market share theory of liability, notwithstanding the *Namm* court's determination that "[e]xtensive policy shifts of this magnitude should not be initiated by an intermediate appellate court."[85] A resolution of this issue, however, must await a later day.

An issue left open in all of the decided New Jersey cases is whether the liability to be assessed under any theory of collective responsibility should be joint or several. The New Jersey Supreme Court has noted that the strict liability analysis, once knowledge of the defect is imputed, is "almost identical to [a] negligence analysis in its focus on the reasonableness of the defendant's conduct."[86] When there is no true "concert of action" in, for example, circum-

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[83] *Wolfsbruck*, slip op. at 13 (Dreier, J., dissenting).

[84] *Id.* at 17 (Dreier, J., dissenting).

[85] *Namm*, 178 N.J. Super. at 35, 427 A.2d at 1129. Use of this modified market share theory was first advanced in Ferrigno v. Eli Lilly and Co., 175 N.J. Super. 551, 420 A.2d 1305 (Law Div. 1980), but was rejected by the trial court.

[86] Feldman v. Lederle Laboratories, 97 N.J. 429, 451, 479 A.2d 374, 385 (1984).

stances wherein there is a conspiracy to distribute an unsafe product or the like, defendants are joined as a group, not because they are joint tortfeasors, but because of the problem of identification of the particular distributor. Yet, each might well be held accountable only for its own actions. In this limited respect, where there is no true "concert of action," the case might differ from the "joint and several" analysis of *Summers*. In *Summers*, it was unclear whether the court in finding alternative liability engendering joint and several responsibility focused upon the agreed-upon dangerous activity in its determination of the joint aspect of liability.

There has not yet been a New Jersey case raising the issue of the appropriateness of several, as opposed to joint and several, liability in an alternative liability market share or modified market share setting. In the appropriate case, a negligence-related analysis of the reasons for each type of responsibility must be examined before either approach can be applied.

A related matter is the duty of either the plaintiff or one or more of the defendants to assemble all possible manufacturers and distributors. The relevant "market" for at least limited market share liability is the area of possible distribution to the New Jersey plaintiff, and thus, the long-arm jurisdiction of New Jersey[87] could be exercised over all such defendants.[88] If less than all of the possible defendants are joined, a court must determine whether there is a reason to shift to the initial defendants the responsibility for impleading all remaining possible defendants. A plaintiff could assume its traditional burden if responsibility is several; either side could be given the duty if the responsibility is joint and several. This issue also will require thought and resolution as subsequent cases unfold.

As was noted in the *Wolfsbruck* dissent, the trial judge was correct in determining *Namm* to be the controlling law and dismissing the complaint. New Jersey courts following the *Namm* decision have not utilized any of the four existing theories of industry-wide allocation of responsibility in generic products liability cases. Of course, unless and until the New Jersey Supreme Court or some other part

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87 *See* N.J. CT. R. 4:4-4(a),(c),(e) (defining long-arm jurisdiction in New Jersey).

88 *See* Charles Gendler & Co., Inc. v. Telecom Equip. Corp., 102 N.J. 460, 480, 508 A.2d 1127, 1137 (1986) (New Jersey may retain jurisdiction "if the manufacturer knew or reasonably should have known of the distribution system through which its products were being sold. . . ."). *See also* Note, *New Jersey Adopts Stream-of-Commerce Theory for Establishing Personal Jurisdiction Over a Foreign Manufacturer*, 17 SETON HALL L. REV. 700 (1987).

of the appellate division in a published opinion rejects the *Namm* rationale, all trial judges will continue to be bound to follow *Namm*.