I. INDUSTRY-WIDE OR MARKET-SHARE LIABILITY

A generally accepted principle of tort law is that the plaintiff must prove by a preponderance of the evidence that tortious conduct on the part of the target defendant was at the very least a factual cause of the illness or injury for which damages are sought. In the alternative, he must prove that the defendant is vicariously liable for the actions of another whose conduct proved to be a cause. The element of tort causation in Texas is generally referred to as "proximate cause." Proximate cause is then subdivided into the necessary elements of causation in fact and foreseeability. Causation in fact means that the defendant's tortious conduct was a substantial factor in causing the injury. Foreseeability, however, focuses upon the aspect of reasonability: should the defendant, as a person of ordinary intelligence, have anticipated the danger to others that was created by his act?

In general, the plaintiff carries the burden of proof as to proximate cause, but it is not necessary that the plaintiff prove that an injury posi-
tively resulted from a defendant's misconduct, only that the "greater probability" was that the defendant's misconduct caused the injury. The plaintiff's burden of proof is not of the magnitude of sole cause; rather it is of a concurring cause that might have been contemplated by the defendant at the time of the tortious act. The allocation of the burden of proof to a claimant also amounts to an allocation of the risk of loss to such a person for an illness or an injury if the more likely cause cannot be identified at trial. This result can be justified on two grounds: the security and well-being of those engaged in socially desirable activities are just as important as the security and well-being of those who are injured; and a loss ought not to be shifted from a victim unless he can establish that it was attributable to tortious conduct of the defendant. The burden of persuasion or of producing some evidence is sometimes shifted to a defendant to prove that his conduct was not a proximate cause. This shift usually occurs in situations in which the defendant's actions could have been a proximate cause. The justification for shifting the burden of proximate cause proof is the theory that the risk of loss, as a matter of justice and fairness, should be allocated to the defendant when the causative agency cannot be established.

The potential difference between a plaintiff's and a defendant's duty to prove causation or lack of causation is emphasized in claims based on industry-wide liability. Industry-wide liability is a hybrid concept of liability drawn from the theories of alternate or concurrent liability as well as from doctrines of products liability. The result is a type of absolute liability.
ity. Industry-wide liability has been applied only in cases in which a product has been manufactured, such as a drug, and it is impossible to determine which manufacturer among many produced the specific product in question. Once the plaintiff has proven injury and causation by the product, the burden shifts to the industry-wide defendants to exonerate themselves by showing that their respective products could not have caused the injury. The doctrine thus forces defendants to point fingers of blame at one another. If the industry-wide defendants are unable to isolate the causation for the plaintiff's injury, liability is consequently apportioned amongst those defendants not able to disprove proximate cause in accordance with a percentage share of a defined relevant sales market. Because the difficulty in proving proximate cause is not a circumstance of the plaintiff's making, the doctrine of industry-wide liability fashions a way around product identification.

The point that I have chosen to make at the outset of the treatment of this very important subject of industry-wide liability is that the rules related to the burden of persuasion and to presumptions are rules that have the effect of allocating risks of losses between claimants and defendants just as surely as do the rules of substantive law. Policy considerations as to who should bear the risk of loss when the precise causative agent cannot be ascertained sometimes induce courts to make exceptions to the general rule which allocates the loss to the claimant or victim. This simply means that there are some situations when, as fairness and justice dictate as between the plaintiff and the defendant, the risk of loss should be on the defendant or a group of defendants when the cause is uncertain so long as there is a reasonable probability that the defendant or each of a group was a causative agency.

Another device to allocate the risk of loss as between two parties relates to the subject of vicarious liability. This has nothing to do with "the uncertainty" about causation. Rather, this is a device to allocate risks between two persons when the conduct of neither was a cause, but when

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some third person's conduct was a cause. The defendant is held vicari-
ously liable in those situations when it is considered that as between the
parties to the lawsuit, the defendant should be responsible for the tortious
conduct of the third person.

These two problems relating to the allocation of the risk of loss between
parties to the litigation have been catapulted into current prominence as a
consequence of a large number of claims that have been made in two sepa-
rate and distinct general situations: (1) claims based on the notion that a
drug commonly referred to as DES (a synthesized form of the female hor-
mone estrogen) has caused a type of cervical or vaginal cancer in the
daughters of mothers who were treated with the drug to prevent miscar-
riages; and (2) claims that have been made nationwide during the last dec-
ade (perhaps as many as 12,000 to 15,000, primarily in federal courts)
against defendants who made and sold insulation products containing va-
rying amounts of asbestos.

It is important to note the historical backgrounds of the DES and asbes-
tos litigation in order to fully appreciate the impact of risk-of-loss analysis
in decisions endorsing industry-wide liability. DES is a synthesized hor-
mone produced primarily to prevent miscarriages during pregnancy. It
was first approved for public use by the Federal Drug Administration
(FDA) in 1947, and prescription of the drug by doctors caused its distribu-
tion to millions of pregnant women prior to 1970. In 1971, however,
statistical studies indicated a significant relationship between use of DES
and the development of cancer in the daughters of the users. Because of
an increasing fear concerning the ill effects on the offspring of DES users,
in 1971 the FDA effectively banned the drug.

Difficulties in the area of asbestos insulation arose about the same time
as those evolving from DES use. During World War II and for some years

21. What has emerged as the modern justification for vicarious liability is a rule of
policy, a deliberate allocation of the risk. See Seavey, Speculation as to Respondeat Superior,
in Harvard Legal Essays 433 (1934); Douglas, Vicarious Liability and Administration of Risk,
38 Yale L.J. 684, 720 (1929).

22. DES was first synthesized in England in 1938 but never was patented. It was less
expensive than natural estrogen and could be administered orally. See Comment, DES and

23. Id. at 964. Because of the mass production of the product, which at the time was
thought to be an effective means of preventing miscarriages, no one is sure how many com-
panies manufactured DES for use in pregnancy or which companies manufactured the drug
for certain pharmacies. Id. at 964 n.3. The number of producers has been estimated to
exceed 300, but this approximation is unconfirmed. Id. Much of the problem results from
the fact that DES still is marketed in the United States for a variety of purposes, not the least
of which is as an ingredient to birth control pills. Id. at 963 n.2.

