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Market Share Liability New York Style: Negligence in the Air?

Hymowitz v. Eli Lilly and Co.¹

In its famous Palsgraf² decision, the Court of Appeals of New York faced the issue whether, given that a defendant acts negligently towards someone, this negligence gives rise to liability to an unforeseeable plaintiff.³ Judge Benjamin Cardozo concluded that "[p]roof of negligence in the air, so to speak, will not do."⁴ Because the defendant's conduct did not pose an unreasonable risk of harm to the particular plaintiff, and the damage to her was unforeseeable, the fact that the conduct was unjustifiably risky to another was irrelevant.⁵

In a recent decision, the highest court of New York adopted a theory of market share liability that strays from Cardozo's foreseeability theory. The New York court added a new twist to "traditional"⁶ market share liability and held that a defendant could be liable even if the defendant can show that it did not make the particular drug that injured the plaintiff. This Note evaluates the New York approach, with particular emphasis on the consequences of holding a defendant liable for "negligence in the air."

I. FACTS AND HOLDING

Hymowitz v. Eli Lilly and Co.⁷ consolidates four cases in which plaintiffs alleged injury resulting from their mothers' ingestion of the drug diethylstil-

3. Id. at 339, 162 N.E. at 99.
4. Id.
5. Id.
bestrol (DES) during pregnancy. Various manufacturers of the drug were joined as defendants in the underlying actions. DES is a synthetic form of the female hormone estrogen. Production of DES is much cheaper than isolating natural estrogen. From 1947 to 1971 the drug was marketed for human miscarriage prevention. In 1971, however, the Food and Drug Administration (FDA) prohibited the use of DES for this purpose. Studies linked the use of DES with vaginal adenocarcinoma, a form of cancer, and with adenosis, a precancerous vaginal growth, in the female offspring of DES users. Because an estimated one-half to three

8. Id. at 503, 539 N.E.2d at 1071, 541 N.Y.S.2d at 943. Although not class actions, the court stated that "these cases are representative of nearly 500 similar actions pending in the courts in this state; the rules articulated by the court here, therefore, must do justice and be administratively feasible in the context of this mass litigation." Id.


12. Id. at 944. Some commentators argue that DES was actually ineffective in preventing miscarriage. See Comment, supra note 10, at 963 n.2.

13. Schwartz & Mahshigian, supra note 11, at 944. DES is still used for other purposes in the United States. See Comment, supra note 10, at 963 n.2.

14. Hymowitz, 73 N.Y.2d at 503, 539 N.E.2d at 1072, 541 N.Y.S.2d at 944. See also Fischer, supra note 10, at 1623-24; Comment, supra note 10, at 965-66. Indeed, the PHYSICIANS' DESK REFERENCE states:

ESTROGENS SHOULD NOT BE USED DURING PREGNANCY. The use of female sex hormones during early pregnancy may affect the offspring. It has been reported that females exposed in utero to diethylstilbestrol, a nonsteroidal estrogen, may have an increased risk of developing later in life a rare form of vaginal or cervical cancer. This risk has been estimated to be 0.14 to 1.4 per 1000 exposures. Furthermore, from 30 to 90 percent of such exposed women have been found to have vaginal adenosis and epithelial changes of the vagina and cervix. Although these changes are histologically benign, it is not known whether they are precursors of malignancy.

PHYSICIANS' DESK REFERENCE 1174-75 (43d ed. 1989).

http://scholarship.law.missouri.edu/mlr/vol55/iss4/7
million women used DES during pregnancy, the potential monetary damages to users' daughters is estimated in the billions of dollars.  

Potential DES plaintiffs face a virtually impregnable bar to recovery under traditional tort principles. This bar stems from the difficulty in identifying a particular DES manufacturer and from the latent nature of DES injuries. It is estimated that, during the 24 years in which DES was approved for use during pregnancy, as many as 300 companies may have produced the drug. Further, DES is a generic drug, meaning that each manufacturer uses an identical formula in production. Thus, druggists usually fill prescriptions from whatever source is on hand. The long gestation period also clouds the identification issue. The Hymowitz court stated:

[M]emories fade, records are lost or destroyed, and witnesses die. Thus the pregnant women who took DES generally never knew who produced the drug they took, and there was no reason to attempt to discover this fact until many years after ingestion, at which time the information is not available.

