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COMMENTS

ENTERPRISE LIABILITY RECOVERY THEORIES: WILL THEY WORK IN TEXAS?

by Ann E. Ward

A fundamental principle of tort law requires that a plaintiff show a causal connection between his injury and the defendant's act before recovery will be granted.¹ In strict products liability cases causation consists of three elements. First, the plaintiff must show that he was injured by a product; second, that the injury occurred because the product was defective; and third, that the defect existed at the time the product left the defendant's hands.² The plaintiff thus must show that he was injured by an act of the defendant or an instrumentality within the defendant's control.³

The required showing necessitates a preliminary identification of the defendant as the manufacturer or seller of the product in question.⁴ Failure

1. McClure v. Allied Stores of Texas, Inc., 608 S.W.2d 901, 903 (Tex. 1980); Missouri Pac. R.R. v. American Statesman, 552 S.W.2d 99, 103 (Tex. 1977); General Motors Corp. v. Hopkins, 548 S.W.2d 344, 350 (Tex. 1977); Comanche Duke Oil Co. v. Texas Pac. Coal & Oil Co., 298 S.W. 554, 564 (Tex. Comm'n App. 1927, judgment adopted); Texas & N.O. Ry. v. Rooks, 292 S.W. 536, 544 (Tex. Comm'n App. 1927, judgment adopted); C. MORRIS & C. MORRIS, JR., MORRIS ON TORTS 155 (2d ed. 1980); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41 (4th ed. 1971).

2. Pittsburg Coca-Cola Bottling Works v. Ponder, 443 S.W.2d 546, 548 (Tex. 1969); Darryl v. Ford Motor Co., 440 S.W.2d 630, 631-32 (Tex. 1969); Jack Roach-Bissonnet, Inc. v. Puskar, 417 S.W.2d 262, 278 (Tex. 1967); W. PROSSER, *supra* note 1, § 103; Note, *Industry-Wide Liability: Solving the Mystery of the Missing Manufacturer in Products Liability Law*, 38 WASH. & LEE L. REV. 139, 142 (1981).

3. Coca-Cola Bottling Co. v. Fillmore, 453 S.W.2d 239, 241 (Tex. Civ. App.—Amarillo 1970, no writ); *see also* Technical Chem. Co. v. Jacobs, 480 S.W.2d 602, 604 (Tex. 1972) (even in strict liability, where product supplier's care irrelevant and liability based solely on act of selling defective product, causation is essential element). Regarding imposition of strict liability without regard to the seller's care, *see* McKisson v. Sales Affiliates, Inc., 416 S.W.2d 787 (Tex. 1967); Jacob E. Decker & Sons v. Capps, 139 Tex. 609, 164 S.W.2d 828 (1942); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

4. Thompson-Hayward Chem. Co. v. Childress, 277 Ala. 285, 169 So. 2d 305, 312 (1964); McCreery v. Eli Lilly & Co., 87 Cal. App. 3d 77, 84, 150 Cal. Rptr. 730, 734 (1978); Matthews v. GSP Corp., 368 So. 2d 391, 392 (Fla. Dist. Ct. App. 1979); Keen v. Dominick's Finer Foods, Inc., 49 Ill. App. 3d 480, 364 N.E.2d 502, 504 (1977); Dawley v. Thisius, 304 Minn. 453, 231 N.W.2d 555, 557 (1975); 1 L. FRUMER & M. FRIEDMAN, PRODUCTS LIABILITY § 11.01[4] (1982).

to so identify a responsible defendant normally prevents recovery.⁵ Identification of the manufacturer ordinarily is not difficult because the identity of the manufacturer is either well-known or uncontested.⁶ In some cases, however, the plaintiff, through no fault of his own, is unable to show who manufactured the injury-causing product. For example, the means of identification may have been destroyed in the injury-causing accident.⁷ Identification may also be impossible when the product-related injury does not occur until many years after all evidence of the manufacturer's identity has been lost.⁸ The injury may also have resulted from exposure to similar products of different manufacturers, so that no one manufacturer's product can be clearly identified as the cause of the injury.⁹ The potential for injury by the product of an unidentifiable manufacturer is enhanced by the large number of fungible products available in today's market.¹⁰

The current litigation concerning asbestos illustrates the plaintiff's dilemma.¹¹ Asbestos is a heat- and chemical-resistant mineral widely used as an insulating, packing, and fireproofing material.¹² Exposure to asbestos dust or fibers creates significant health hazards to persons involved in the mining, manufacture, or commercial application of the material, as well as to persons residing in the vicinity of asbestos plants or even in the households of asbestos workers.¹³ A person who inhales asbestos dust or fibers may contract asbestosis, a noncancerous but irreversible lung dis-

5. Gray v. United States, 445 F. Supp. 337, 338 (S.D. Tex. 1978); Kinsey v. Coca-Cola Bottling Co., 137 Ga. App. 681, 225 S.E.2d 96, 97 (1976); McDonough v. General Motors Corp., 6 Mich. App. 239, 148 N.W.2d 911, 913 (1967); Bilk v. Abbotts Dairies, Inc., 147 Pa. Super. 39, 23 A.2d 342, 345 (1941). For a general discussion of the identification requirement, see Annot., 51 A.L.R.3d 1344 (1973).

6. 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1.41 (2d ed. 1974).

7. See, e.g., Hall v. E.I. Du Pont de Nemours & Co., 345 F. Supp. 353 (E.D.N.Y. 1972) (plaintiffs injured by exploding blasting caps; all evidence of manufacturer's identity destroyed in blast).

8. Abel v. Eli Lilly & Co., 94 Mich. App. 59, 289 N.W.2d 20, 28 (1979).

9. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1094 (5th Cir. 1973), cert. denied, 419 U.S. 869 (1974).

10. LaMarca, *Market Share Liability, Industry-Wide Liability, Alternative Liability and Concert of Action: Modern Legal Concepts Preserving Liability for Defective But Unidentifiable Products*, 31 DRAKE L. REV. 61, 62-65 (1982). The author notes that the identification problem is complicated by the existence of trade associations, industry-wide standards, and governmental regulations, tending to cause uniformity among products. *Id.* at 63. Additionally, intra-industry cooperation and sharing of data effectively eliminate any distinguishing features among the products of different manufacturers. Sindell v. Abbott Labs., 26 Cal. 3d 588, 606, 607 P.2d 924, 932-33, 163 Cal. Rptr. 132, 140-41, cert. denied, 449 U.S. 912 (1980).

11. That the identification problem in generic product cases is of immense proportions is illustrated by the fact that as of 1978 over 1,000 lawsuits had been filed in the United States alleging injuries resulting from exposure to asbestos. Comment, *Asbestos Litigation: The Dust Has Yet to Settle*, 7 FORDHAM URB. L.J. 55, 73-74 (1978).

12. See generally Comment, *supra* note 11 (discussing asbestos industry); 40 Fed. Reg. 47,652-63 (1975) (discussing physical characteristics of asbestos); Sweeney, *The Asbestosis Time Bomb*, TRIAL, Oct. 1978, at 17 (discussing relationship between asbestos exposure and asbestosis).

13. Comment, *supra* note 11, at 58 (citing Anderson, *Household Contact Asbestos Neoplastic Risk*, 271 ANN. N.Y. ACAD. SCI. 311 (1976); Selikoff, Churg & Hammond, *Asbestos Exposure and Neoplasia*, 188 J. A.M.A. 22 (1964); Wagner, Sleggs & Marchand, *Diffuse*

ease, or mesothelioma, a form of lung cancer.¹⁴ Both diseases have a latency period of ten to twenty-five years between initial exposure and apparent effect.¹⁵ Once inhaled, asbestos dust and fibers remain permanently in the lungs, thus having a cumulative effect.¹⁶ This cumulative effect makes it difficult, if not impossible, to determine which of a series of exposures to asbestos caused the disease.¹⁷ A plaintiff exposed to the asbestos products of a number of manufacturers over a long time period may be unable to identify the manufacturer of the product responsible for his injury.

Litigation involving the drug diethylstilbestrol (DES) also exemplifies the manufacturer identification problem.¹⁸ DES is a synthetic estrogen manufactured by many companies between 1947 and 1971 and prescribed to pregnant women for the prevention of miscarriages.¹⁹ Some of the daughters of women who took DES now suffer from cancer or pre-cancerous conditions caused by their mothers' ingestion of DES.²⁰ The time lapse between the mothers' intake of the drug and the manifestation of harmful effects in their daughters makes identification of the manufacturer of the specific injury-causing drug virtually impossible.²¹

Courts in both asbestos and DES cases have generally held that inability to identify the correct defendant precludes recovery.²² A few courts, how-

Pleural Mesothelioma and Asbestos Exposure in North Western Cape Province, 17 BRIT. J. INDUS. MED. 260 (1960)).

14. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973) (citing Selikoff, Bader, Bader, Churg & Hammond, *Asbestosis and Neoplasia*, 42 AM. J. MED. 487 (1967); Selikoff, Churg & Hammond, *The Occurrence of Asbestosis Among Insulation Workers*, 132 ANN. N.Y. ACAD. SCI. 139 (1965)), *cert. denied*, 419 U.S. 869 (1974); Comment, *supra* note 11, at 58-64 (citing P. BRODEUR, *EXPENDABLE AMERICANS* 15 (1973); Sweeney, *supra* note 12; Wagner, Sleggs & Marchand, *supra* note 13).

15. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1083 (5th Cir. 1973) (citing Selikoff, Bader, Bader, Churg & Hammond, *supra* note 14; Selikoff, Churg & Hammond, *supra* note 14), *cert. denied*, 419 U.S. 869 (1974).

16. 493 F.2d at 1083.

17. *Id.*

18. Like the asbestos litigation, the DES cases are numerous. By 1978 some 80 to 100 cases regarding DES-related illnesses were pending in the United States. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 966-67 (1978).

19. *Id.* at 963-64 (citing Davis & Fugo, *Steroids in the Treatment of Early Pregnancy Complications*, 142 J. A.M.A. 778 (1950); Dieckmann, Davis, Rynkiewicz & Pottinger, *Does the Administration of Diethylstilbestrol During Pregnancy Have Therapeutic Value?*, 66 AM. J. OBSTET. & GYNEC. 1062 (1953); Karnaky, *The Use of Stilbestrol for the Treatment of Threatened and Habitual Abortion and Premature Labor: A Preliminary Report*, 35 S. MED. J. 838 (1942); Smith, *Diethylstilbestrol in the Prevention and Treatment of Complications of Pregnancy*, 56 AM. J. OBSTET. & GYNEC. 821 (1948)).

20. Comment, *supra* note 18, at 964-66 (citing B. SEAMAN, *WOMEN AND THE CRISIS IN SEX HORMONES* 29 (1977); Herbst, Robboy, Scully & Poskanzer, *Clear-Cell Adenocarcinoma of the Vagina and Cervix in Girls: Analysis of 170 Registry Cases*, 119 AM. J. OBSTET. & GYNEC. 713, 720 (1974); Herbst, Scully & Robboy, *Problems in the Examination of the DES-Exposed Female*, 46 OBSTET. & GYNEC. 353, 354 (1975); Ulfelder, *The Stilbestrol-Adenosis-Carcinoma Syndrome*, 38 CANCER 426, 428 (1976)).

21. Comment, *supra* note 18, at 972; see also Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713 (1982) (discussing difficulty in proving causation against individual drug manufacturer).

22. *Morton v. Abbott Labs.*, 538 F. Supp. 593, 599-600 (M.D. Fla. 1982) (DES); *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 187 (S.D. Ga. 1982) (asbestos); *Mizell v. Eli*

ever, have attempted to fashion a solution to the plaintiff's identification problem. These courts have developed the "enterprise liability" theories of products liability.²³ The notion of enterprise liability encompasses theories of alternative liability, concert of action, industry-wide liability, and market share liability. These theories relieve the plaintiff of the burden of identifying the manufacturer of the injury-causing product. This Comment examines each of the enterprise liability theories of recovery, reports the current status of each one in American courts, and analyzes the compatibility of these theories with Texas law.