24. Id. at 964. Although studies continue, the relationship appears to be based on more
than conjecture.

25. Id. at 966. DES, nevertheless, still is used to prevent certain types of breast cancer.
Id. at 963 n.2. This use, in part, accounts for the fact that virtually every major drug com-
pany in the United States has been named a defendant in the DES suits arising since 1971.
Id. at 967. For a discussion of the medical problems linked to DES, see Greenwald, Barlow,
Nesca, & Burnett, Vaginal Cancer After Maternal Treatment With Synthetic Estrogen, 285
New Eng. J. Med. 390 (1971); Herbst, Uelfelder, & Poskanzer, Adenocarcinoma of the Va-
thereafter about 40% of all insulation products were asbestos-containing.\textsuperscript{26} The percentage has now dropped materially with advances in the state of the art in the use of less dangerous substances. Asbestos-containing material was probably the most effective material available to insulate against extremely high temperatures, often as high as 1,000 degrees. Claims that have been filed are based on the assumption that insulation workers acquired lung disorders, including asbestosis, and often a form of fatal lung cancer from exposure to air laden with asbestos fibres.\textsuperscript{27}

Claims in both of these types of cases have been filed some twenty or more years after exposure to defendants' products. Both types of claims present very difficult problems of causation and concert of action, resulting in decisions abandoning the usual rules about relating tortious conduct to plaintiff's injury or illness. Establishing legal liability for a product-related disease confronts a lawyer and a court with several problems not usually present in the case of an injury arising out of a single and isolated damaging event. The long latency period in these so-called "creeping disease" situations poses a number of questions other than causation, including: (1) those relating to the liability of successor entities and of stockholders of dissolved corporations; (2) those relating to insurance coverage since several different insurance carriers may have insured the defendant with somewhat different language as to coverage; (3) conflict of laws problems presented as a consequence of the fact that occupational exposures may have often been multi-state exposures; and (4) problems related to both misuse with appreciation of danger by employers and victims and unforeseeable misuse. When the strict rules of causation must be relaxed due to such peculiar factual circumstances, which invoke industry-wide liability, it is then that the theories of allocating risk of loss can be especially helpful in defining proper causation burdens of proof.

Applying "Erie indicators," a federal district judge in the Eastern District of Texas, for discovery purposes, has espoused the position that Texas


\textsuperscript{27} Medical testimony indicated that asbestos inhalation, even in the least affected industrial settings, can be responsible for the lung diseases of asbestosis and mesothelioma. 493 F.2d at 1083. Much of the history of these claims is set forth in the Borel opinion. Borel, an insulation worker from 1936 to 1969, died of asbestosis and mesothelioma caused by exposure to concentrations of asbestos dust generated by insulation materials. As such, his affliction fitted within the rubric of occupational disease, which means an impairment of health resulting from conditions of employment. See Note, Compensating Victims of Occupational Diseases, 93 Harv. L. Rev. 916 (1980).

Some administrative law cases related to litigation about regulatory standards involved legal principles somewhat similar to those involved with tort concepts. These cases are useful evidentiary sources on causal connection between toxic substances or atmospheric conditions polluted with toxic substances and occupational disease. See American Petroleum Inst. v. OSHA, 581 F.2d 493 (5th Cir. 1978), aff'd sub nom. Industrial Union Dept, AFL-CIO v. American Petroleum Inst., 448 U.S. 609 (1980) (benzene standard); American Iron & Steel Inst. v. OSHA, 577 F.2d 825 (3d Cir. 1978) (coke oven emission standard); Society of the Plastics Indus., Inc., v. OSHA, 509 F.2d 1301 (2d Cir. 1975) (vinyl chloride standard). They also demonstrate how elusive are the concepts of reasonable scientific knowability and legal cause of harm in the occupational disease context. See id. at 1308.
will adopt some form of industry-wide liability, thereby relieving the
claimant of the necessity of showing that exposure to the named defend-
ant's specific product was the proximate cause of the alleged injury. In
*Hardy v. Johns-Manville Sales Corp.* fifty-seven claims were consolidated
against multiple manufacturers of insulation products containing varying
amounts of asbestos.\(^{28}\) One defendant filed a cross-action for contribution
against other defendants; a motion for discovery was filed based upon the
assumption that each defendant would be subject to liability for a propor-
tionate amount of the plaintiff's damages represented by the defendant's
market share of asbestos-containing products.\(^{29}\) Intimating that Texas
courts would adopt some form of industry-wide liability in asbestos-re-
lated cases, the district court granted the defendant's motion for discov-
ery.\(^{30}\) The court, however, refused to consider whether industry-wide
liability would apply in a trial on the merits, limiting its opinion only to
the motion for discovery.\(^{31}\) The issue of what constitutes a relevant market
in terms of applying market-place proportional damages also was side-
stepped by the court, thereby leaving the *Hardy* opinion quite limited in
scope.\(^{32}\) The federal judge, however, did recognize that 1) three courts in
such cases have accepted a concept of enterprise or industry-wide liability
when the product of a particular manufacturer could not be identified as
the causative agent;\(^{33}\) 2) Texas had adopted a concept of concurrent liabil-
ity in an oil industry pollution case when the plaintiff's injury was indivisi-
ble as to the causative defendant;\(^{34}\) and, 3) Texas courts are likely to adopt
some kind of comparative causative fault analysis.\(^{35}\)

**A. Water and Air Pollution and the Single Damaging Event**

A substantial number of cases involve injuries or illnesses resulting from
a single exposure to polluted water or air in which two or more tortious
actors contributed to the polluted condition. These are cases where claim-
ants have not been able to recover damages without identifying the event
that caused the plaintiff's injury, the polluted condition that caused the
event, or the varied contributors to the polluted condition. In these cases,

\(^{28}\) 509 F. Supp. 1353 (E.D. Tex. 1981). Some of the plaintiffs were insulation workers,
some were pipefitters, and some were carpenters and factory workers. Thus, they were not
exposed to the same level of asbestos fibre concentration. Consequently, the issues relating
to failure to warn and causation were not the same. *Id.* at 1354.