Because of the latent nature of DES injury, many DES cases are barred by the statute of limitations before discovery of the injury. The traditional New York rule was that "the limitations period accrued upon exposure in actions alleging personal injury caused by toxic substances." This "expo-

15. Fischer, supra note 10, at 1623-24 (citing Henderson, Products Liability, DES Litigation: The Tidal Wave Approaches Shore, 3 CORP. L. REV. 143, 143 (1980)). Potential monetary damages are likely to rise dramatically if noted plaintiff's attorney Aaron M. Levine is successful in his quest to prove that DES causes genetic mutations. Sherman, New DES Front, NAT'L L.J., March 12, 1990, at 1, col. 1. Mr. Levine maintains that on about March 16, 1990 he will file a complaint alleging that DES "genetically altered the grandchild of a woman who took the drug." Id. (emphasis added). Apparently, thirteen-year-old Amy Roberts, whose grandmother took the drug while pregnant with Amy's father, developed the trademark cancer of the cervix. Id. at 26, col. 1. Mr. Levine postulates that "there are many more [such cases] to come." Id. at 1, col. 2.

16. Hymowitz, 73 N.Y.2d at 503, 539 N.E.2d at 1072, 541 N.Y.S.2d at 944.
17. Id.
18. Id. See also Fischer, supra note 10, at 1625.
19. Hymowitz, 73 N.Y.2d at 503, 539 N.E.2d at 1072, 541 N.Y.S.2d at 944.
20. Id.
21. Id.
22. Id.
23. Id. at 503-04, 539 N.E.2d at 1072-73, 541 N.Y.S.2d at 945.
24. Id. at 503, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945 (emphasis added)
sure rule" made it practically impossible for DES plaintiffs to recover.\textsuperscript{25} In 1986, however, the New York Legislature enacted a "discovery rule" for "the latent effects of exposure to any substance."\textsuperscript{26} Thus, the statute of limitations clock does not begin to tick until \textit{discovery} of the injury.

While helping DES plaintiffs, this legislative action does not resolve the identification issue.\textsuperscript{27} In the \textit{Hymowitz} cases, the defendants moved for summary judgment on the grounds that the plaintiffs could not identify the particular manufacturer of the particular drug that purportedly injured them.\textsuperscript{28} In three of the four underlying actions the defendants also moved on statute of limitations grounds.\textsuperscript{29} The defendants alleged that a New York statute reviving causes of action for DES exposure for one year was unconstitutional.\textsuperscript{30} The trial court denied all motions.\textsuperscript{31} Particularly, on the statute of limitations defense the trial court granted plaintiffs' cross motions, which eliminated defendants' affirmative defense that the actions were time-barred.\textsuperscript{32}

On appeal, the New York Supreme Court, Appellate Division, affirmed in all respects. It certified the following question to the court of appeals: "whether a DES plaintiff may recover against a DES manufacturer when identification of the producer of the specific drug that caused the injury is impossible."\textsuperscript{33} The New York Court of Appeals answered yes. It held that a market share theory, using a national market for determining liability, was the appropriate method for determining liability and apportioning damages in DES cases in which identification of a particular manufacturer was impossible.\textsuperscript{34}