I. ALTERNATIVE LIABILITY

Alternative liability is the term commonly applied²⁴ to the rule announced in *Summers v. Tice*.²⁵ In *Summers* the plaintiff and the two defendants were hunting together. During the hunt the defendants happened to fire their shotguns simultaneously in the plaintiff's direction. A shotgun pellet struck the plaintiff's eye. Both of the defendants were found to have acted negligently, but the plaintiff could not prove which defendant had fired the shot that injured his eye.²⁶ Under prior law neither defendant would have been held liable because they had not acted in concert.²⁷ The California Supreme Court held, however, that the unfairness of such a result demanded that the negligent defendants be held jointly and severally liable to the plaintiff, even though they had not acted in concert and could not both have caused the injury.²⁸ The court stated that the burden rested

Lilly & Co., 526 F. Supp. 589, 596 (D.S.C. 1981) (DES); *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121, 1125 (Super. Ct. App. Div. 1981) (DES).

23. Courts and legal scholars have traditionally used the term "enterprise liability" to refer to liability imposed on a business for torts arising out of or connected with the business. The earliest form of enterprise-associated liability was respondeat superior. Enterprise liability also includes the employer's duty to provide workers' compensation for job-related injuries and the strict products liability of manufacturers of defective products. These forms of liability generally have a no-fault basis, relying instead on the notion that the losses resulting from a particular enterprise should be borne by persons who have some logical relation to the enterprise. Regarding traditional forms of enterprise liability, see Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951); Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153 (1976); Steffen, *Enterprise Liability: Some Exploratory Comments*, 17 HASTINGS L.J. 165 (1965). The theories of enterprise liability this Comment analyzes rely on the same policy of risk allocation as does enterprise liability in the ordinary sense, but they operate on a fault rather than a no-fault basis. The term "enterprise liability" as used herein thus refers to a distinct subsection of business-related liability.

24. See, e.g., W. PROSSER, *supra* note 1, § 41, at 243; Kroll, *Intra-Industry Joint Liability: The Era of Absolute Products Liability*, 1980 INS. L.J. 185, 188 [hereinafter cited as Kroll, *Absolute Products Liability*]; Kroll, *Intra-Industry Joint Liability: A New Era in Products Liability*, 1979 INS. L.J. 193, 195; LaMarca, *supra* note 10, at 68-69; Note, *Industry-Wide Liability*, 13 SUFFOLK U.L. REV. 980, 1007 (1979).

25. 33 Cal. 2d 80, 199 P.2d 1 (1948).

26. 199 P.2d at 2.

27. *Wilder v. Shannon*, 21 Ala. App. 163, 106 So. 69 (1925); *Weinberg Co. v. Bixby*, 185 Cal. 87, 196 P. 25, 34 (1921); *Dickson v. Yates*, 194 Iowa 910, 188 N.W. 948, 950-52 (1922).

28. 199 P.2d at 3-4. The court noted that the policy supporting this decision was similar to the reasoning behind the *res ipsa loquitur* doctrine the court adapted to the facts of *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687, 689 (1944); *Summers*, 199 P.2d at 4. In

on each defendant to absolve himself if he could.²⁹

The conduct giving rise to alternative liability thus is not a true joint tort, but rather involves independent wrongful acts of two or more tortfeasors, only one of whom actually causes the injury.³⁰ Concerted action need not be shown.³¹ Alternative liability is only available when all possible tortfeasors are named as defendants,³² so that one of the parties before the court must necessarily have caused the injury.³³ The plaintiff must prove that each defendant acted tortiously³⁴ and that evidence linking any single defendant to the harm is unavailable.³⁵ The burden then shifts to each defendant to demonstrate that he was not responsible for the harm.³⁶ Any defendant who proves he did not cause the injury avoids liability, while those unable to absolve themselves remain jointly and severally liable.³⁷

Some courts apply a modified version of alternative liability to impose

Ybarra the plaintiff was injured while unconscious on an operating table. The *Ybarra* court stated that "the particular force and justice" of applying *res ipsa loquitur* in those circumstances rested on the fact that evidence regarding which of the defendants was culpable was completely inaccessible to the plaintiff. *Ybarra*, 154 P.2d at 689. The court therefore shifted to the defendants the burden of showing who was at fault. *Id.*, cited in *Summers*, 199 P.2d at 4.

29. 199 P.2d at 5.

30. *LaMarca*, *supra* note 10, at 68 (citing *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20, 25 (1979)).

31. 199 P.2d at 3. The *Summers* court expressly rejected any notion of concerted activity as a basis for its decision, relying instead solely on the policy of fairness to an innocent plaintiff. *Id.*

32. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 603-04, 607 P.2d 924, 931, 163 Cal. Rptr. 132, 139, *cert. denied*, 449 U.S. 912 (1980); *cf.* *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1016-17 (D.S.C. 1981) ("all or substantially all" possible tortfeasors must be before court).

33. *Kroll, Absolute Products Liability*, *supra* note 24, at 189; Comment, *supra* note 18, at 986.

34. *LaMarca*, *supra* note 10, at 69.

35. *Prelick v. Johns-Manville Corp.*, 531 F. Supp. 96, 98 (W.D. Pa. 1982); *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185, 190 (Super. Ct. App. Div. 1979). The plaintiff need not show, however, that the defendants had greater access than the plaintiff to information regarding causation. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 599-600, 607 P.2d 924, 929, 163 Cal. Rptr. 132, 137, *cert. denied*, 449 U.S. 912 (1980).

36. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 598, 607 P.2d 924, 928, 163 Cal. Rptr. 132, 136, *cert. denied*, 449 U.S. 912 (1980); *Summers*, 199 P.2d at 5.

37. *Summers*, 199 P.2d at 5; *LaMarca*, *supra* note 10, at 82. The *Summers* rule was adopted in § 433B of the *Restatement (Second) of Torts*. Section 433B provides in part:

(3) 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 caused the harm.

RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965).

A few jurisdictions have adopted alternative liability as that theory is set out in *Summers* and the *Restatement (Second)*. See, e.g., *Transamerica Ins. Co. v. Diplomat Parking Corp.*, 282 A.2d 564, 565 (D.C. 1971) (action against insurance companies for coverage on stolen vehicle where loss occurred near time when one insurer's coverage ended and other's began, and both companies had negligently failed to inspect insured premises); *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1 (hospital patient's suit in which plaintiff's injury was caused either by defective surgical instrument or by physician's negligence, but not by both), *cert. denied*, 423 U.S. 929 (1975); *Thrower v. Smith*, 62 A.D.2d 907, 406 N.Y.S.2d 513 (1978) (chain automobile collision case in which it was found that act of only one of defendant drivers caused accident).

joint and several liability on tortfeasors who have combined through concurring wrongful acts to cause a single indivisible injury.³⁸ This rule, known as "double fault and alternative liability,"³⁹ differs from true alternative liability, in which only one of the tortfeasors actually caused the harm. The indivisible injury cases nevertheless rely on a policy similar to that underlying true alternative liability. Requiring a plaintiff to apportion damages among several defendants is unfair, according to courts that apply this modified theory, when each defendant acted wrongfully and contributed to the plaintiff's injury.⁴⁰ Such courts hold that permitting the injured party to recover is preferable to allowing all of the defendants to escape liability, even though one of the tortfeasors may pay more than his share of the damages.⁴¹

Similar reasoning has been employed to extend the modified alternative liability theory to products liability. In *Borel v. Fibreboard Paper Products Corp.*⁴² the plaintiff was exposed to asbestos products of several manufacturers over a thirty-three-year period. The specific exposure that caused the plaintiff's injury could not be identified.⁴³ The court relied on the cumulative effect of repeated asbestos exposure, however, to find that each successive exposure could have caused a separate injury.⁴⁴ Concluding that each manufacturer was the cause in fact of some injury to the plaintiff, the court adopted the modified alternative liability theory to relieve the plaintiff of the impossible burden of apportioning damages among the several defendants.⁴⁵

One court has adopted the alternative liability theory in a products liability case involving generic pharmaceutical products. In *Ferrigno v. Eli Lilly & Co.*,⁴⁶ a DES case, the New Jersey Superior Court relied on state supreme court precedent applying alternative liability in a negligence action.⁴⁷ The *Ferrigno* court noted a strong state policy favoring recovery by innocent plaintiffs who cannot identify the source of their injuries and asserted that this policy becomes even more compelling when all of the defendants are wrongdoers.⁴⁸ The court pointed out the defendants' joint

38. *Bowman v. Redding & Co.*, 449 F.2d 956, 967-68 (D.C. Cir. 1971); *Rudd v. Grimm*, 252 Iowa 1266, 110 N.W.2d 321, 324 (1961) (citing *Murphy v. Taxicabs of Louisville, Inc.*, 330 S.W.2d 395, 397-98 (Ky. 1959)); *Riley v. Indus. Fin. Serv. Co.*, 157 Tex. 306, 310, 302 S.W.2d 652, 655-56 (1957). An indivisible injury is an injury caused by the concurrent tortious acts of two or more wrongdoers that cannot be apportioned with reasonable certainty to the individual wrongdoers. *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 256, 248 S.W.2d 731, 734 (1952).

39. W. PROSSER, *supra* note 1, § 41, at 243.

40. *Woodward v. Blythe*, 249 Ark. 793, 462 S.W.2d 205, 209 (1971).

41. *Holtz v. Holder*, 101 Ariz. 247, 418 P.2d 584, 588 (1966).

42. 493 F.2d 1076 (5th Cir. 1973) (holding expressly not limited to cases of concurring tortious conduct), *cert. denied*, 419 U.S. 869 (1974).

43. See *supra* notes 15-16 and accompanying text.

44. 493 F.2d at 1094.

45. *Id.* at 1095-96 (citing *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952) (establishing indivisible injury rule in Texas)).

46. 175 N.J. Super. 551, 420 A.2d 1305 (Super. Ct. Law Div. 1980).

47. *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1, 5-6, *cert. denied*, 423 U.S. 929 (1975).

48. 420 A.2d at 1314.

membership in a group of manufacturers who had each produced an identical product proven to be defective,⁴⁹ and the defendants' high duty of care to the public arising out of the nature of the pharmaceutical industry.⁵⁰ Finally, the court emphasized that the defendants had contributed to the plaintiff's inability to identify the responsible party by marketing a fungible item whose harmful effects did not appear until years after its use.⁵¹ These factors led the court to remove the plaintiff's burden of identifying the culpable manufacturer.⁵² The court expressed a lack of sympathy for the defendants, upon whom it placed the burden of proving that they had not caused the plaintiff's loss, despite a likelihood that the responsible party was not before the court.⁵³ *Ferrigno* is the only products liability case purporting to impose alternative liability,⁵⁴ and even this application of the theory deviates from true alternative liability because some of the possibly culpable parties were admittedly not before the court.⁵⁵ Moreover, alternative liability continues to be employed by only a small number of jurisdictions even in negligence cases.⁵⁶

As the *Ferrigno* case demonstrates, alternative liability extends liability far beyond the traditional situations in which joint and several liability rested on evidence that the particular defendant contributed to the loss.⁵⁷

49. *Id.* at 1313.

50. *Id.*

51. *Id.* at 1314.

52. *Id.* at 1313-16.

53. *Id.* (relying on language in *Anderson v. Somberg*, 67 N.J. 291, 308, 338 A.2d 1, 10, *cert. denied*, 423 U.S. 929 (1975)). The court expressly rejected the alternative liability analysis appearing in *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 603-04, 607 P.2d 924, 930-31, 163 Cal. Rptr. 132, 138-39, *cert. denied*, 449 U.S. 912 (1980). The California court in *Sindell* refused to apply the theory because of the strong probability that the guilty party was not before the court. 26 Cal. 3d at 603-04, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39.