\(^{29}\) *Id.* at 1355-56.

\(^{30}\) *Id.* at 1355. Judge Parker hesitated to make sweeping determinations of Texas law,
as Texas courts have not had occasion to approach the question of market-wide liability.
Sounding the "Erie-alarm," he nevertheless treaded into uncharted waters, at least insofar as
the discovery issue was concerned, stating that "it becomes the Court's duty to determine
what course Texas law would follow were the issues of [market-wide] liability and market
share apportionment presented to the state's highest court." *Id.* at 1356-57.

\(^{31}\) *Id.* at 1357.

\(^{32}\) *Id.* at 1359-60.

\(^{33}\) The cases are set forth in note 16 supra.

\(^{34}\) See *Landers v. East Tex. Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731
(1952). See notes 38-40 infra and accompanying text.

*appeal docketed*, No. 81-2204 (5th Cir. May 29, 1981).
the plaintiff has recovered only upon proof of a greater likelihood that 1) a polluted condition was the cause of the illness; 2) the condition was brought about as a consequence of the independent and separate conduct of several tortious actors; and, 3) the contribution of each tortious actor was substantial. Most courts have considered the claimant's injury to be divisible so that each defendant is liable only for a proportionate share of the damages; the rationale is that one cannot be made a joint tortfeasor merely by the rules of joinder. Something more, such as concert of action, is required to lessen the plaintiff's burden of proof as to causation.

In *Landers v. East Texas Salt Water Disposal Co.*, however, the Supreme Court of Texas held that where two defendants independently contributed to the pollution of a lake with salt water, and the amount of independent contribution per defendant could not be determined, each would be jointly liable for the entire amount. In this case, the time of the injury as well as the event from which the injury arose was clearly identified. The decision was based upon the notion of fairness that a plaintiff should not have to bear the onerous burden of proving a percentage of contribution by a defendant. In effect, the risk of loss was shifted to the defendant because of the policy need to compensate an injured plaintiff. Landers thus represents a minority view; most courts would probably adopt the view that the harm caused by the pollution is divisible. The question then becomes whether the harm caused by the pollution is divisible and whether each defendant will be liable for a pro rata portion of the damages if the amount of contribution of each cannot be ascertained.

**B. Asbestos Cases Involving Long-Term Exposure**

There is no effective way to identify the events in the working-life history of a particular plaintiff stricken by asbestosis that would establish the true cause of the disease. In *Borel v. Fibreboard Paper Products Corp.*, a

36. *See* Sun Oil Co. v. Robicheaux, 23 S.W.2d 713 (Tex. Comm'n App. 1930, holding approved). The Robicheaux court ruled that an action at law for tort damages cannot be maintained against several defendants where their actions did not occur in concert and where the plaintiff is unable to prove sufficient fault as to each. *Id.* at 715. The court reasoned that each tortfeasor is liable only for the damages he actually caused; he cannot be held jointly and severally liable by procedural joinder. *Id.* Independent action by tortfeasors, however, was subject to prospective equitable relief. *Id.*

37. In these cases, strong emphasis is placed on the "independent" quality of the tortfeasor's conduct. Mitchell Realty Co. v. City of West Allis, 184 Wis. 352, 199 N.W. 390, 396 (1924); Farley v. Crystal Coal & Coke Co., 85 W. Va. 595, 102 S.E. 265 (1920); Pulaski Anthracite Coal Co. v. Gibboney Sand Bar Co., 110 Va. 444, 66 S.E. 73, 74 (1909). *See generally* F. HARPER & F. JAMES, THE LAW OF TORTS 1125 (1956).

38. 151 Tex. 251, 258, 248 S.W.2d 731, 735 (1952). Justice Calvert conducted an extensive analysis of both jurisdictional approaches and legal commentary on the issue of joint and several liability of independently contributing tortfeasors. *Id.* at 255, 248 S.W.2d at 733.

39. The Landers court explicitly overruled the decision in Sun Oil Co. v. Robicheaux, 23 S.W.2d 713 (Tex. Comm'n App. 1930, holding approved), stating that "if such has been the law, from the standpoint of justice it should not have been; if it is the law now, it will not be hereafter." *Id.* at 734.

40. *See* the cases collected in note 37 *supra*; *cf.* Slater v. Pacific Am. Oil Co., 212 Cal. 648, 300 P. 31 (1931) (damages denied because of impossibility of ascertaining defendants' contributions, but injunctive relief preventing further pollution granted).
wrongful death action in which the decedent had died from cancer, the Fifth Circuit Court of Appeals held each of the several manufacturers of asbestos-containing products liable for all damages (absent a specific showing of causation by the plaintiff as to particular defendants) with the simple explanation that the jury was justified in finding that each defendant's product was a cause of the illness and death. While the court in Borel did not specifically utilize the risk-of-loss theories to shift the burden of proving specific causation from plaintiff to defendants, such was the practical effect of the opinion. Realistically, however, all that the plaintiff can establish in the creeping-illness cases is that each exposure to a product containing asbestos involved a risk of making a contribution to the severity of the disease. A victim's illness in nearly all of the asbestos cases has occurred as a consequence of some combination of the polluted conditions occurring over a period of ten to twenty-five years from the time of first exposure to manifestation of the disease. This is quite different from a case where the conduct of several defendants combines to produce a single polluted condition that was clearly the cause of death or injury. There is a similarity, however, in that each defendant's product was involved in at least one of the events that could have been a contributing factor.