\begin{flushleft}
(citation omitted).
\end{flushleft}

\textsuperscript{25} \textit{Id.}
\textsuperscript{26} \textit{Id.} at 504, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945 (citation omitted).
\textsuperscript{27} \textit{Id.}
\textsuperscript{28} \textit{Id.}
\textsuperscript{29} \textit{Id.}
\textsuperscript{30} \textit{Id.} \textit{See} 1986 N.Y. LAWS ch. 682, \S 4.
\textsuperscript{31} \textit{Id.}
\textsuperscript{32} \textit{Id.}
\textsuperscript{33} \textit{Id.} at 505, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945.
\textsuperscript{34} \textit{Id.} at 502, 512-13, 539 N.E.2d at 1072, 1078, 541 N.Y.S.2d at 944, 950.
The seminal case on market share liability is *Sindell v. Abbott Laboratories*. The fact pattern presented to the California Supreme Court in *Sindell* was very similar to that presented in *Hymowitz*. The *Sindell* court stated that generally there can be no liability without a specific showing that defendant caused plaintiff's injuries. The court noted, however, this general causation rule was not without exceptions. The *Sindell* court proposed and adopted a new basis of liability for this situation; it based its proposal on a modification of an existing exception to the causation rule.

The first and most important exception examined by the California court was the so-called "alternative liability" theory as set forth in *Summers v. Tice*. In *Summers*, the plaintiff was negligently shot by one of two hunters using identical guns and ammunition. Although the plaintiff could not prove which of the two defendants actually caused his injury, the court held the defendants jointly and severally liable. The defendants could, however, escape liability by showing they could not have caused plaintiff's injury. The *Sindell* case did not find the alternative liability theory applicable because

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37. *Id.* at 597, 607 P.2d at 928, 163 Cal. Rptr. at 136.
38. *Id.* at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.
39. *Id.*
40. *Id.* (citing *Summers v. Tice*, 33 Cal. 2d 80, 199 P.2d 1 (1948)). See infra notes 45-55 and accompanying text for a discussion of other exceptions.
42. *Sindell*, 26 Cal. 3d at 598-99, 607 P.2d at 928, 163 Cal. Rptr. at 136.
43. *Id.; Summers*, 33 Cal. 2d at 86, 199 P.2d at 4. The *Summers* rule is embodied in the Restatement of Torts. *Sindell*, 26 Cal. 3d at 599-600 n.11, 607 P.2d at 929 n.11, 163 Cal. Rptr. at 137 n.11; see RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965) ("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.").
of the large number of DES producers and because of the long latency period involved in DES claims.\textsuperscript{44}

The court also discussed a second exception to the traditional causation requirement, the theory of "concert of action."\textsuperscript{45} The Sindell court quoted the \textsc{Restatement (Second) of Torts}, providing that

\begin{quote}
[f]or 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.\textsuperscript{46}
\end{quote}

Because there was no evidence of an express or tacit agreement between manufacturers to engage in tortious conduct, there was no viable cause of action under the concerted action theory.\textsuperscript{47}

Finally, the Sindell court discussed the theory of "enterprise liability" posited in \textit{Hall v. E.I. Du Pont de Nemovis & Co., Inc.}\textsuperscript{48} In \textit{Hall}, several children were injured by blasting caps. Unfortunately, the plaintiffs could not identify the specific manufacturer of the injury-causing product. The court imposed liability on the entire domestic blasting cap industry, which consisted of six manufacturers. The court specifically found that those six entities jointly controlled the risk.\textsuperscript{49} The court also focused on the parallel behavior present in the establishment of industry wide safety standards.\textsuperscript{50} Thus, "under this industry-wide liability theory, the existence of industry wide standards or practices may support a finding of joint control of risk and shift the burden of proving identification to the defendants."\textsuperscript{51} This theory however, has never been adopted by any other court.\textsuperscript{52}

The Sindell court rejected the theory of enterprise liability, and noted that in the \textit{Hall} case there were six possible manufacturers, while in the DES

\begin{footnotesize}
\begin{enumerate}
\item Sindell, 26 Cal. 3d at 602-03, 607 P.2d at 931, 163 Cal. Rptr. at 139.
\item Id. at 603-07, 607 P.2d at 931-33, 163 Cal. Rptr. at 139-41.
\item Id. (quoting \textsc{Restatement (Second) of Torts} § 876 (1965)).
\item Id. at 605-06, 607 P.2d at 932-33, 163 Cal. Rptr. at 140-41.
\item Id. at 607-10, 607 P.2d at 933-35, 163 Cal. Rptr. at 141-43 (citing \textit{Hall}, 345 F. Supp. 353 (E.D.N.Y. 1972)).
\item Id.
\item Id.
\item Schwartz & Mashigian, \textit{supra} note 11, at 953 (citing \textit{Hall}, 345 F. Supp. at 374).
\item Sindell, 26 Cal. 3d at 607-10, 607 P.2d at 933-35, 163 Cal. Rptr. at 141-43.
\end{enumerate}
\end{footnotesize}
situation there were at least 200. Further, the court relied on the absence of concert of action for the proposition that defendants did not jointly control the risk. Also, the drug industry is monitored by the Food and Drug Administration; therefore, the industry standard is suggested by the government rather than by industry consensus.