54. *Cf. Holloway v. General Motors Corp.*, 403 Mich. 843, 271 N.W.2d 777, 782 n.15 (1978) (implying in footnote that alternative liability may be applicable in products liability cases).

55. 420 A.2d at 1314.

56. Robinson, *supra* note 21, at 723. Several courts have rejected alternative liability in products cases. In *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185 (Super. Ct. App. Div. 1979), the plaintiff identified one of the defendants as the manufacturer of the injury-causing product, but he still sought joint and several liability against other manufacturers. The court held that alternative liability could not apply where the identity of the culpable party is known. 406 A.2d at 190. The court did not reject alternative liability itself. In *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (Super. Ct. App. Div. 1981), however, the court rejected alternative liability "on principle." 427 A.2d at 1128. The court found that in adopting the theory, "traditional concepts and basic principles would of necessity be either distorted or abandoned altogether." *Id.* The court noted that application of the alternative liability theory would impose liability on one or all of the 44 defendants, regardless of individual fault. Thus, the defendants might be liable for injury caused by only one of the defendants, or by a company not before the court, merely because they manufactured a product also manufactured by others. *Id.* Similar reasoning also convinced the courts to reject alternative liability in *Morton v. Abbott Labs.*, 538 F. Supp. 593, 598 (M.D. Fla. 1982); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1016 (D.S.C. 1981); and *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 602-03, 607 P.2d 924, 930-31, 163 Cal. Rptr. 132, 138-39, *cert. denied*, 449 U.S. 912 (1980).

57. *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121, 1128 (Super. Ct. App. Div. 1981). Joint and several liability was originally available in situations in which (1) the actors knowingly join in the performance of a tortious act or acts; (2) the actors

This theory is criticized as placing an unjust and unreasonable burden on defendants,⁵⁸ and policy favoring recovery by an injured party is said to be inadequate to override the rule requiring the plaintiff to identify the causative agent.⁵⁹ The use of alternative liability in unidentified-manufacturer cases faces two other objections as well. First, the theory may lose its vitality as the number of defendants increases. *Summers v. Tice* involved only two culpable parties, one of whom had caused the injury, while the number of possibly responsible manufacturers in products liability cases often may be in the tens or hundreds.⁶⁰ Alternative liability raises a presumption that each defendant is the cause in fact of the injury,⁶¹ but in cases of multiple defendants the likelihood that any particular manufacturer actually produced the injury-causing item is slight.⁶² For that reason some courts have rejected alternative liability in multiple defendant cases as unfair.⁶³

The second objection to imposition of alternative liability on multiple defendants in products liability cases is the difficulty of bringing all possible tortfeasors before the court. In *Summers v. Tice* all persons who could possibly have caused the injury were named as defendants. When only a few manufacturers have produced an allegedly defective item, it may be possible to sue all such manufacturers,⁶⁴ but such a suit may be impossible when a large group of manufacturers is involved. Some of the manufacturers may have gone out of business or filed for bankruptcy.⁶⁵ No single

breach a common duty owed to the plaintiff; (3) a special relationship exists between the parties; and (4) there is no concert of action, but the independent acts of several actors concur to produce an indivisible injury. *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 371 (E.D.N.Y. 1972) (citing 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 10.1 (1956)).

58. *Wetzel v. Eaton Corp.*, 62 F.R.D. 22, 30 (D. Minn. 1973).

59. *Malone, Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60, 83-84 (1956). *Malone* also states that the holding in *Summers v. Tice* resulted from the strict treatment traditionally accorded cases involving the negligent use of firearms and implies that perhaps, on different facts, the California court would not have held the defendants liable absent more precise proof of causation. *Id.* at 84.

60. See Comment, *supra* note 11, at 55 (large number of possible defendants in an asbestos case); Comment, *supra* note 18, at 964 (large number of DES manufacturers).

61. Comment, *supra* note 18, at 986.

62. See *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 436 N.Y.S.2d 625, 630 (1981) (DES plaintiff sued only one manufacturer; court held alternative liability not available where plaintiff has not joined or cannot join all possible defendants); see also *Robinson, supra* note 21, at 724 (in DES cases odds that any given manufacturer was responsible are less than 1 in 300).

63. *E.g.*, *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1016 (D.S.C. 1981); *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 609, 607 P.2d 924, 935, 163 Cal. Rptr. 132, 143, *cert. denied*, 449 U.S. 912 (1980).

64. See *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972). In *Hall* the court formulated a burden-shifting theory similar to alternative liability and allowed it to be applied to the entire blasting cap industry, which consisted of only six manufacturers and their trade association, all of whom were defendants. *Id.* at 380; see *infra* notes 103-31 and accompanying text (discussion of *Hall* industry-wide liability).

65. Illustrative of this problem is the case of *Manville Corp.* (formerly *Johns-Manville Corp.*), the world's leading producer of asbestos. On Aug. 26, 1982, after a study revealed 16,500 claims currently pending against *Manville*, with 500 additional claims filed each month, *Manville* filed for ch. 11 bankruptcy protection against a potential two-billion-dollar

court may have jurisdiction over every manufacturer. Information sufficient to identify every manufacturer of a particular product may be unavailable.⁶⁶ In these situations alternative liability is inappropriate because the culpable party may simply not be before the court.⁶⁷

Alternative liability goes far to accommodate the plaintiff who cannot identify the specific cause of his harm. In cases involving fungible or generically marketed products it may offer the only useful recovery mechanism when the manufacturer of the damaging product escapes identification. The theory works, however, only in cases involving products made by a small number of manufacturers, all of whom are before the court, and all of whom are guilty of the same wrongdoing.⁶⁸ Even under such circumstances one court has held this theory to be so violative of traditional principles of tort law that it could not be applied.⁶⁹

II. CONCERT OF ACTION

The concept of joint and several liability for injuries resulting from tortious conduct committed in concert is well established.⁷⁰ Generally, one who either acts with others pursuant to a common plan to commit a tort or otherwise assists or encourages another to carry out tortious activity is jointly and severally liable with those whom he has encouraged or with whom he has acted, regardless of whether his own acts actually contributed to the plaintiff's injury.⁷¹ For joint and several liability to attach, the

liability for its asbestos products. Wall St. J., Aug. 27, 1982, at 1, col. 6. Other asbestos company bankruptcy filings are predicted by the insurance industry. *Id.*; see also Comment, *supra* note 18, at 984 n.114 (many DES manufacturers no longer in business).

66. Comment, *supra* note 18, at 964 n.3.

67. Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1007 (D.S.C. 1981).

68. Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 390 (1950).

69. See Namm v. Charles E. Frosst & Co., 178 N.J. Super. 19, 427 A.2d 1121, 1128 (Super. Ct. App. Div. 1981) (adoption of alternative liability would distort or abandon traditional concepts and basic principles).

70. Thompson v. Johnson, 180 F.2d 431, 433-34 (5th Cir. 1950); Stapler v. Parler, 212 Ala. 644, 103 So. 573, 573 (1925); Wrabek v. Suchomel, 145 Minn. 468, 177 N.W. 764, 766 (1920); Oliver v. Miles, 144 Miss. 852, 110 So. 666, 668 (1926). As early as 1613 it was held that "all coming to do an unlawful act, and of one party, the act of one is the act of all of the same party being present." Sir John Heydon's Case, 11 Co. Rep. 5, 77 Eng. Rep. 1150, 1151 (1613), cited in W. PROSSER, *supra* note 1, § 46.

71. Bierczynski v. Rogers, 239 A.2d 218, 221 (Del. 1968) (racing automobiles); Hanrahan v. Cochran, 12 A.D. 91, 42 N.Y.S. 1031, 1033 (1896) (racing horses); Sprinkle v. Lemley, 243 Or. 521, 414 P.2d 797, 800-01 (1966) (physicians).

Concert of action is codified in the *Restatement (Second) of Torts*. Section 876 of the *Restatement (Second)* provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

RESTATEMENT (SECOND) OF TORTS § 876 (1979).

plaintiff must demonstrate the existence of an agreement among the defendants.⁷² The agreement need not be express, however; a tacit understanding is sufficient.⁷³ Joint and several liability for torts committed in concert is most frequently imposed to deter antisocial group behavior,⁷⁴ such as drag-racing⁷⁵ and group assault.⁷⁶

Liability for concert of action differs from alternative liability in four major aspects. First, under alternative liability the plaintiff must sue every party who could have caused his loss. A plaintiff relying on a concert of action theory, however, need not join all tortfeasors⁷⁷ because the act of one in concert with others is the act of all, and any one tortfeasor is liable for the wrongful conduct of the group.⁷⁸ Second, alternative liability involves independent conduct by multiple defendants, while concert of action by its very nature entails an express or tacit agreement to act together.⁷⁹ Third, under concert of action theory the burden of proof on causal responsibility does not shift to the defendants as it does under alternative liability.⁸⁰ Because one who contributed to or encouraged the conduct that caused the loss bears equal responsibility with his co-tortfeasors, the plaintiff need not identify one member of the group as the precise causative agent. The plaintiff need only show that all defendants were, in fact, tortfeasors. The concerted action itself is arguably the cause of the injury, so a plaintiff who establishes concert of action and resulting injury has met the burden of identification.⁸¹ Thus the burden of proof in a concert of action case need not shift to the defendants. Finally, concert of action differs from alternative liability because a defendant who can prove that he personally did not cause the plaintiff's injury nevertheless remains liable for the entire loss if he acted in concert with others who caused it.⁸² Alternative liability, on the other hand, would exonerate a defendant who

72. *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1016 (D.S.C. 1981).

73. *See Troop v. Dew*, 150 Ark. 560, 234 S.W. 992, 994 (1921); *Patnode v. Westenhaber*, 114 Wis. 460, 90 N.W. 467, 472 (1902); *Prosser, Joint Torts and Several Liability*, 25 CALIF. L. REV. 413, 418 (1937). Conscious parallel behavior has been held sufficient to support an inference of tacit agreement. *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 374 (E.D.N.Y. 1972).

74. *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185, 190 (Super. Ct. App. Div. 1979); *RESTATEMENT (SECOND) OF TORTS* § 876 comment d (1979).

75. *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968); *Andreassen v. Esposito*, 90 N.J. Super. 170, 216 A.2d 607 (Super. Ct. App. Div. 1966); *Lemons v. Kelly*, 239 Or. 354, 397 P.2d 784 (1964).

76. *Thompson v. Johnson*, 180 F.2d 431 (5th Cir. 1950).

77. *LaMarca*, *supra* note 10, at 67.

78. *Purinton v. Hinchliff*, 219 Ill. 159, 76 N.E. 47, 50 (1905); *Boston v. Simmons*, 150 Mass. 461, 23 N.E. 210, 212 (1890); *Green v. Davies*, 182 N.Y. 499, 75 N.E. 536, 536 (1905); *Martens v. Reilley*, 109 Wis. 464, 84 N.W. 840, 844 (1901).

79. *W. PROSSER*, *supra* note 1, § 46.

80. *LaMarca*, *supra* note 10, at 67, 82.

81. *Note*, *supra* note 2, at 143.