C. Industry-Wide Liability and Concert of Action

It is generally accepted that concert of action on the part of a group with intent to achieve certain ends can result in both tort and criminal liability of each member of the group for the actions of others in the group. Each group member thus becomes vicariously liable for the conduct of others in the achievement of the common goal. This is because group action to achieve such ends is antisocial and inimical to the general welfare. This concept, however, seldom has been utilized in tort law outside the area of price-fixing or boycotting. The usual situation involving concert of action relating to physical harm claims has been one where two or more persons have acted simultaneously and dangerously in carrying out a particular undertaking pursuant to an express or implied agreement. It is therefore said that when one does a tortious act in concert with the other, or pursu-

42. 493 F.2d at 1083, 1094.
43. See notes 37-40 supra and accompanying text.
44. RESTATEMENT (SECOND) OF TORTS § 876 (1965). The Restatement specifically disclaims application of this section when strict liability is involved. Id.
45. One legal scholar has commented: "It now seems generally agreed, although there has been authority to the contrary, that there are certain types of conduct, such as boycotts, in which the element of combination adds such a power of coercion, undue influence or restraint of trade, that it makes unlawful acts which one man alone might legitimately do. It is perhaps pointless to debate whether in such a case the combination or conspiracy becomes itself the tort, or whether it merely gives a tortious character to the acts done in furtherance of it.
W. PROSSER, supra note 12, at 293 (footnotes omitted).
46. RESTATEMENT (SECOND) OF TORTS § 876, comment d (1965).
47. Id.
ant to a common design with the other, he assumes consequential liability for the tortious act of the latter. 48 It is also said that when one knowingly aids and abets another in the commission of a tortious act, he will be subject to liability for the tortious act of another. 49 These are defined as examples of vicarious liability. They are principles originally announced and created to deter antisocial group behavior; they were not initially promulgated to escape various difficulties with causation. Therefore, it can be reasoned that any attempt to apply these theories of liability to the asbestos and DES cases in order to solve a causation problem is questionable. It is, of course, indeed possible that there has been antisocial group behavior of a kind that ought to subject each member of the group to liability for harm resulting from conduct identical to the type of conduct committed by all other members of the group. But this is not necessarily the proper rationale for applying the aforementioned theories of liability to such antisocial group behavior. A more straightforward approach would be to announce the policy of liability in such group situations based upon the theories of risk of loss, for example.

The most frequently recurring situation relating to these principles is that of negligent automobile racing on the highway. 50 In that situation, each defendant's conduct can be regarded as a cause of the accident of another driver involved in the race as opposed to an example of vicarious liability. The aiding and abetting section of the Restatement (Second) of Torts states that the defendant must know that the other's conduct constitutes a breach of duty in order for this liability to apply. 51 Drag races constitute such an example, but this principle does not apply simply because the defendant aided and abetted another in doing something that was proved later to be tortious. Concert of action usually does not result in joint liability for acts pursuant to the joint undertaking in the absence of simultaneous action unless the objective to be obtained by joint action is regarded as antisocial in its nature. 52

Evidence has been introduced, especially in the DES cases, for the purpose of showing a certain amount of concert of action on the part of those manufacturers engaged in the production and marketing of DES. A concert of action theory therefore has been advanced primarily to escape a burden of proof problem as to causation. 53 Parallel practices provide a basis for charges of concert of action in the sense of action taken in response to an express or implied-in-fact agreement of the group. One possible advantage to this theory is the unusual manner in which drugs are marketed. As the marketing of new drugs must be approved by the FDA,
joint clinical files are often submitted by a group of drug manufacturers. The manufacturers join statistical forces in order to achieve government approval. The companies may have collaborated in other ways as well. Suffice it to say that this theory should be applicable only if there is evidence to show an implied-in-fact agreement to act in a manner that each defendant knew to be wrongful or to act in a similar manner to achieve an objective that should not have been achievable by collaborative action.

Concert of action thus has been considered a possible basis for recovery in several DES cases. Conversely, it has also been rejected as a possible basis for recovery. In *Bichler v. Eli Lilly & Co.*, the Supreme Court, Appellate Division, of New York gave the following instruction:

If you find that defendant and the other drug companies either consciously paralleled each other in failing to test DES on pregnant mice, as a result of some implied understanding, or that they acted independently of each other in failing to do such testing, but that such independent actions had the effect of substantially aiding or encouraging the failure to test by the others, then you should find that the defendant wrongfully acted in concert with the other drug manufacturers in the testing and marketing of D.E.S. for use in accidents of pregnancy.

This instruction seems to assume that if it was agreed that testing was unnecessary and there was an implied understanding to that effect, each manufacturer would be vicariously liable for harm caused by the sale of DES once a defect was proved, even in the absence of negligence, fraud, deception, or misrepresentation to the FDA.

**D. Concert of Action by Way of Joint Control of Risk**

A product is defective as sold if it is sold in the kind of condition that makes it unreasonably dangerous. In *Hall v. E.I. Du Pont de Nemours & Co.*, the New York district court applied a concert of action theory by holding that when manufacturers of a fungible or identical product collaborated in controlling the risk or dangerous propensities of that product, each accepts vicarious liability for the identical or substantially identical conduct of the other. In *Hall* thirteen children were injured in a series of unrelated accidents spanning a period of four years. Injuries occurred in ten different states. The plaintiffs were citizens of the states in which the injuries occurred. The plaintiffs were claiming damages against six different manufacturers of blasting caps as well as the defendant’s trade association, the Institute of Makers of Explosives (IME). The plaintiffs’ primary contentions were that the injuries were caused by the defendants’ failure to place warnings on the blasting caps, and that the defendants’ production of caps was such that the product was too susceptible to accidental detonation. The court explicitly noted that joint control of risk did not require a

56. 436 N.Y.S.2d at 631.
The court then stated that joint control can be shown in one of three ways: first, by explicit agreement; second, by the defendants’ parallel behavior sufficient to show tacit agreement; and third, by acting independently in adhering to an industry-wide standard or to a customary standard, thereby engaging in joint control of the risk. The Hall decision thus makes collaboration in the establishment of industry standards a questionable legal practice.

E. The "Alternative Liability" Theory

Courts, in a variety of situations, have permitted a plaintiff to join two or more defendants and prove that one or the other defendant probably caused a damaging event out of which an indivisible injury or illness arose. The plaintiff then is allowed to obtain a recovery against each defendant for the entire amount of damages in the absence of exculpating evidence from one of the defendants to show that its conduct could not have been a factor. This "alternative liability" theory is for the explicit purpose of escaping the usual burden of proof requirements of causation and therefore allocates the risk of loss to the several defendants rather than to the victim when the causative agent cannot be ascertained.