Modifying the Summers v. Tice alternative liability theory, the California Supreme Court adopted a new theory of market share liability. The Sindell court first changed the Summers requirement that all potential defendants be before the court to a requirement that a "substantial percentage" be joined. Next, the Sindell majority held "[e]ach defendant will be held liable for the proportion of the judgment represented by its share of that market unless it demonstrates that it could not have made the product which caused plaintiff's injuries." Thus, a defendant can exculpate itself by showing it could not have made the injury-causing product. The court rationalized that "[u]nder this approach, each manufacturer's liability would approximate its responsibility for the injuries caused by its own products.

The Sindell decision left open the question whether the liability imposed would be joint and several or several only. In Brown v. Superior Court, the California Supreme Court resolved this ambiguity, by providing that each defendant's liability under market share is several only. An individual manufacturer's liability cannot be inflated to allow for the full recovery of

53. Id. at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.
54. Id.
55. Id.
56. Id. at 612-13, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46.
57. Id. at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court reasoned that "[i]f plaintiff joins in the action the manufacturers of a substantial share of the DES which [plaintiff]'s mother might have taken, the injustice of shifting the burden of proof to defendants to demonstrate that they could not have made the substance which injured plaintiff is significantly diminished." Id. The court refused to hold that seventy-five to eighty percent of the market was enough to constitute a "substantial share," stating "we hold only that a substantial percentage is required." Id.
58. Id.
59. Id. The court stated that strong policy reasons favored holding defendants liable in this situation, despite the absence of clear evidence of causation. Id. at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144. First, and most persuasive, was the policy cited by the court in Summers that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury." Id. Second, "defendants are better able to bear the cost of injury resulting from the manufacture of a defective product." Id.
60. 44 Cal. 3d 1049, 751 P.2d 470, 245 Cal. Rptr. 412 (1988).
61. Id. at 1072-76, 751 P.2d at 485-87, 245 Cal. Rptr. at 426-28.
plaintiffs' injuries. Thus, in California liability cannot exceed a given company's market share.

The Wisconsin Supreme Court adopted its own version of market share liability in Collins v. Eli Lilly Co. It declined to follow the Sindell approach, and held instead that "unalloyed market share theory does not constitute the most desirable course to follow in DES cases because the theory, while conceptually attractive, is limited in practical applicability." By practical inapplicability, the court was referring to "the practical difficulty of defining and proving market share.

The Wisconsin approach begins with the general proposition that "[e]ach defendant contributed to the risk of injury to the public ... thus each defendant shares, in some measure, a degree of culpability in producing or marketing ... a drug with possibly harmful side effects." Under this approach, the plaintiff's prima facie case consists of "establish[ing] by a preponderance of the evidence that a defendant produced or marketed the type (e.g., color, shape, markings, size, or other identifiable characteristics) of DES taken by the plaintiff's mother."