82. *Purinton v. Hinchliff*, 219 Ill. 159, 76 N.E. 47, 50 (1905); *Boston v. Simmons*, 150 Mass. 461, 23 N.E. 210, 212 (1890); *Green v. Davies*, 182 N.Y. 499, 75 N.E. 536, 536 (1905); *Martens v. Reilley*, 109 Wis. 464, 84 N.W. 840, 844 (1901); *Comment, Recent Developments in Joint & Several Liability*, 24 SYRACUSE L. REV. 1319, 1320 (1973).

proves his innocence.⁸³

Courts have frequently applied the concert of action theory in cases of intentional torts and negligence⁸⁴ as well as in price-fixing and other antitrust actions.⁸⁵ The concert of action theory is not widely accepted in the products liability area, however, although the theory has been used in two cases involving the manufacturer identification problem.⁸⁶ In *In re Beverly Hills Fire Litigation*⁸⁷ the plaintiffs sued over one thousand wire and insulation manufacturers⁸⁸ for deaths caused by a fire at the Beverly Hills Supper Club in Kentucky.⁸⁹ Because the fire destroyed the allegedly defective products, the responsible wire and insulation manufacturers could not be identified.⁹⁰ The court allowed the plaintiffs to plead concert of action and held that in order to recover, the plaintiffs had to prove an express or tacit agreement among the defendants to market a standard defective product.⁹¹

Bichler v. Eli Lilly & Co.,⁹² a DES action, involved clear concert of ac-

83. *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1, 5 (1948); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305, 1316 (Super. Ct. Law Div. 1980). The court may not even apportion damages among defendants of varying degrees of culpability. *Miller v. Singer*, 131 Colo. 112, 279 P.2d 846, 848 (1955).

84. *E.g.*, *Stapler v. Parler*, 212 Ala. 644, 103 So. 573, 573 (1925) (negligence—setting automobile on fire); *Troop v. Dew*, 150 Ark. 560, 234 S.W. 992, 993 (1921) (negligence—allowing fence to go unrepaired such that cattle broke through and damaged plaintiff's crops); *Daggy v. Miller*, 108 Iowa 1146, 162 N.W. 854 (1917) (negligence—vehicular collision); *Burton v. Roberson*, 139 Tex. 562, 566, 164 S.W.2d 524, 526 (1942) (false imprisonment).

85. *See Theatre Enters. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (conscious parallel behavior is evidence of concert of action in antitrust action, but not conclusive); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 223 (1939) (knowing participation in plan sufficient to establish conspiracy in antitrust action). Liability for civil conspiracy outside antitrust also resembles concert of action liability because once the defendants' agreement is shown, any one of the defendants is liable for all of the damages. *Mims v. Bohn*, 536 S.W.2d 568, 570 (Tex. Civ. App.—Dallas 1976, no writ).

86. *In re Beverly Hills Fire Litig.*, No. 77-79 (E.D. Ky. filed Nov. 14, 1979); *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981).

In a third case, *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979), the Michigan Court of Appeals allowed plaintiffs to plead concert of action in a DES case. 289 N.W.2d at 27. The 182 plaintiffs alleged that all of the defendants had acted in concert to produce and market DES without adequate safeguards, and that each plaintiff had been injured by the product of one or another of the defendants. The court viewed the problem as one of apportionment among proven wrongdoers. *Id.* at 26. In order for the court to impose joint and several liability the plaintiffs would have to prove that each defendant had breached a duty of care in producing DES, that each plaintiff's injury resulted from ingestion of DES by her mother, and that one or more of the named defendants had manufactured the DES actually ingested. *Id.* at 26-27. *Abel* does not, however, represent the application of true concert of action because, although the plaintiffs pleaded concert, the court spoke in terms of alternative liability. *Id.* at 26. The court noted that each defendant could attempt to absolve itself from liability, *id.*, a characteristic not found in pure concert of action theory. Moreover, the court remanded the case for trial so that the ultimate basis for recovery, if any, is yet to be determined. *Id.* at 27.

87. No. 77-79 (E.D. Ky. filed Nov. 4, 1979), discussed in Comment, *The Market Share Theory: Sindell's Contribution to Industry-Wide Liability*, 19 Hous. L. Rev. 107, 112-13 (1981).

88. Comment, *supra* note 87, at 112-13.

89. Kroll, *Absolute Products Liability*, *supra* note 24, at 187.

90. Comment, *supra* note 87, at 107.

91. *Id.* at 113.

92. 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981).

tion. The plaintiffs sued a single manufacturer, Lilly, and alleged that Lilly had acted in concert with other pharmaceutical companies in the development, production, and marketing of DES. Evidence at trial disclosed that representatives of Lilly and other manufacturers had formed a committee to expedite Food and Drug Administration (FDA) approval of DES and to represent the industry before the FDA. The plaintiffs demonstrated that Lilly and other manufacturers had applied for permission to market DES without adequate testing, despite questions concerning the drug's efficacy and the possibility of carcinogenic effects. The evidence also indicated that the companies had pooled clinical data regarding DES and that Lilly's literature had become the model for the DES package insert.⁹³ The court stated that a jury could rationally have construed such conduct as concerted and in pursuit of an express agreement.⁹⁴ The court thus held Lilly liable for all of the plaintiffs' damages.⁹⁵ Such liability was fair, noted the court, because the concert of action theory permits a plaintiff to proceed against any one or more of the tortfeasors,⁹⁶ and because Lilly could subsequently pursue actions for contribution against other manufacturers.⁹⁷

Other courts have refused to apply the concert of action theory in products liability cases, asserting that mere cooperation in the development, production, or marketing of a product does not fit the traditional notion of concerted activity.⁹⁸ One court has suggested, for example, that applying for FDA approval of a new drug is not the sort of antisocial behavior that liability for concert of action is intended to deter.⁹⁹ One commentator, however, has praised concert of action liability as a fair means of recovery against a products liability defendant because the defendant is free to join other manufacturers as third-party defendants and because defendants generally have more information than do plaintiffs regarding identification of the culpable manufacturer.¹⁰⁰ The concert of action theory is more practicable than alternative liability in cases involving manufacturer identification problems, because the plaintiff need not sue and establish fault as to every possible tortfeasor.¹⁰¹ Particularly in cases of small industries in which manufacturers cooperate closely, concert of action may be a viable solution to the manufacturer identification problem. Nevertheless, most

93. 436 N.Y.S.2d at 628-30.

94. *Id.* at 633.

95. *Id.* at 634.

96. *Id.* (citing *Graphic Arts Mut. Ins. v. Bakers Mut. Ins.*, 45 N.Y.2d 551, 382 N.E.2d 1347, 410 N.Y.S.2d 571 (1978)).

97. 436 N.Y.S.2d at 634.

98. *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1015-16 (D.S.C. 1981); *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 607, 607 P.2d 924, 933, 163 Cal. Rptr. 132, 141, *cert. denied*, 449 U.S. 912 (1980). Joint control of a risk may, however, be a sufficient basis for joint and several liability. *See Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 373-74 (E.D.N.Y. 1972).

99. *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185, 190 (Super. Ct. App. Div. 1979).

100. *LaMarca*, *supra* note 10, at 67.

101. *See supra* notes 70-71, 77-78 and accompanying text.

courts have yet to accept concert of action as an appropriate theory of recovery in products liability cases involving unknown manufacturers.¹⁰²

III. INDUSTRY-WIDE LIABILITY

The theory of industry-wide liability¹⁰³ derives its principles from both concert of action and alternative liability.¹⁰⁴ As with concert of action, the plaintiff must show that all defendants participated in joint tortious activity.¹⁰⁵ Under industry-wide liability this tortious activity must consist of joint and concerted adherence to a dangerous industry-wide standard in the manufacture of the injury-producing product.¹⁰⁶ Additionally, the plaintiff must show that each defendant breached an independent duty to a class of which the plaintiff is a member, that each defendant produced a similar product, and that the plaintiff's injury in all probability resulted from a defect in the product made by one of the defendants.¹⁰⁷ Here, however, the similarity between industry-wide liability and the concert of action theory ends. Before the court will impose joint and several liability, the plaintiff must establish, as he must under alternative liability, that he cannot identify the manufacturer whose product caused his injury and that this inability is not due to lack of effort by the plaintiff.¹⁰⁸ As with alternative liability, the court will then shift the burden of identifying the precise causative agent to the defendants, each of whom may escape liability if it can absolve itself of culpability.¹⁰⁹

The concept of industry-wide liability originated in *Hall v. E.I. Du Pont*

102. Courts in four DES cases have rejected concert of action as a basis for liability. In *Morton v. Abbott Labs.*, 538 F. Supp. 593 (M.D. Fla. 1982), the court found that the DES manufacturers "simply did not act in concert as that concept is defined in tort law." *Id.* at 596 (footnote omitted). The court found no indication of any conduct "that might conceivably raise an inference that a tacit understanding or common plan existed among DES manufacturers." *Id.* at 597 (footnote omitted). Similarly, in *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981), the court stated that absent a showing of an express or tacit agreement not to test the product or provide adequate warnings, the manufacturers could not be liable under the concert of action theory. *Id.* at 1015-16. Lack of an agreement among the defendants also prevented application of concert of action liability in *Payton v. Abbott Labs.*, 512 F. Supp. 1031, 1038 (D. Mass. 1981). Finally, the court in *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185 (Super. Ct. App. Div. 1979), held that cooperation among drug producers was not the sort of anti-social behavior that concert of action liability is designed to deter. 406 A.2d at 190-91.

103. Industry-wide liability is sometimes called "enterprise liability." *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 608, 607 P.2d 924, 933, 163 Cal. Rptr. 132, 141, cert. denied, 449 U.S. 912 (1980); *LaMarca*, *supra* note 10, at 69; see also Comment, *supra* note 18, at 974-75 (use of term "enterprise liability" for proposed theory based on industry-wide liability).

104. *Robinson*, *supra* note 21, at 723-24.

105. *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 379 (E.D.N.Y. 1972); Note, *supra* note 24, at 1000.

106. Comment, *supra* note 18, at 974.

107. *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 187 (S.D. Ga. 1982) (citing *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 379 (E.D.N.Y. 1972)); *LaMarca*, *supra* note 10, at 70; Note, *supra* note 24, at 1000.

108. *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 379-80 (E.D.N.Y. 1972).

109. *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 187 (S.D. Ga. 1982); *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 380 (E.D.N.Y. 1972); *LaMarca*, *supra* note 10, at 70-71.

de Nemours & Co.,¹¹⁰ an action arising out of eighteen separate incidents in which children were injured by blasting caps. The plaintiffs in *Hall* sued all the blasting cap manufacturers in the United States¹¹¹ and their trade association, alleging that the defendants, in following insufficient industry standards, had failed to provide adequate warnings and to take adequate precautions in manufacturing the caps. The plaintiffs also contended that because they could not identify which of the defendants had manufactured the product actually involved in each incident,¹¹² they should be relieved of the burden of showing a causal connection between each specific injury and the product of any single defendant. The plaintiffs sought imposition of joint and several liability on all the manufacturers and their trade association.

The federal district court held that the plaintiffs' pleadings raised a genuine issue concerning joint control of the risk,¹¹³ which is the basic element justifying joint and several liability for concert of action.¹¹⁴ The court stated that joint control of a risk by members of a particular industry could be established by proving that all members of the industry adhered to explicit or implicit safety standards, codes, or practices so that the industry in effect operated as a collective unit.¹¹⁵ Because the industry members were best able to employ foresight, precaution, and risk distribution, joint and several liability could properly be imposed on them.¹¹⁶ The court thus held that if the plaintiffs could establish by a preponderance of the evidence: first, that the injury-causing blasting caps were made by an uniden-

110. 345 F. Supp. 353 (E.D.N.Y. 1972).

111. The entire blasting cap industry in the United States consisted of only six manufacturers. *Id.* at 370.

112. *Id.* The court recognized that the plaintiffs could not be certain that the caps were made by a U.S. company; therefore, the court held that the plaintiffs need only show that the caps were more probably than not the product of one of the defendants. *Id.* at 379.

113. *Id.* at 375.

114. *Id.* at 373-74. The court listed three ways in which the plaintiffs could show joint control of the risk:

First, plaintiffs can prove the existence of an explicit agreement and joint action among the defendants with regard to warnings and other safety features—the classic “concert of action.” Second, plaintiffs can submit evidence of defendants’ parallel behavior sufficient to support an inference of tacit agreement or cooperation

Third, plaintiffs can submit evidence that defendants, acting independently, adhered to an industry-wide standard or custom with regard to the safety features of blasting caps. Regardless of whether such evidence is sufficient to support an inference of tacit agreement, it is still relevant to the question of joint control of risk.