The leading example of this theory is Summers v. Tice. This was a case in which two negligent hunters simultaneously fired in the direction of the plaintiff, one bullet striking him. The plaintiff was unable to identify the gun which fired the damaging bullet; therefore, the burden of proving causation as to a particular defendant was not carried by the plaintiff. The Summers court, unwilling to strain the concert of action theory to cover that situation, nevertheless held that it would be unfair to prevent the plaintiff from recovering when it was clear that one or the other of the two defendants, both of whom were negligent, caused the accident. The court thus found each defendant liable in the absence of evidence to show that one of them was not the causative party.

A kind of alternative liability occasionally has been applied against two or more defendants, only one of whom was probably liable for tortious conduct, under a liberalized version of the res ipsa loquitur doctrine. In

58. Id. at 359.
59. Id. at 373-74. See also Namm v. Charles E. Frost & Co., 178 N.J. Super. 19, 427 A.2d 1121 (Super. Ct. App. Div. 1981). This was a suit against 44 drug manufacturers of DES. The plaintiff relied on two theories of liability described as "alternative" liability and "enterprise" liability. The argument was in effect for collective liability based on the fact that DES was accepted as a safe drug for use in the prevention of miscarriages due to the cumulative effort of all who entered the market and urged FDA approval for the sale for such a purpose. 427 A.2d at 1128-29.
60. See notes 12-19 supra and accompanying text.
61. 33 Cal. 2d 80, 199 P.2d 1 (1948). Some courts have tried to rely on the concert of action theory even when the concert of action was not for an improper purpose. See, e.g., Oliver v. Miles, 144 Miss. 852, 110 So. 666 (1926); Benson v. Ross, 143 Mich. 452, 106 N.W. 1120 (1906).
62. 199 P.2d at 5.
Ybarra v. Spangard, a hospital and several doctors and nurses were permissively joined at trial; all were held liable on proof that a patient went into the hospital for an appendectomy and emerged from the operation with an injury to his neck and shoulder. Much of the court's decision focused upon the fact that the patient was unconscious during the tortious act and consequently had no real access to evidence that would establish the true cause of injury.

These two California examples were urged upon the California Supreme Court in Sindell v. Abbott Laboratories, one of the many DES cases. Both Summers and Ybarra, however, are examples of single events in which the defendants were present at or about the time the injury was inflicted; moreover, each defendant was in a much better position than the plaintiff to explain what had occurred. Discovery rules do not alter the fact that, in the absence of an explanation from a defendant who ought to know the facts surrounding the accident, it is fair and just to shift the burden of persuasion. Thus, Sindell ruled that although the specific manufacturer of DES could not clearly be identified, the plaintiff could still hold all manufacturers liable upon a showing that each defendant produced a substantial percentage share of the drug in question.

In products liability cases, however, courts generally have not abandoned the traditional position that in the single damaging event situation, an essential element of the plaintiff's case is the identification of the specific defendant as the manufacturer of the alleged defective product. Texas cases are in accord. The alternative liability theory also has been applied in products liability cases other than those concerning DES. These cases usually involve situations where the product causing injury was clearly manufactured by one defendant, but the defect itself may be attributable to one of several defendants. Thus, in a Michigan case, a plaintiff


Id. at 689. The court noted that if the doctrine of res ipsa loquitur was to serve its true purpose, it must be applicable in situations in which the defendants have full access to information concerning the cause of the injury, but the plaintiffs through no fault of their own do not. Id.


607 P.2d 936-38. This finding was not, however, one of pure enterprise liability in that the plaintiff was required to prove each defendant produced a substantial amount of the drug in question. A manufacturer of a very small percentage of market-share proportions could thus be held not liable. Id. at 937. Likewise, pure alternative liability and pure concert of action liability was rejected. Id. at 930-35.


In Welch v. Coca-Cola Bottlers' Ass'n, 380 S.W.2d 26 (Tex. Civ. App.—Eastland 1964, no writ), suit was filed as a result of injuries sustained by the plaintiff due to a foreign substance in a bottle of Coca-Cola. The court held that if recovery is sought from a bottler, it must be shown that the defendant was the bottler. Id. at 30. See Coca-Cola Bottling Co. v. Fillmore, 453 S.W.2d 239 (Tex. Civ. App.—Amarillo 1970, no writ).
recovered damages for personal injuries even though he was unable to prove whether a defect that caused brake failure of a delivery truck was caused by the manufacturer or the dealer.\textsuperscript{70} Likewise, in the New Jersey case of \textit{Anderson v. Somberg}, where the plaintiff suffered injury in the course of a back operation when a surgical instrument broke off and lodged in the spine, several defendants were held liable under alternative liability.\textsuperscript{71} The court held that a surgeon who used the needle, the hospital that supplied the needle after several previous uses, and the manufacturer of the needle could each be held liable for the entire amount of damages in the absence of exculpatory evidence by a particular defendant.\textsuperscript{72} Finally, in at least two states, a rule has been adopted in exploding bottle cases permitting a plaintiff to join the maker of the bottle, the bottler, and the retailer, holding each responsible for the entire amount of damages in the products suits.\textsuperscript{73} Thus, the alternative liability theory occasionally has been utilized in products liability litigation, but only as against those in the marketing chain as well as users who have had some identification with a product that was either defective or improperly used at the time of the specific damaging event.