Once the plaintiff has alleged a viable cause of action, the burden of proof shifts to the defendant "to prove by a preponderance of the evidence that it did not produce or market the subject DES either during the time period the plaintiff was exposed to DES or in the relevant geographical market area in which the plaintiff's mother acquired the DES." The Collins court held that determination of liability was a jury question to be answered in the context of Wisconsin's comparative negligence doctrine. According to the court,

62. Id.
63. 116 Wis. 2d 166, 342 N.W.2d 37 (1984).
64. Id. at 189, 342 N.W.2d at 48.
65. Id. The court further held that "the waste of judicial resources which would be inherent in a second 'mini-trial' to determine market share militates against its adoption." Id. at 190, 342 N.W.2d at 49. Note that the California court seems to have subsequently solved this problem by adopting a national market and compiling this national market share information. See Hymowitz, 73 N.Y.2d at 509, 539 N.W.2d at 1076, 541 N.Y.S.2d at 948.
66. Collins, 116 Wis. 2d at 191-92, 342 N.W.2d at 40. The court again rationalized that as between an innocent plaintiff and negligent defendants, "the latter should bear the cost of injuries." Id. Further, "[t]he drug company is in a better position to absorb the cost of the injury." Id. Finally, "the cost of damages awards will act as an incentive for drug companies to test adequately the drugs they place on the market for general medical use." Id.
67. Id. at 194, 342 N.W.2d at 50.
68. Id. at 198, 342 N.W.2d at 52. The court reasoned that defendants "will have better access to relevant records than the plaintiff." Id.
69. Id. at 198-99, 342 N.W.2d at 53.
MARKET SHARE LIABILITY

market share remains an important factor for the jury's consideration. The goal of the Wisconsin approach appears to be to allow the jury to hold a defendant liable "in proportion to the amount of risk it created that the plaintiff would be injured by DES." This risk-based approach resembles market share liability only when a jury is allowed to consider market share in making its assessment of the proportion of risk of injury for which a defendant is liable.

Shortly after Collins, the Washington Supreme Court adopted another version of DES market share liability in Martin v. Abbott Laboratories. The Washington version, styled "market share alternative liability," claims justification in that "[e]ach defendant contributed to the risk of injury to the public and, consequently, the risk of injury to individual plaintiffs." The Washington court did leave defendants an out: "Individual defendants are entitled to exculpate themselves from liability by establishing, by a preponderance of the evidence, that they did not produce or market the . . . DES taken by plaintiff's mother . . . ."

An interesting aspect of the Washington methodology is that defendants who fail to exculpate themselves are "presumed to have equal shares of the market and are liable for only the percentage of plaintiff's judgment that

70. Id. The court stated that

[i]n assigning a percentage of liability to each defendant, the jury may consider factors which include, but are not limited to, the following: whether the drug company conducted tests on DES for safety and efficacy in use for pregnancies; to what degree the company took a role in gaining FDA approval of DES for use in pregnancies; whether the company had a small or large market share in the relevant area; whether the company took the lead or merely followed the lead of others in producing or marketing DES; whether the company issued warnings about the dangers of DES; whether the company produced or marketed DES after it knew or should have known of the possible hazards DES presented to the public; and whether the company took any affirmative steps to reduce the risk of injury to the public.

71. Hymowitz, 73 N.Y.2d at 510, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948.


73. Martin, 102 Wash. 2d at 604, 689 P.2d at 382. See also Hymowitz, 73 N.Y.2d at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949.

74. Martin, 102 Wash. 2d at 605, 689 P.2d at 382.
represents their presumptive share of the market.” A defendant may rebut this presumption by introducing evidence to establish respective market share. If proven, a particular defendant is liable only for the percentage of the total judgment corresponding to the company’s market share. The liability of unexculpated defendants, however, is inflated to allow for a 100% recovery.

The Washington Supreme Court further developed its theory in George v. Parke-Davis, a subsequent DES decision. First, the determination of market share is a question of fact in each case. Second, depending on the circumstances of a particular case, the relevant market may be as small as the local pharmacy or as large as the country. The court stated "the relevant market for determining liability [should] be as narrow as possible.”