Id. (citations omitted). “Joint control of risk” thus signifies situations in which several defendants have either collectively created a risk or exercised collective control over the risk-creating product or activity. *Id.* at 375-76.

115. *Id.* at 374-75 (citing *Dement v. Olin-Mathieson Chem. Corp.*, 282 F.2d 76 (5th Cir. 1960) (joint liability of makers of components of explosive charge based on defendants’ control over product safety at critical stage when high degree of care required); *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964) (joint liability of automobile manufacturer and retailer based in part on their joint ability to eliminate risk)).

116. 345 F. Supp. at 376-78 (citing *Wm. Tackaberry Co. v. Sioux City Serv. Co.*, 154 Iowa 358, 378, 132 N.W. 945, 952-53 (1911) (Weaver, J., dissenting); *Moses v. Morgantown*, 192 N.C. 102, 133 S.E. 421 (1926)).

tifiable defendant; second, that each defendant breached a duty of care owed to the plaintiffs; and third, that the breaches were substantially concurrent and of a similar nature, then the burden of proof on causal responsibility would shift to the defendants.¹¹⁷ The court thus approved the imposition of liability on the entire industry. The *Hall* decision clearly resulted from the court's recognition of the plaintiffs' inability to obtain relief under any existing legal theory in New York although they had sustained compensable injuries.¹¹⁸ Consequently, the court developed a recovery theory to afford the plaintiffs relief.

The *Hall* theory has yet to be adopted by any other court.¹¹⁹ Courts have been reluctant to accept industry-wide liability partly because they consider it a drastic deviation from traditional tort law principles of causation,¹²⁰ since the theory renders every manufacturer an insurer not only of its own products, but of similar products of other manufacturers.¹²¹ Courts and commentators further criticize industry-wide liability on several grounds. First, because the theory requires that all members of the industry be defendants, a precise industry must be defined, and all mem-

117. 345 F. Supp. at 380.

118. The first New York decision adopting alternative liability, *Thrower v. Smith*, 62 A.D.2d 907, 406 N.Y.S.2d 513 (1978), occurred after *Hall*. The court in *Thrower*, citing no New York authority for alternative liability other than *Hall*, stated: "[I]t is generally accepted that where several defendants, who are found to be tort-feasors, are guilty of acts, only one of which caused the injury, all are liable absent a showing as to whose act was the cause" 406 N.Y.S.2d at 521 (citations omitted).

119. Two courts have rejected industry-wide liability as too great a deviation from traditional tort law principles. The court in *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183 (S.D. Ga. 1982), held that the *Hall* theory violated Georgia's products liability rule that a manufacturer is not an insurer of his products. *Id.* at 190. The court also stated that imposition of industry-wide liability would have undesirable social and economic effects, in that it would endanger the manufacturer's continued ability to spread losses and, further, would cause unfair assessment of damages against manufacturers whose products were not clearly the cause of the loss. *Id.* In *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121 (Super. Ct. App. Div. 1981), the court stated that adoption of industry-wide liability "would, of necessity, result in total abandonment of the well settled principle that manufacturers are only responsible for damages caused by a defective product upon proof that the product was defective and that the defect arose while the product was in the control of defendant." 427 A.2d at 1129.

The court in *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004 (D.S.C. 1981), stated that DES manufacturers should not be punished for following government-prescribed standards. *Id.* at 1018. Similarly, in *Morton v. Abbott Labs.*, 538 F. Supp. 593 (M.D. Fla. 1982), the court stated that if liability were predicated on deficient industry-wide standards, responsibility would lie with the FDA as the standard-setter for the drug industry. *Id.* at 598. The *Morton* court also distinguished the large, decentralized drug industry from the smaller blasting cap industry in concluding that the *Hall* theory should not be applied to DES cases. *Id.*

The court in *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185 (Super. Ct. App. Div. 1979), rejected industry-wide liability on the facts before it, since the plaintiff had been able to identify the culpable manufacturer, noting that industry-wide liability only applies where the responsible party's identity is unknown. 406 A.2d at 190. The court did not, however, reject the theory itself.

120. *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 190 (S.D. Ga. 1982); *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121, 1129 (Super. Ct. App. Div. 1981); see *supra* note 119.

121. *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 190 (S.D. Ga. 1982); *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121, 1129 (Super. Ct. App. Div. 1981).

bers of that industry identified.¹²² Plaintiffs may have difficulty identifying the qualities that make products so similar that the manufacturers may be said to be in the same industry.¹²³ This problem would be particularly acute if the industry were composed of thousands of members.¹²⁴ Second, critics contend that concerted action requires more than use of an industry-wide standard to justify imposition of joint and several liability.¹²⁵ This criticism contains particular force when, as in the DES cases, the standard has been set or authorized by a governmental agency charged with oversight of the industry.¹²⁶ Third, the virtual elimination of the plaintiff's burden of identifying the responsible manufacturer assumes that manufacturers have better access to relevant information than do plaintiffs. If that assumption is false, then liability may be unfairly imposed on manufacturers who possess no means of exculpating themselves.¹²⁷ Fourth, one writer charges that industry-wide liability would adversely affect the market place by vastly increasing the risk of liability for product-related injuries, which in turn would discourage research and development of new products.¹²⁸ Similarly, trade associations like the one in *Hall* might curtail standards development and testing activities, which contribute to industry safety, in order to avoid any appearance of concerted action by the manufacturers.¹²⁹ Conversely, the larger manufacturers might eliminate marginal producers through efforts to impose suitable industry-wide standards.¹³⁰ One court has stated, finally, that in industries composed of many members the probability that any particular manufacturer produced the injury-causing item is so small that the imposition of liability would simply be unjust.¹³¹ Limitation of the theory to the situations contem-

122. Shea, *Product Liability: A Continuing Process of Change*, 68 A.B.A. J. 576, 577 (1982).

123. *Id.* In *Davis v. Yearwood*, 612 S.W.2d 917 (Tenn. Ct. App. 1980), plaintiffs sued for injuries and deaths resulting from a jail fire. The defendants were the manufacturers of various chemical and plastic products in the jail, but plaintiffs were unable to establish which manufacturer's product caused their damages. The court rejected the plaintiffs' plea for application of industry-wide liability, distinguishing *Hall* because of the size difference between the blasting cap industry in *Hall* and the chemical and plastics industries. *Id.* at 920. The court also distinguished the DES cases, in which a specific product caused the injury, and noted that in the present case any one of a variety of items could have caused the loss. *Id.* at 920. The court concluded that the adoption of industry-wide liability was inappropriate because of the lack of similarity among the products and manufacturers involved. *Id.*

124. The *Hall* court itself recognized that its theory, while appropriate in an industry containing a small number of manufacturers, would be manifestly unreasonable if applied to a large, decentralized industry. 345 F. Supp. at 378.

125. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 608, 607 P.2d 924, 934, 163 Cal. Rptr. 132, 142, *cert. denied*, 449 U.S. 912 (1980); Comment, *supra* note 18, at 997.

126. *Sindell v. Abbott Labs.*, 26 Cal. 2d 588, 608, 607 P.2d 924, 935, 163 Cal. Rptr. 132, 142, *cert. denied*, 449 U.S. 912 (1980).

127. *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 190 (S.D. Ga. 1982); Note, *supra* note 24, at 1000-01.

128. Note, *supra* note 24, at 1004.

129. See Shea, *supra* note 122, at 577.

130. Note, *supra* note 24, at 1005.

131. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 608, 607 P.2d 924, 935, 163 Cal. Rptr. 132, 142-43, *cert. denied*, 449 U.S. 912 (1980).

plated by the *Hall* court would partially alleviate these concerns raised by potential general application of industry-wide liability.

IV. MARKET SHARE LIABILITY

One commentator has proposed a refined version of industry-wide liability that contains the following elements:

- 1) Plaintiff is not at fault for his inability to identify the causative agent and such inability is due to the nature of the defendant's conduct.
- 2) A generically similar defective product was manufactured by all the defendants.
- 3) Plaintiff's injury was caused by this product defect.
- 4) The defendants owed a duty to the class of which plaintiff was a member.
- 5) There is clear and convincing evidence that plaintiff's injury was caused by the product of some one of the defendants. For example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury.
- 6) There existed an insufficient, industrywide standard of safety as to the manufacture of this product.
- 7) All defendants were tortfeasors satisfying the requirements of whichever cause of action is proposed: negligence, warranty, or strict liability.¹³²

The commentator suggests an additional element that distinguishes the proposed theory from industry-wide liability: although each defendant may exonerate itself by proving that its product could not have caused the plaintiff's injury, a defendant who cannot exculpate itself is subject not to joint and several liability but rather to liability in proportion to its share of the product market.¹³³ This theory supposedly combines the best elements of the concert of action¹³⁴ and alternative liability theories¹³⁵ with a method of apportioning damages that is fair in view of the proportionate probability that each defendant actually caused the plaintiff's injury.¹³⁶

132. Comment, *supra* note 18, at 995. Element 5 varies from the *Hall* court's preponderance of the evidence standard. See *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 380 (E.D.N.Y. 1972). The author suggests that the "clear and convincing evidence" test is consistent with the standard generally applied to joining parties in civil cases. Comment, *supra* note 18, at 995 (citing C. McCORMICK, EVIDENCE § 340, at 796 (E. Cleary 2d ed. 1972)).

133. Comment, *supra* note 18, at 995.

134. *Id.* at 996. Under the proposed test, the element of concerted action within an industry would be satisfied by parallel behavior, such as adherence to an inadequate safety standard or concurrent manufacture of an identically defective product. *Id.* This standard is less rigorous than the requirement of conscious agreement, a standard often applied by courts imposing the *Hall* liability theory. See *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 380 (E.D.N.Y. 1972); *supra* notes 106-07 and accompanying text.

135. Comment, *supra* note 18, at 996. Under the traditional *Summers* alternative liability theory the plaintiff is required to join all possible tortfeasors; under the proposed model a plaintiff need only show a high probability that one of the defendants caused the injury. *Id.*; see *Hall v. E.I. Du Pont de Nemours & Co.*, 345 F. Supp. 353, 379 (E.D.N.Y. 1972).

136. Comment, *supra* note 18, at 997, 999.

In *Sindell v. Abbott Laboratories*,¹³⁷ a DES case, the California Supreme Court adopted the damage apportionment element of market share liability.¹³⁸ The court declined, however, to adopt those elements of market share liability that are similar to industry-wide liability.¹³⁹ The *Sindell* court relied on the difference between the small number of defendants in *Hall v. E.I. Du Pont de Nemours & Co.*,¹⁴⁰ in which industry-wide liability was applied, and the large number of DES manufacturers to demonstrate that industry-wide liability was inapplicable to a DES case.¹⁴¹ The court noted that in *Hall* the manufacturers' delegation to a trade association of certain safety functions had served as a basis for finding joint control of the risk, while the DES manufacturers had not delegated such functions.¹⁴² Instead, the court found that the FDA was responsible for safety control in the pharmaceutical industry and concluded that drug manufacturers could not justly be held liable for following government standards.¹⁴³

The *Sindell* court sympathized, however, with the plaintiff's inability to identify the responsible manufacturer of a generically produced product.¹⁴⁴ Following *Summers v. Tice*,¹⁴⁵ the court stated that as between an innocent plaintiff and defendants who produced injury-causing products, the defendants should bear the cost of the injury, particularly where the defendants had the best opportunity to discover and guard against defects in their products.¹⁴⁶ The court observed that the defendants had contributed to the plaintiff's inability to identify the responsible tortfeasor by producing a product with harmful effects that did not manifest themselves until years after consumption.¹⁴⁷ Moreover, the court found that the defendants could best shoulder the cost of the injury.¹⁴⁸ The supreme court concluded that a modification of the *Summers* rule was therefore war-

137. 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied, 449 U.S. 912 (1980).

138. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145.

139. *Id.* at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

140. 345 F. Supp. 353, 370 (E.D.N.Y. 1972); see *supra* note 111 and accompanying text.

141. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143. But see Comment, *supra* note 18, at 995 (author developed her theory specifically for application to DES litigation).

142. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

143. *Id.* The court referred to regulations specifying the tests a manufacturer must perform on certain drugs, 21 C.F.R. §§ 436.206-333 (1982); the type of packaging required, *id.* § 429.10; the warnings that must appear on labels, *id.* § 369.20; and the standards to be followed in the manufacture of a drug, *id.* §§ 211.22-208. 26 Cal. 3d at 609 n.26, 607 P.2d at 935 n.26, 163 Cal. Rptr. at 143 n.26.

144. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

145. 33 Cal. 2d 80, 199 P.2d 1 (1948); see *supra* notes 25-29 and accompanying text.

146. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144 (citing *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436, 443 (1944) (Traynor, J., concurring) (in era of mass production and complex marketing methods, traditional negligence standard insufficient to govern obligations of manufacturer to consumer)). The *Sindell* court stated that the rise in production of fungible goods necessitated some adaptation of the rules of causation and liability, just as the complexity of the market had demanded in the time of *Escola*. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

147. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144; cf. *Ybarra v. Spangard*, 25 Cal. 2d 486, 154 P.2d 687 (1944) (res ipsa loquitur case where defendants possessed all information regarding causation).

148. 26 Cal. 3d at 510, 607 P.2d at 936, 163 Cal. Rptr. at 144; see Calabresi, *Some*

ranted and adopted the market share concept for apportionment of damages.¹⁴⁹ According to the court, if the plaintiff joined as defendants the producers of a "substantial share" of the DES market, the burden of identifying the manufacturer of the actual injury-causing drug would shift to the defendants.¹⁵⁰ Each defendant who could not exculpate itself would be liable for a share of the plaintiff's damages in proportion to such defendant's share of the appropriate market.¹⁵¹ Each manufacturer's liability would therefore approximate its probable share of responsibility for the injuries caused by the drug. The *Sindell* holding thus applied alternative liability with the addition of an element of proportionate contribution.¹⁵²

As a practical matter, market share liability is problematic in application. The number of manufacturers who must be named as defendants remains uncertain. The *Sindell* court required producers representing a "substantial share" of the market to be joined as defendants, but failed to define "substantial share."¹⁵³ *Sindell* thus leaves courts without a standard for determining the adequacy of market representation in any particular case. The *Sindell* court also gave little guidance as to the meaning of "market."¹⁵⁴ That term could mean a market as small as the city in which the DES plaintiff's mother resided, determined during the year in which the mother took the drug, or it could include worldwide production during the entire period of the drug's manufacture. In addition, as with industry-wide liability, the membership of a particular industry may be difficult to define. Finally, the *Sindell* court did not define what sorts of goods, other than pharmaceuticals, constitute the fungible type of product for which market share is appropriate.¹⁵⁵ These difficulties of application may diminish the effectiveness of the market share theory.¹⁵⁶

Market share liability has also been strongly criticized for its potential effects on industry. The theory has been described as radical,¹⁵⁷ tantamount to absolute liability,¹⁵⁸ and a major departure from established tort

Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499 (1961); Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

149. 26 Cal. 3d at 611, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45.

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

151. *Id.*

152. Robinson, *supra* note 21, at 768.

153. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145; Comment, *Market Share Liability—Proposals for Application*, 19 AM. BUS. L.J. 523, 525 (1982). The Comment from which the *Sindell* court drew much of its rationale for market share suggested that 75-80% of the market would be appropriate. Comment, *supra* note 18, at 996.

154. Comment, *supra* note 87, at 129.

155. Comment, *supra* note 153, at 529.

156. Other practical problems with market share include possible unavailability of market share data and difficulty in properly assessing damages if one or more defendants were not in the subject market for the market's duration. See Comment, *supra* note 87, at 129; Comment, *supra* note 153, at 533.

157. *Morton v. Abbott Labs.*, 538 F. Supp. 593, 599 (M.D. Fla. 1982); Comment, *The DES Cases and Liability Without Causation*, 19 AM. BUS. L.J. 511, 517 (1982).

158. Gillick, *The Essence of Enterprise Liability, or the True Meaning of "We're All in this Together,"* 16 FORUM 979, 987 (1981).

law.¹⁵⁹ The chief objection voiced is that some manufacturers may repeatedly be required to pay for injuries caused by manufacturers not named as parties.¹⁶⁰ *Sindell's* deep-pocket rationale arguably makes insurers out of manufacturers.¹⁶¹ Commentators claim that market share liability would discourage development of innovative or complex products because of uncertainty as to future effects of the product.¹⁶² One writer contends that market share liability would also increase the cost of nondefective products, either because of the prohibitive expense of insuring against extensive liability or because the self-insured manufacturer would transfer the cost of his market share liability to other products.¹⁶³ The prevailing reason for rejecting the theory, however, is its abandonment of the traditional element of causal identification.¹⁶⁴

Only one court other than the California Supreme Court has apportioned damages according to the market share liability theory. In *Ferrigno v. Eli Lilly & Co.*¹⁶⁵ the New Jersey superior court applied the alternative liability theory in a DES case, but invoked the market share approach to determine the liability of each defendant that could not exculpate itself. The *Ferrigno* court found the *Sindell* rule a more reasonable solution to the inability to ascertain actual culpability than joint and several liability.¹⁶⁶ In *Hardy v. Johns-Manville Sales Corp.*,¹⁶⁷ an asbestos case, a federal district court in Texas allowed a cross-action and discovery based on

159. Mizell v. Eli Lilly & Co., 526 F. Supp. 589, 596 (D.S.C. 1981); Gillick, *supra* note 158, at 987.

160. Fischer, *Products Liability—An Analysis of Market Share Liability*, 34 VAND. L. REV. 1623, 1659 (1981); Comment, *Policy and Proof: Shifting the Burden of Proof in a Products Liability Case*, 34 BAYLOR L. REV. 83, 102 (1982).

161. Starling v. Seaboard Coast Line R.R., 533 F. Supp. 183, 190 (S.D. Ga. 1982); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1017 (D.S.C. 1981).

162. Comment, *supra* note 153, at 536. But see Comment, *supra* note 157, at 521-22 (doubtful that market share will discourage product development or product safety).

163. Kroll, *Absolute Products Liability*, *supra* note 24, at 196.

164. Morton v. Abbott Labs., 538 F. Supp. 593, 599 (M.D. Fla. 1982); Starling v. Seaboard Coast Line R.R., 533 F. Supp. 183, 186 (S.D. Ga. 1982); Mizell v. Eli Lilly & Co., 526 F. Supp. 589, 596 (D.S.C. 1981); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1017 (D.S.C. 1981).

165. 175 N.J. Super. 551, 420 A.2d 1305 (Super. Ct. Law. Div. 1980); see *supra* notes 46-56 and accompanying text.

166. 420 A.2d at 1316.

167. 509 F. Supp. 1353 (E.D. Tex. 1981), *rev'd on other grounds*, 681 F.2d 334 (5th Cir. 1982). The market share portion of the district court's opinion was not appealed. 681 F.2d at 336. The district court in *Hardy*, an asbestos case, granted a partial summary judgment for plaintiffs based on nonmutual offensive collateral estoppel and judicial notice. 509 F. Supp. at 1362-63. This ruling was based on the holding in *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), that asbestos insulation manufacturers were strictly liable to an insulation worker who contracted asbestosis and mesothelioma. 493 F.2d at 1087-92. In *Hardy* the district court construed *Borel* as establishing as a matter of law that asbestos insulation products were unavoidably unsafe products and that asbestos is a competent producing cause of mesothelioma and asbestosis. *Hardy*, 509 F. Supp. at 1360. The Fifth Circuit reversed *Hardy* on this issue, holding that defendants who were not parties to *Borel* were not estopped, because collateral estoppel requires identity of parties. *Hardy*, 681 F.2d at 340-41. The court also held that defendants who were parties to *Borel* were not estopped because the *Borel* opinion was ambiguous on the issues on which the district court in *Hardy* relied. *Id.* at 345.

the market share theory.¹⁶⁸ The court stated that market share liability is more fair than pro rata contribution because it imposes liability in relation to fault and not merely in proportion to the number of defendants.¹⁶⁹ The *Hardy* court subsequently vacated its order, however, on the ground that the market share theory could not be reconciled with traditional theories of tort recovery in Texas.¹⁷⁰ Neither *Ferrigno* nor the vacated *Hardy* opinion confronts the practical questions inherent in applying market share theory to specific facts. Both cases merely approve the general concept of market share liability. The issue of whether trial courts can handle the complex computations and elusive evidence involved in determining precise market shares for assessment of damages therefore remains unanswered.

V. THE RECOVERY THEORIES AND TEXAS LAW

The Texas courts have not had occasion to discuss enterprise liability.¹⁷¹ The growing number of cases involving manufacturer identification problems,¹⁷² however, increases the likelihood of a Texas court decision on enterprise liability in the near future. This Comment therefore analyzes the Texas tort law precedents upon which Texas courts may rely in considering the enterprise liability theories. This analysis leads to the conclusion that under present law the courts of Texas will accept none of these theories. This prediction rests on an evaluation of Texas law regarding proof of causation, manufacturer liability in general, and the concept of risk allocation.

A. Policy Prerequisites to Enterprise Liability

Adoption of any of the enterprise liability theories by Texas courts will necessitate changes in several policies underlying past decisions. First, the plaintiff's traditional duty to identify a specific defendant responsible for the injury-causing product will require modification. In Texas proof of causation is an essential element in a strict products liability action.¹⁷³

168. 509 F. Supp. at 1360. The court's order was given in response to a motion by one of the defendants; the plaintiffs had not asserted market share liability. *Id.* at 1354.

169. *Id.* at 1358-59.

170. *Hardy v. Johns-Manville Sales Corp.*, No. M-79-145-CA (E.D. Tex. Sept. 24, 1982) (order vacating order granting discovery and cross-action based on market share theory).

171. Texas is not unusual in this regard. The reported decisions reflect that the courts of only three states have addressed enterprise liability. Their discussions appear in *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super. 19, 427 A.2d 1121, 1128 (Super. Ct. App. Div. 1981) (alternative liability rejected as abandoning traditional tort law); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305, 1316 (Super. Ct. Law Div. 1980) (alternative liability accepted; market share modified and accepted); *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185, 190 (Super. Ct. App. Div. 1979) (alternative liability and industry-wide liability rejected because plaintiff identified tortfeasor; concert of action rejected because cooperation in drug development not anti-social); *Bichler v. Eli Lilly & Co.*, 79 A.D.2d 317, 436 N.Y.S.2d 625, 630 (1981) (concert of action accepted); and *Davis v. Yearwood*, 612 S.W.2d 917, 920 (Tenn. Ct. App. 1980) (industry-wide liability rejected as inappropriate to facts).

172. See *supra* notes 7-22 and accompanying text.

173. *Technical Chem. Co. v. Jacobs*, 480 S.W.2d 602, 604 (Tex. 1972); *Fort Worth Steel & Mach. Co. v. Norsworthy*, 570 S.W.2d 132, 135 (Tex. Civ. App.—Tyler 1978, writ dismissed).