\textbf{F. Enterprise and Market-Share Liability}

Enterprise and market-share liability is not to be confused with concert of action. The case that has attracted the most attention and which adopted a similar but slight variation of the alternative liability doctrine is \textit{Sindell v. Abbott Laboratories}.\textsuperscript{74} In this case, the Supreme Court of California imposed liability on each of the eleven defendant drug manufacturers of DES that were joined in the lawsuit for a proportionate share of a particular victim's damage for cancer attributable to DES. The requirements for market-share liability are: 1) injury or illness occasioned by a fungible product (identical product) made by all of the defendants joined in the lawsuit; 2) injury or illness due to a design hazard, with each defendant having been found to have sold the product in a manner that made it unreasonably dangerous (either a failure to warn by all or an unreasonably dangerous product design); 3) specific manufacturer of the product or products that caused the injury or illness cannot be identified by the plaintiff; and 4) plaintiff has joined enough of the manufacturers of the fungible or identical product to represent a substantial share of the market.\textsuperscript{75}

Any defendant can exculpate itself by showing that it could not have manufactured the product. A proper application of the concert of action theory would seem to dictate that there would be industry-wide liability

\textsuperscript{72} 338 A.2d at 4.
\textsuperscript{75} \textit{Cf.} 607 P.2d at 935, n.24 (listing seven proposed requirements for industry-wide liability).
even when the manufacturer of the DES was identified. Only those defendants who are unable to exculpate themselves will then be liable, and apparently each defendant will be liable for the proportion of the totality of the plaintiff’s damages represented by its share of the market—perhaps its share of the market in the state where the DES was purchased by the user. There is some ambiguity about the Sindell opinion, but it can be implied that the court did not intend to provide for joint and several liability.

As indicated by the district court in Hardy v. Johns-Manville Sales Corp., the adoption of this theory in Texas could bring with it a number of problems. Initially, it is said that the application of this principle depends upon the joinder of enough defendants to represent a substantial share of the market. Apparently, this requirement is imposed to make it more likely than not that one of the defendants did make the product that was actually used. This would tend to support the holding that the culpable source would not escape all responsibility. It is therefore likely that the claimant must join enough of the manufacturers to represent more than 50% of the market. It is not clear from the Sindell opinion, however, whether 50% is or should be the appropriate cut-off point for a substantial share of the market. Perhaps a greater or lesser share should be the standard.

There are also difficulties in defining the appropriate market as to time, purpose, and geography. Moreover, there is difficulty with the identical or fungible product concept. It can be argued that it would not be reasonable to apply this theory to asbestos products because they are by no means identical as to the degree of danger due to varying amounts of asbestos in the products. Such a criticism would not apply, however, to the distribution of DES. Furthermore, many products come off the assembly line somewhat flawed, thus affecting the dangerous characteristics of the product. It is questionable to impose group responsibility on all manufacturers of products upon the theory that their respective products are identical when they often are not. This group responsibility is by no means as effective a deterrent to the production of defective products as is individual responsibility. Finally, it is not clear what the result is to be when market shares cannot be identified with reasonable certainty. Courts have delayed resolution of this issue, leaving unanswered the critical question of the potential scope of available remedies.

II. PRODUCTS LIABILITY AFTER DISSOLUTION OF THE CORPORATE MANUFACTURER OR SALE OF CORPORATE MANUFACTURER'S ASSETS

A. Claims Against a Dissolved or Selling Manufacturer

A cause of action based on the sale of a defective product may not arise or be discovered until many years after such sale. Thus, the probability for recovery greatly decreases because of the likelihood that one or more of the possible defendants no longer exists and, therefore, is incapable of satisfying a judgment. The Texas Supreme Court addressed one aspect of this problem in Hunter v. Fort Worth Capital Corp.\(^77\) In this case the Hunter-Hayes Company installed an elevator in a building under construction in 1960. In 1975 the elevator fell when a valve in the elevator pit broke, permanently injuring the plaintiff. Shortly after the installation, however, Hunter-Hayes had transferred its assets to the Dover Corporation for 25,000 shares of Dover preferred stock. Hunter-Hayes then changed it name to H.H. Hunter Corporation and distributed the shares of Dover stock among its shareholders; H.H. Hunter Corporation was issued a certificate of dissolution on March 11, 1964. The plaintiff sued the former stockholders of Hunter-Hayes and they defended on the ground that suit had to be brought within three years of dissolution.\(^78\)

At common law a corporation's capacity to sue or be sued terminated when the corporation dissolved.\(^79\) An equitable doctrine developed, however, to circumvent the harsh result of this rule. This doctrine deems assets received by shareholders upon dissolution of a corporation to be a "trust fund" for the benefit of any unpaid creditors.\(^80\) Most of the cases applying this trust fund doctrine have involved claims that existed prior to dissolution.\(^81\) Also, all states now have statutes that modify the strict common law rule and allow the corporation to sue and be sued following dissolution. The statutes vary in at least two respects: 1) the time within which

\(^{77}\) 620 S.W.2d 547 (Tex. 1981).
\(^{78}\) See TEX. BUS. CORP. ACT ANN. art. 7.12 (Vernon 1980).
\(^{79}\) See Nardis Sportswear v. Simmons, 147 Tex. 608, 218 S.W.2d 451, 453 (1949); Burkburnett Ref. Co. v. Ilseng, 116 Tex. 366, 292 S.W. 179, 181 (1927); Life Ass'n of America v. Goode, 71 Tex. 90, 8 S.W. 639, 640 (1888).
\(^{80}\) See Norton, Relationship of Shareholders to Corporate Creditors upon Dissolution: Nature and Implications of the "Trust Fund" Doctrine of Corporate Assets, 30 BUS. LAW. 1061 (1975).