75. Id.
76. Id.
77. Id. at 606, 689 P.2d at 383.
78. Id. The Martín court provided the following hypotheticals to illustrate the theory’s application:

Assume that plaintiff’s damages are $100,000 and defendants X and Y remain subject to liability after exculpation by other named defendants. If neither establishes its market share then they are presumed to have equal shares of the market and are liable respectively for 50 percent of the total judgment, X, $50,000 and Y, $50,000. Assume defendant X establishes that it occupies 20 percent of the relevant market, and defendant Y fails to prove its market share. Defendant X is then liable for 20 percent of the damages, or $20,000, and defendant Y is subject to the remaining 80 percent, or $80,000. Assume that defendant X establishes a market share of 20 percent and defendant Y a 60 percent market share. Then defendant X is subject to 20 percent of the judgment, $20,000, and defendant Y to 60 percent of the judgment, $60,000. The plaintiff does not recover her entire judgment because the remaining 20 percent of the market share is the responsibility of unnamed defendants.

79. 107 Wash. 2d 584, 733 P.2d 507 (1987) (en banc). See also Hymowitz, 73 N.Y.2d at 511, 539 N.E.2d at 1077, 541 N.Y.S.2d at 949.
80. George, 107 Wash. 2d at 593, 733 P.2d at 512.
81. Id. See Schwartz & Mahshigian, supra note 11, at 954-64 (comparing the various versions of market share liability).
82. Id.
III. THE INSTANT DECISION

A. Rejection of Accepted Tort Doctrines

Judge Wachtler, author of the majority opinion, began by rejecting the established tort doctrines of alternative liability and concerted action. He stated "we agree with the near unanimous views of the high [s]tate courts that have considered the matter that these doctrines in their unaltered common-law forms do not permit recovery in DES cases."

Relying on *Summers v. Tice*, the *Hymowitz* court stated the rule of alternative liability as "where two defendants breach a duty to the plaintiff, but there is uncertainty regarding which one caused the injury, 'the burden is upon each such actor to prove that he has not caused the harm.'" The court stated that "the central rationale for shifting the burden of proof in such a situation is that without this device both defendants will be silent, and plaintiff will not recover; with alternative liability, however, defendants will be forced to speak, and reveal the culpable party, or else be held jointly and severally liable themselves."

The court postulated that in order to invoke the doctrine of alternative liability, the defendant must have better access to information than the plaintiff, and all possible tortfeasors should be joined in the action. Further, the court stated "alternative liability rests on the notion that where there is a small number of possible wrongdoers, all of whom breached a duty to the plaintiff, the likelihood that any one of them injured the plaintiff is relatively high, so that forcing them to exonerate themselves, or be held liable, is not unfair."


84. *Hymowitz*, 73 N.Y.S.2d at 505, 539 N.E.2d at 1073, 541 N.Y.S.2d at 945.

85. 33 Cal. 2d 80, 199 P.2d 1 (1948). See infra notes 40-44 and accompanying text for a discussion of alternative liability.

86. *Hymowitz*, 73 N.Y.S.2d at 505, 539 N.W.2d at 1074, 541 N.Y.S.2d at 946 (quoting RESTATEMENT (SECOND) OF TORTS § 433B(3) (1965)).

87. *Id.*

88. *Id.* at 505-06, 539 N.E.2d at 1074, 541 N.Y.S.2d at 946 (citing *Summers v. Tice*, 33 Cal. 2d at 86, 199 P.2d at 1; RESTATEMENT (SECOND) OF TORTS § 433(B), comment h (1965)).

89. *Id.* at 506, 539 N.E.2d at 1074, 541 N.Y.S.2d at 946 (citing *Sindell*, 26 Cal. 3d at 603, 607 P.2d at 924, 163 Cal. Rptr. at 132).
The *Hymowitz* court ultimately held the large number of potential tortfeasors and the long time period between ingestion and injury created problems for this traditional tort theory.\(^9\) Defendants did not have the requisite better access to information, and it was virtually impossible to have all possible producers before the court.\(^1\) The court seized also on the issue of fairness, holding "while it may be fair to employ alternative liability in cases involving only a small number of potential wrongdoers, that fairness disappears with the decreasing probability that any one of the defendants actually caused the injury."\(^9\) In DES litigation the chance a particular defendant actually caused the injury in question is often very remote.\(^9\) Therefore, alternative liability provides no relief.\(^9\)

Next, the court dealt with the theory of concerted action.\(^9\) Analogizing to drag racing cases, it stated the theory "provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a common plan or design to commit a tortious act."\(^9\)