The plaintiff must show that the product was defective at the time it left the defendant's hands¹⁷⁴ and that his injury was the result of some act by that defendant.¹⁷⁵ Texas courts have found the causation requirement satisfied and have imposed joint and several liability on defendants who have acted concurrently to produce an indivisible injury.¹⁷⁶ Joint and several liability may be imposed, however, only where all defendants have caused some injury to the plaintiff.¹⁷⁷ No Texas court has adopted the holding in *Summers v. Tice*,¹⁷⁸ which allowed joint and several liability where less than all of the defendants had injured the plaintiff. Texas law thus lacks the requisite foundation for abandonment of the manufacturer identification element in products liability cases.

The second prerequisite to acceptance of enterprise liability is a willingness by the courts to increase the financial burdens on industry. The enterprise liability theories necessarily increase costs to manufacturers who are found liable for injuries despite a possible lack of responsibility for the injury-causing product.¹⁷⁹ The manufacturer also must bear the expense of defending lawsuits in the absence of evidence of a causal connection between its product and the plaintiff's injury. Although the adoption of strict liability by the Texas Supreme Court enlarged the scope of manufacturers' liability, strict products liability applies only to the seller or producer of the product which injured the plaintiff, not to the sellers or producers of similar products.¹⁸⁰

The Texas Supreme Court has also held that a manufacturer is not an

(relying on *Technical Chem. Co.*); *Welch v. Coca-Cola Bottlers' Ass'n*, 380 S.W.2d 26, 28 (Tex. Civ. App.—Eastland 1964, no writ).

174. *Turner v. General Motors Corp.*, 584 S.W.2d 844, 848 (Tex. 1979) (citing *Jack Roach-Bissonnet, Inc. v. Puskas*, 417 S.W.2d 262, 278 (Tex. 1967)); *Pittsburg Coca-Cola Bottling Works v. Ponder*, 443 S.W.2d 546, 548 (Tex. 1969); *Dr Pepper Co. v. Crow*, 621 S.W.2d 464, 465 (Tex. Civ. App.—Waco 1981, no writ) (citing *Pittsburg Coca-Cola*).

175. *Gray v. United States*, 445 F. Supp. 337, 338 (S.D. Tex. 1978); *Coca-Cola Bottling Co. v. Fillmore*, 453 S.W.2d 239, 241 (Tex. Civ. App.—Amarillo 1970, no writ).

176. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. at 1359 (citing *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952)).

177. *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1094-96 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); *Johnson v. Willis*, 596 S.W.2d 256, 263 (Tex. Civ. App.—Waco 1980, writ ref'd n.r.e.); *Phillips v. Gulf & South Am. Steamship Co.*, 323 S.W.2d 631, 635 (Tex. Civ. App.—Houston 1959, writ ref'd).

178. 33 Cal. 2d 80, 199 P.2d 1, 3-4 (1948).

179. The increased cost results from payment of damages to plaintiffs who were probably injured by another manufacturer's product, whereas in traditional tort law a manufacturer pays only for damages proven to result from his own product. See *Fischer, supra* note 160, at 1644 (discussing possibility, under market share theory, that manufacturer will have to pay more than his market share percentage of losses caused by similar products of all manufacturers).

180. In *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788-89 (Tex. 1967), the Texas Supreme Court adopted § 402A of the *Restatement (Second) of Torts*. Section 402A provides:

- (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
 - (a) the seller is engaged in the business of selling such a product, and
 - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.

insurer of his product;¹⁸¹ when a plaintiff misuses a product or assumes the risk of a known danger, the manufacturer is relieved of all¹⁸² or part¹⁸³ of the responsibility for the loss. Texas courts thus expect manufacturers to assume financial responsibility for injuries resulting from defects in their own products, but do not hold a manufacturer liable for an injury not caused by its product. Enterprise liability theories, however, would make a manufacturer potentially liable for injuries caused by a product not proven to have been manufactured by it.

The third element necessary for the adoption of enterprise liability in Texas is a policy judgment that it is better to force a defendant to pay for a loss not clearly attributable to his conduct than to leave an injured party uncompensated.¹⁸⁴ The court in *Summers v. Tice* approved such a policy when it shifted the risk of loss to the defendants.¹⁸⁵ Texas courts have made analogous, though more limited, value judgments. In *Landers v. East Texas Salt Water Disposal Co.*¹⁸⁶ the Texas Supreme Court abrogated the rule that defendants who had acted independently of one another could not be sued jointly in a tort action, even though their acts had produced a single indivisible injury.¹⁸⁷ The court held instead that independent tortfeasors could be held jointly and severally liable for an indivisible injury.¹⁸⁸ The supreme court considered the former rule unjust because it effectively relieved defendants of the consequences of their wrongs and required an innocent plaintiff to suffer his injury without recompense.¹⁸⁹ Thus, the policy of fairness to the injured party prevailed over established law.¹⁹⁰ Risk allocation under the enterprise liability the-

(2) The rule stated in Subsection (1) applies although

(a) the seller has exercised all possible care in the preparation and sale of his product, and

(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

RESTATEMENT (SECOND) OF TORTS § 402A (1965).

181. *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374, 376 (Tex. 1978); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779, 785 (Tex. 1967).

182. *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779, 785 (Tex. 1967); *Procter & Gamble Mfg. Co. v. Langley*, 422 S.W.2d 773, 780 (Tex. Civ. App.—Dallas 1967, writ dismissed).

183. *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977).

184. See, e.g., *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305, 1314 (Super. Ct. Law Div. 1980) (compelling policy supports recovery by innocent plaintiff against manufacturer defendant known to be wrongdoer). The inherent policy judgment in enterprise liability is thus that the risk of loss that may result from a defective product is to be borne by defendants known to have produced such a defective product.

185. 199 P.2d at 4.

186. 151 Tex. 251, 248 S.W.2d 731 (1952).

187. *Id.* at 256, 248 S.W.2d at 734 (overruling *Sun Oil Co. v. Robicheaux*, 23 S.W.2d 713 (Tex. Comm'n App. 1930, judgment adopted) (action in tort for damages may not be maintained against several defendants jointly when defendants acted independently in injuring plaintiff)).

188. 151 Tex. at 256, 248 S.W.2d at 734.

189. *Id.*

190. The court made a similar policy decision when it adopted the rule of strict liability for manufacturers of defective food products in *Jacob E. Decker & Sons v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942). The court stated that public policy favoring consumers and the protection of human health required the imposition of strict liability; the court found partic-

ory requires a policy judgment even more favorable to plaintiffs than does the imposition of joint and several liability in negligence, however, because some manufacturer-defendants in the enterprise liability situation may not have caused any injury at all to the particular plaintiff.¹⁹¹

B. *Precedents for Enterprise Liability*

In addition to comparing the policies underlying Texas tort law and enterprise liability, a determination must be made as to whether Texas case law provides a precedential basis for imposition of enterprise liability in products liability cases. This determination requires analysis of the precedents relied on by courts of other jurisdictions in adopting the enterprise liability theories. If Texas law contains similar precedents, then theoretically the Texas courts could make a similar policy decision to adopt enterprise liability.

1. *Alternative Liability*. The adoption of alternative liability in *Summers v. Tice*¹⁹² resulted primarily from a policy decision by the California Supreme Court.¹⁹³ The court did, however, base its decision in part on *Ybarra v. Spangard*,¹⁹⁴ a *res ipsa loquitur* negligence case in which the plaintiff, through no fault of his own, could not prove which of the defendants had caused his injury.¹⁹⁵ The *Ybarra* court held that the defendants should carry the burden of exculpating themselves because evidence of causation was available to them but not to the plaintiff.¹⁹⁶ The *Summers* court similarly shifted the burden to the defendants.¹⁹⁷ The *Summers* court also cited a number of concert of action cases from other jurisdictions, relying not on the substantive nature of concert of action liability, but on the underlying policy favoring risk-shifting that those cases supported.¹⁹⁸ Because California law, like Texas law, lacks actual precedent for alternative liability, Texas courts arguably could adopt the theory for the same policy reasons given in *Summers*. Texas courts have been reluc-

ularly compelling the consumer's ordinary inability to analyze food for defects prior to consumption. *Id.* at 612, 164 S.W.2d at 829.

191. See generally Comment, *supra* note 160, at 97-103 (policy favoring recovery by injured party competes with traditional policy requiring identification of causal agent; latter policy abrogated by enterprise liability).

192. 33 Cal. 2d 80, 199 P.2d 1 (1948).

193. Prosser, *supra* note 68, at 389-90.

194. 25 Cal. 2d 486, 154 P.2d 687 (1944), cited in *Summers*, 199 P.2d at 4.

195. 154 P.2d at 689. The plaintiff in *Ybarra* was injured while unconscious on an operating table; the defendants were the physicians and nurses attending him. *Id.*

196. *Id.* at 690.

197. 199 P.2d at 4.

198. *Id.* at 3. The court quoted *Oliver v. Miles*, 144 Miss. 852, 110 So. 666 (1927), in which two persons hunting together fired their guns across a highway, injuring a traveller on the road. The *Oliver* court stated: "We think that . . . each is liable for the resulting injury to the [plaintiff], although no one can say definitely who actually shot him. To hold otherwise would be to exonerate both from liability, although each was negligent, and the injury resulted from such negligence." 110 So. at 668. The *Oliver* court based the imposition of joint and several liability on a finding that the defendants had acted in pursuit of a common purpose. *Id.*

tant, however, to make such policy changes without judicial precedent or legislative authority.¹⁹⁹

The absence of precedential support for alternative liability in Texas contrasts with the situation in *Ferrigno v. Eli Lilly & Co.*,²⁰⁰ in which the New Jersey court adopted alternative liability in products liability cases. Not only did the forum state in *Ferrigno* possess the indivisible injury rule,²⁰¹ but the New Jersey Supreme Court had already applied true alternative liability in a negligence case.²⁰² The *Ferrigno* court could thus build on an existing policy favoring recovery by innocent plaintiffs who could not identify the specific causes of their injuries.²⁰³ Because Texas courts have not developed this policy, a Texas court would be unlikely to impose alternative liability in a products liability case. Assuming that the policy of fairness as between an innocent plaintiff and strictly liable defendants would be persuasive to a Texas court, the countervailing policy that manufacturers are not insurers of their products would probably still prevent the court from applying alternative liability.

2. *Concert of Action*. Texas courts have applied concert of action liability in cases not involving products liability for many years.²⁰⁴ Texas tort law thus contains the same precedential basis for applying the concert of action theory in products liability cases as does the law of those states that have already taken this step. In applying concert of action to the multiple manufacturer products liability situation, the courts in both *Bichler v. Eli Lilly & Co.*²⁰⁵ and *Abel v. Eli Lilly & Co.*²⁰⁶ treated their decisions as natural extensions of existing concert of action liability.²⁰⁷ Neither court was troubled by what the *Sindell v. Abbott Laboratories* court considered an expansion of concert of action liability far beyond its intended scope.²⁰⁸ In *Sindell* the California court described the typical concert of action case as involving a small number of defendants whose actions over a short period of time resulted in a tort against a single plaintiff, with each defendant being held liable as a direct or indirect participant in the tort.²⁰⁹ Texas

199. See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862-63 (Tex. 1977).

200. 175 N.J. Super. 551, 420 A.2d 1305 (Super. Ct. Law Div. 1980).

201. *Hill v. Macomber*, 103 N.J. Super. 127, 246 A.2d 731 (Super. Ct. App. Div. 1968).

202. *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1 (1975).

203. 420 A.2d at 1314 (citing *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185 (Super. Ct. App. Div. 1979)).

204. *Burton v. Roberson*, 139 Tex. 562, 566, 164 S.W.2d 524, 526 (1942) (citing *Wolf v. Perryman*, 82 Tex. 112, 118-20, 17 S.W. 772, 775-76 (1891)); *Markham v. Houston Direct Navigation Co.*, 73 Tex. 247, 250, 11 S.W. 131, 132 (1889).

205. 79 A.D.2d 317, 436 N.Y.S.2d 625 (1981).

206. 94 Mich. App. 59, 289 N.W.2d 20 (1979).