The following cases involve claims which may have existed prior to dissolution, but were not asserted by the creditor until after dissolution: Hutton v. Commissioner, 59 F.2d 66 (9th Cir. 1932); Drew v. United States, 367 F.2d 828 (Cl. Ct. 1966); Zinn v. Bright, 87 Cal. Rptr. 736 (Cal. App. 1970); Godshall v. Hessen, 277 So. 2d 506 (Fla. App. 1969). Wallach, supra, at 328-29, n.28.
the suit must be brought on a claim, and, 2) the applicability of the statute to post-dissolution claims or causes of action. Approximately half of the states, including Texas, have statutes resembling section 105 of the Model Business Corporation Act. 82 Article 7.12 of the Texas Business Corporation Act provided for suits against a dissolved corporation for a period of three years after dissolution on claims or causes of action arising prior to dissolution. 83

The issue before the Texas Supreme Court in Hunter was whether the legislature intended this statute to replace the equitable court-made trust fund theory or to be an additional or alternative remedy available to pre-dissolution claimants. If the statutory cause of action is the exclusive remedy against the corporation or its former shareholders, then, unless the successor entity is held responsible, no remedy exists for a person injured by a corporation's defective product subsequent to the corporation's dissolution. Therefore, the question of the liability of the successor entity is important. There are three possible ways to deal with such losses occurring after dissolution of the selling corporation. The first alternative is to shift the loss to the dissolved corporation or its shareholders. The second is to shift the loss to the successor corporation. Thirdly, the courts could decline to shift the loss and leave the injured party without a remedy. There are reasonable arguments for the position that more harm than good results from allowing product liability claims long after the sale of a product even in the absence of either a dissolution of the selling corporation or a sale of the corporate assets related to the production of the kind of product involved. Thus, some states have passed statutes of repose that cut off claims after six or more years following the sale of a product. 84 The

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82. Citations to the state statutes are collected in the Model Business Corp. Act Ann. § 105. See also W. Fletcher, Cyclopedia of Private Corporations §§ 8127, 8142-43 (1962); Note, Suits By and Against Dissolved Corporations, 48 Iowa L. Rev. 1006, 1009-11 (1963); Wallach, supra note 81, at 329, n.30.

83. Art. 7.12 of the Texas Business Corporation Act reads as follows:

Survival of Remedy After Dissolution
A. The dissolution of a corporation either (1) by the issuance of a certificate of dissolution by the Secretary of State, or (2) by a decree of court when the court has not liquidated the assets and business of the corporation as provided in this Act, or (3) by expiration of its period of duration, shall not take away or impair any remedy available to or against such corporation, its officers, directors, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding thereon is commenced within three years after the date of such dissolution. Any such action or proceeding by or against the corporation may be prosecuted or defended by the corporation in its corporate name. The shareholders, directors, and officers shall have power to take such corporate or other action as shall be appropriate to protect such remedy, right, or claim. If such corporation was dissolved by the expiration of its period of duration, such corporation may amend its articles of incorporation at any time during such period of three years so as to extend its period of duration.


84. The Oregon product liability statute provides that a product liability action shall be commenced not later than eight years after the date on which the product was first purchased for use or consumption. Or. Rev. Stat. § 30.905 (1979). Under the Kentucky product liability statute, it is presumed in all product liability actions, unless rebutted by a
Hunter court, with two justices dissenting, held that the legislature, by adopting the statute, intended to preclude recovery under the trust fund theory.\(^8\) In all probability, this is what the drafters of the Model Business Corporation Act intended.\(^6\) Moreover, there is a policy reason for holding the statute to be the exclusive remedy. This policy is that there should be some time limit on how long former shareholders of a corporation should be subject to liability and the possibility of claims against them. The policy arguments in support of products liability tend more to support either liability against successor entities or, in the rare case in which successor liability would not be reasonable, the abrogation of a remedy.

### B. Tort Liability of Successor Entities

A purchaser of the assets of a corporation does not, by virtue of the contract of purchase, become bound to assume any of the liabilities of the corporate seller.\(^7\) If a purchaser pays fair value for the assets, then creditors, obligees, and shareholders are not regarded as having been improperly treated by the transaction. Thus, the general rule is that a purchaser does not ipso facto assume any liabilities. For this reason the two justices dissented in Hunter.\(^8\) They argued that the net effect of the majority holding that the successor entity is not liable would be to leave the victim of defective products without a remedy in those cases in which the selling corporation dissolves after a sale of its corporate assets.\(^9\) The dissenters stated that such a rule allows a purchaser to acquire all of the benefits of a dissolved corporation without the liabilities. At the same time, the dissenters argued, the former shareholders of the dissolved corporation can dis-

\(^{85}\) Preponderance of the evidence, that a product is not defective if injury, death, or property damage occurred more than eight years after the date of manufacture. Ky. Rev. Stat. § 411.310 (1980 Supp.). See also discussion in P. Keeton, D. Owen, & J. Montgomery, Cases and Materials on Products Liability and Safety 1009-12 (1980).

\(^{86}\) See notes 77-81 supra and accompanying text.

\(^{87}\) The comment to section 105 of the Model Act seems to suggest that the equitable action no longer has a purpose to fulfill after the passage of a statute that would allow a claim against the corporation for a specified time after dissolution. See Miller, The Status of Choses in Action of Dissolved But Unadministered Corporations After Expiration of the Statutory Period for Winding Up, 9 Miss. L. J. 455, 462-64 (1937).


\(^{89}\) Hunter v. Fort Worth Capital Corp., 620 S.W.2d 547, 553 (Tex. 1981).

\(^{90}\) The dissent wrote:

As some writers have openly observed, a corporation seeking to acquire another corporation should purchase only its assets in exchange for stock in the purchasing corporation.

The selling corporation, left with no assets except the stock it received for sale, distributes that stock to its own shareholders, then dissolves. By this procedure, the acquiring corporation obtains all of the benefits and assets of the dissolved corporation but none of its liabilities. The shareholders of the dissolved corporation have received value for their stock, yet are shielded from contributing to the compensation of the victims of the wrongs perpetrated by the dissolved corporation to the extent of assets received by them upon dissolution.