207. The *Bichler* court stated: "It does not strain one's sense of fairness to allow a limited expansion of the doctrine of concerted action to cover the type of circumstances faced in a DES case" 436 N.Y.S.2d at 632. The *Abel* court was more straightforward: "In so holding, we adopt no new theory of law We simply follow precedent" 289 N.W.2d at 27.

208. 26 Cal. 3d 588, 606, 607 P.2d 924, 933, 163 Cal. Rptr. 132, 141, cert. denied, 449 U.S. 912 (1980).

209. 26 Cal. 3d at 605-06, 607 P.2d at 933, 163 Cal. Rptr. at 141.

concert of action cases generally fit this description.²¹⁰ Additionally, the prevailing view in other jurisdictions holds that the conduct of manufacturers in developing and marketing a defective product does not constitute the sort of antisocial group behavior that concert of action liability is intended to prevent.²¹¹ Texas courts thus are unlikely to apply concert of action liability in products liability cases. This prediction must, however, be qualified. In a products liability case involving only two or three manufacturers, all of whom had directly cooperated in culpable conduct, the application of concert of action liability by a Texas court would not be so great a departure from policy or precedent as it would be in cases involving members of large industries.²¹²

3. *Industry-Wide Liability.* In *Hall v. E.I. Du Pont de Nemours & Co.*²¹³ the federal district court relied on cases from many states in formulating its industry-wide liability theory.²¹⁴ The court held that liability for joint control of a risk could arise out of a business relationship or joint enterprise,²¹⁵ but that the joint enterprise need not entail a profit-sharing element for joint and several liability to apply.²¹⁶ The court thus concluded that independent members of an industry who had followed the

210. See, e.g., *Krishnan v. Garza*, 570 S.W.2d 578 (Tex. Civ. App.—Corpus Christi 1978, no writ) (action against doctor and hospital for malpractice); *Carlile v. Easterling*, 502 S.W.2d 589 (Tex. Civ. App.—El Paso 1973, no writ) (tort action against two parties for interference in performance of contract); *Leon's Shoe Stores, Inc. v. Hornsby*, 306 S.W.2d 402 (Tex. Civ. App.—Waco 1957, no writ) (action against store and store employee for false imprisonment).

211. *Morton v. Abbott Labs.*, 538 F. Supp. 593, 596-97 (M.D. Fla. 1982); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1015-16 (D.S.C. 1981); *Payton v. Abbott Labs*, 512 F. Supp. 1031, 1038 (D. Mass. 1981); *Lyons v. Premo Pharmaceutical Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185, 190 (Super. Ct. App. Div. 1979).

212. One Texas decision discusses concert of action in a products liability context. In *McMillen Feeds, Inc. v. Harlow*, 405 S.W.2d 123 (Tex. Civ. App.—Austin 1966, writ ref'd n.r.e.), the court stated: "It is the general rule in Texas that two or more persons become joint tortfeasors when they participate in concerted action to commit a common tort and accomplish their purpose." *Id.* at 139. The court held the two defendants in *McMillen* jointly and severally liable for supplying defective animal feed. *Id.* The defendants, however, were the actual supplier of the product and another corporation of which the supplier was the wholly owned subsidiary. *McMillen* is thus not a case of two or more distinct parties acting in concert, but of two parties constituting essentially a single entity. No other products liability case in Texas could be found that discusses concert of action.

213. 345 F. Supp. 353 (E.D.N.Y. 1982).

214. *Id.* at 372-73 (citing *Dement v. Olin-Mathieson Chem. Corp.*, 282 F.2d 76 (5th Cir. 1960); *Thompson v. Johnson*, 180 F.2d 431 (5th Cir. 1950); *Troop v. Dew*, 150 Ark. 560, 234 S.W. 992 (1921); *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968); *Prussak v. Hutton*, 30 A.D. 66, 51 N.Y.S. 761 (1898); *Hanrahan v. Cochran*, 12 A.D. 91, 42 N.Y.S. 1031 (1896); *Moses v. Morgantown*, 192 N.C. 102, 133 S.E. 421 (1926); *Sprinkle v. Lemley*, 243 Or. 521, 414 P.2d 797 (1966); *Michigan Millers Mut. Fire Ins. Co. v. Oregon-Washington R.R. & Navigation Co.*, 32 Wash. 2d 256, 201 P.2d 207 (1948)).

215. 345 F. Supp. at 372 (citing *Troop v. Dew*, 150 Ark. 560, 234 S.W. 992 (1921); *Lindsay v. Acme Plaster Co.*, 220 Mich. 367, 190 N.W. 275 (1922); *Prussak v. Hutton*, 30 A.D. 66, 51 N.Y.S. 761 (1898); *Walton, Witten & Graham v. Miller's Adm'x*, 109 Va. 210, 63 S.E. 458 (1909)).

216. 345 F. Supp. at 373 (citing *Connor v. Great Western Sav. & Loan Ass'n*, 69 Cal. 2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (bank liable for negligence in exercising its share of control over housing development contractor whom bank financed)).

same inadequate standards could be held jointly and severally liable because of their joint control of the risk.²¹⁷ Texas courts would be less likely than the *Hall* court to adopt precedents from other jurisdictions. Under Texas law participants in a joint adventure must have a common interest in the objects and pursuits of the enterprise, an agreement to share profits and losses, and an express or implied right to control one another's conduct.²¹⁸ In contrast, the defendant-manufacturers in *Hall* shared no such common interests or mutual right of control but rather pursued independent profit-seeking activity.²¹⁹ The *Hall* court also relied on the *Summers v. Tice* holding. As discussed above, Texas does not follow the *Summers* rule, even in negligence cases. Texas thus lacks the precedential basis for *Hall's* theory of industry-wide liability.²²⁰ The *Hall* court's restriction of its theory to cases involving small, close-knit industries further decreases the chance that Texas courts will confront a fact situation in which they would apply industry-wide liability.²²¹

4. *Market Share*. The only distinction between the alternative liability and market share theories is the degree of liability imposed on the defendants. Under alternative liability the defendants are jointly and severally liable for all of the plaintiff's damages, while the market share approach imposes liability according to each defendant's percentage of the market.²²² As discussed above, Texas courts are unlikely to adopt alternative liability, which the *Sindell v. Abbott Laboratories*²²³ court relied on as precedent for adoption of market share liability; thus the adoption of market share liability is also unlikely in Texas. The availability in Texas of contribution among joint tortfeasors provides no basis for market share liability, because contribution in Texas operates on a pro rata system rather than a percentage of causation or percentage of market formula.²²⁴ The vacated opinion in *Hardy v. Johns-Manville*²²⁵ indicated that the movement toward comparative fault in Texas products liability law sup-

217. 345 F. Supp. at 374.

218. *Brown v. Cole*, 155 Tex. 624, 631, 291 S.W.2d 704, 709 (1956); *Raybourn v. Lewis*, 567 S.W.2d 908, 911 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.); *Tonahill v. Pickett*, 278 S.W.2d 930, 931-32 (Tex. Civ. App.—Waco 1955, writ ref'd n.r.e.).

219. 345 F. Supp. at 373.

220. Texas courts could conceivably draw on precedent from other jurisdictions, as the *Hall* court did, to support industry-wide liability or any other form of enterprise liability. The scope of this Comment, however, is necessarily confined to precedents existing within Texas law; whether Texas courts will go outside their own precedents to justify enterprise liability is highly speculative.

221. The fact that most of the decisions discussing industry-wide liability and the other enterprise liability theories are by federal courts may be a factor in the future of these theories in Texas, because Texas state courts may not have the opportunity to decide a case with facts that would be appropriate for adopting enterprise liability under state court precedents.

222. *Sindell v. Abbott Labs.*, 26 Cal. 3d 588, 612-13, 607 P.2d 924, 936, 163 Cal. Rptr. 132, 145, cert. denied, 449 U.S. 912 (1980).

223. 607 P.2d at 936-37, 163 Cal. Rptr. at 136.

224. Under the pro rata system, contribution is determined according to the number of defendants and not according to the percentage of fault or causation attributable to each defendant. TEX. REV. CIV. STAT. ANN. art. 2212 (Vernon 1971).

225. *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1359 (E.D. Tex. 1981); cf.

ports imposition of market share liability, but to date a complete system of comparative fault has not developed.²²⁶ Further, a comparative fault system ordinarily apportions damages according to actual causative fault. Because the manufacturer identification problem continues to exist in a comparative fault system, the actual causative fault of each defendant remains impossible to determine.²²⁷ *Hardy* also cited the availability of joint and several liability in Texas as an indication that Texas courts would follow *Sindell*.²²⁸ As demonstrated above, however, Texas courts allow joint and several liability only as to proven tortfeasors, while the market share theory imposes liability on parties not shown to have caused the plaintiff's harm.

Thus the Texas methods of apportioning liability will not accommodate the market share theory. The conclusion must be that Texas courts, which traditionally have been cautious in developing products liability law, will not accept market share liability because that theory is inconsistent with state law.²²⁹

VI. CONCLUSION

The enterprise liability theories are presently the subject of much commentary. Because of practical difficulties and policy considerations, however, very few courts have applied any of the theories in products liability cases. Enterprise liability theories arose from a concern that plaintiffs who are injured by defective products deserve compensation for their losses, even though they may be unable to attach the blame to a particular defendant. Each of the theories discussed in this Comment represents an earnest attempt to solve the plaintiff's dilemma. At the same time, each theory compromises to some extent the traditional rule that a defendant

Morton v. Abbott Labs., 538 F. Supp. 593, 599 (M.D. Fla. 1982) (stating that adoption of comparative negligence does not indicate trend to abandon causation element).

226. An element of comparative causation was introduced into Texas's strict liability law in *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977), to the extent that the plaintiff's misuse of a product reduces his recovery in proportion to the percentage of causation attributable to the misuse. *Id.* at 352. Comparative negligence is also held to apply to an action for breach of warranty. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 329 (Tex. 1978). Texas has not, however, adopted a complete system of comparative fault for strict products liability like the comparative fault system created by the California Supreme Court in *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

227. Furthermore, comparative fault in products liability would favor the defendants in disallowing recovery of the portion of the damages that the defendant did not cause; thus it serves a purpose opposite to that of enterprise liability, which encourages recovery.

228. 509 F. Supp. at 1359.

229. Federal courts have rejected enterprise liability on the ground that it is antithetical to the law of the forum state. *See Morton v. Abbott Labs.*, 538 F. Supp. 593, 599 (M.D. Fla. 1982) (market share theory contrary to Florida tort law); *Starling v. Seaboard Coast Line R.R.*, 533 F. Supp. 183, 189 (S.D. Ga. 1982) (market share and industry-wide liability have no basis in Georgia tort law); *Mizell v. Eli Lilly & Co.*, 526 F. Supp. 589, 596 (D.S.C. 1981) (market share contrary to public policy and unequivocal tort law of South Carolina); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1018 (D.S.C. 1981) (market share contrary to state law); *Payton v. Abbott Labs.*, 512 F. Supp. 1031, 1040 (D. Mass. 1981) (adoption of enterprise liability is step that must be taken by state supreme court).

should not be held liable unless the plaintiff identifies him as the cause of the plaintiff's injury. Because Texas courts hold fast to this traditional rule, adoption of any one of the enterprise liability theories would be contrary to policy and precedent. Thus under existing law in Texas the adoption of enterprise liability theories appears highly unlikely.

The unfairness of enterprise liability to manufacturers renders it appropriate that Texas courts should reject the theories. An alternate solution is clearly necessary, however, for equitable disposition of the cases, virtually certain to arise in Texas, involving unidentifiable manufacturers. Only when the legal community has taken note of the potentially overwhelming impact of these cases on the Texas court system will a creative and practical solution result. A need thus exists for immediate and serious attention to the manufacturer identification problem from both the legislature and the bar.