\(^{91}\) Id. at 556 (citations omitted).
pose of their liability merely by selling their stock. Thus, a victim of a
defective product manufactured by a dissolved corporation would have no
recourse. The dissenters, however, pointed out a way to relieve most of the
hardship to victims without burdening former shareholders of a dissolved
corporation. They proposed that the law should transfer liability to the
successor corporation because the successor acquires the “good will” and
the “capacity” to bear the loss of damage caused by the defective products
of the selling corporation. This may be a better solution, particularly in
products liability cases.\textsuperscript{90}

In this regard, there are five common law exceptions to the general rule
that the purchaser of the assets of a corporation does not assume any ex-
isting liabilities of the selling corporation. The first exception arises when
a purchaser expressly or impliedly agrees to assume debts and other legal
obligations of the seller. The litigation on this exception usually turns on
whether there was an implied promise to assume tort obligations for claims
resulting from post-sale accidents.\textsuperscript{91}

A second exception to the general rule occurs when a transaction be-
tween the purchasing corporation and the selling corporation amounts to a
consolidation or a merger of the seller and the purchaser. An exchange of
stock of the two corporations for stock of a newly formed corporation tra-
ditionally accompanies a consolidation that is not, in reality, an exception
to the rule but rather a different type of transaction. A third corporation is
formed and the third corporation acquires the assets of the two old corpo-
rations. A merger involves the actual absorption of one corporation into
another with the stockholders of the former becoming stockholders of the
latter.\textsuperscript{92} The old corporations do not dissolve, they just take on a new
form. Thus, the consolidated or merged corporation has all of the rights
and liabilities of the parent entity or entities.\textsuperscript{93}

A third exception arises when the transaction is consummated in fraud
of creditors and others to whom the seller has obligations.\textsuperscript{94} A Louisiana
court, for example, found that the defendants sold a corporation to avoid
liability on possible tort claims. In this case many of the stockholders and
employees of the transferee or purchasing company were the same stock-
holders and employees of the selling company. Several months prior to
the transfer of assets, gas had escaped from the transferor’s defective pipe-
line and exploded. The court found that the consideration paid for the

\textsuperscript{90} See Wallach, supra note 81.

Mill Supply Co., 376 So. 2d 179 (La. Ct. App. 1979), aff’d per curiam, 381 So. 2d 825 (La.
1970).

\textsuperscript{92} See Leannais v. Cincinnati, Inc., 565 F.2d 437 (7th Cir. 1977).

\textsuperscript{93} Tex. Bus. Corp. Act Ann. art. 7.12 (Vernon 1980); see Western Resources Life
Ins. Co. v. Gerhardt, 553 S.W.2d 783 (Tex. Civ. App.—Austin 1977, writ ref’d n.r.e.). The
court stated that “the imposition of liability upon the succeeding corporation is grounded
upon the notice that no corporation should be permitted to commit a tort and avoid liability
through corporate transformations or changes in form only.” Id. at 786.

\textsuperscript{94} See id. at 786.
transfer was inadequate and thus concluded that the transfer was not a good faith sale.95

Recent cases have greatly extended the possibilities of recovering against a corporation that purchases the assets of another corporation either with stock or for cash. I will refer to these developments as establishing a fourth and fifth exception. While the transaction between the corporation purchasing the assets and the corporation selling the assets may not amount to either a merger or a consolidation, the purchasing company may become, in fact, a mere continuation of the seller’s enterprise. This is the fourth exception to the rule. It is often called a de facto merger. A de facto merger usually occurs when the purchasing company uses shares of its own stock in the acquisition of the assets of the selling corporation so that the shareholders of the selling corporation become owners of some shares in the purchasing corporation. Thus, those who were owners of the selling corporation became at least partial owners of the purchasing corporation and have an ownership interest in the purchasing corporation somewhat equivalent in value to that formerly held in the selling corporation.96 The rationale for imposing liability on corporations formed by a de facto merger is the same as that for upholding liability in the case of consolidations or mergers. That is, a corporation should not be able to escape liability because of a mere formality.97

The fifth exception has been called the “product line” rule. This rule departs from corporate law and adopts the same principle of enterprise tort liability commonly employed to protect society from the construction and sale of unreasonably dangerous products. The rules pertaining to consolidations, mergers, and de facto mergers were developed to protect shareholders, creditors, and, perhaps, those with certain contractual rights. These may, however, be inadequate to deal with principles of strict liabil-

97. Some of the recent cases have set forth the requirements of a de facto merger as follows: (1) there is a continuity of management, personnel, physical location, assets, and general business operations; (2) there is a continuity of shareholders which results from the purchasing company using shares of its own stock in the acquisition of the assets of the selling corporation so that the shareholders of the selling corporation become shareholders of the purchasing corporation; (3) the selling corporation ceases its ordinary business operations, liquidates and dissolves as soon as legally and practically possible; (4) the purchasing corporation assumes those obligations, such as contractual obligations, ordinarily necessary for the uninterrupted continuation of normal business. See cases cited in note 96 supra. A few courts have attempted to liberalize the standards for determining a “continuation of the enterprise” of the selling corporation. This has been by way of eliminating the second requirement of a continuity of shareholders. Thus, a few courts have recognized that even though the assets of the selling corporation are acquired with cash, there can be a continuation of the selling enterprise by satisfaction of the other three requirements. Community of ownership in the purchasing and selling corporations is unnecessary if there is community of management, location, personnel, and product line and the selling corporation ceases its ordinary business operations. See Cyr v. B. Offen & Co., 501 F.2d 1145 (1st Cir. 1974); Bonee v. L & M Constr. Chem., 518 F. Supp. 375 (M.D. Tenn. 1981); Turner v. Bituminous Casualty Co., 397 Mich. 406, 244 N.W.2d 873 (1976).
ity related to defective products. Under the product line theory, claimants may recover for accidents that occur long after a defective product has been sold and after there has been a transfer of the good will and the right to produce and sell that kind of product to another. Courts in at least two states, California and New Jersey, have found it to be in the public interest to expand orthodox notions of successor liability to deal particularly with products liability claims. The basis of this approach is the notion of continuation of the product line rather than a continuation of the enterprise. The principal and perhaps only requirements seem to be that the purchasing corporation acquire substantially all the assets of the selling corporation and that the purchasing corporation continue to produce essentially the same product. Whether utilization of the same trade name is necessary is not settled. The rationale for adopting the product-line rule is threefold. First, transfer of assets can virtually destroy any action against the original manufacturer. Second, the purchasing corporation acquires the capacity of the original manufacturer to bear the costs of accidents. Third, it is fair and equitable that the burden attached to the original manufacturer's good will, which is now enjoyed by the successor, should be transferred to the successor.


99. See cases collected in note 98 supra.

100. Id.