The court conceded the drug companies had engaged in parallel conduct in producing DES from an identical formula.\(^7\) There was, however, no evidence of any agreement to market DES in an unsafe manner.\(^8\) The court concluded "[p]arallel activity, without more, is insufficient to establish the agreement element necessary to maintain a concerted action claim."\(^9\)

Although the traditional common law doctrine provided plaintiffs with no relief in *Hymowitz*, the court rationalized that "judicial action is . . . required to overcome the 'inordinately difficult problems of proof' caused by contemporary products and marketing techniques."\(^10\) Thus, the court opened the door for the imposition of market share liability.

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90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* (citing W. PROSSER & W. KEETON, THE LAW OF TORTS § 46 (5th ed. 1984)).
97. *Id.*
98. *Id.*
99. *Id.* (citing Sindell, 26 Cal. 3d at 605, 607 P.2d at 924, 163 Cal. Rptr. at 140; Collins, 116 Wisc. 2d at 185, 342 N.W.2d at 46; Martin, 102 Wash. 2d at 599, 689 P.2d at 379).
100. *Id.* at 507, 539 N.E.2d at 1075, 541 N.Y.S.2d at 947 (citing Bichler v. Eli Lilly and Co., 55 N.Y.2d 571, 579-80, 436 N.E.2d 182, 185, 450 N.Y.S.2d 776, 779 (1982)).

http://scholarship.law.missouri.edu/mlr/vol55/iss4/7
B. Market Share Liability

In looking to non-traditional forms of relief, the Hymowitz court stressed that in the DES situation, "it is more appropriate that the loss be borne by those that produced the drug for use during pregnancy, rather than by those who were injured by the use, even where the precise manufacturer of the drug cannot be identified in a particular action." Policies of fairness and justice mandated judicial relief.

First, the court had to deal with its previous DES decision in Bichler v. Eli Lilly & Co. Some commentators interpreted Bichler to create a modified form of the concerted action doctrine. In Bichler, the court submitted jury instructions substituting "conscious parallel activity by manufacturers" for the traditional common law requirement that a plaintiff prove "actual or tacit agreement to participate in a common plan to commit tortious behavior." Because of the defendant's failure to object, "the modified concerted action theory became the law applicable to that particular case.

The Hymowitz court, however, refused to adopt this modified concerted action theory as the general law of the state. It held

inferring agreement from the fact of parallel activity alone improperly expands the concept of concerted action beyond a rational or fair limit; among other things, it potentially renders small manufacturers, in the case of DES and in countless other industries, jointly liable for all damages stemming from the defective products of an entire industry.

101. Id.
102. Id. The court also focused on the expectations created by the New York Legislature's revival of hundreds of DES cases. Id. See supra notes 24-32 and accompanying text for a discussion of the New York statute of limitations as it relates to DES claims.
104. See, e.g., Jacob, Of Causation in Science and Law: Consequences of the Erosion of Safeguards, 40 BUS. LAW. 1229, 1238 n.29 (1985).
105. Hymowitz, 73 N.Y.2d at 508, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948 (citing Bichler, 55 N.Y.2d at 584, 436 N.E.2d at 188, 450 N.Y.S.2d at 781).
106. Id.
107. Id.
108. Id. at 508-09, 539 N.E.2d at 1076, 541 N.Y.S.2d at 948.
Parallel behavior is too common in modern industry to warrant the imposition of liability. 109

Finally, the Hymowitz court turned to the concept of market share liability. 110 After examining the various forms of market share liability adopted in other jurisdictions, the court posed its own solution. 111 Relying primarily upon California's experience, the court concluded "a market share theory, based upon a national market," provided the practical solution. 112 The court explicitly rejected the Wisconsin "assessment of risk" approach, finding this methodology would prove too burdensome and inconsistent over the long run. 113

The court realized the adoption of a market share liability theory using a national market would probably result in a disparity between an individual manufacturer's liability and the actual injuries caused by that manufacturer in New York. 114 Thus, the Hymowitz policy differs from the Sindell policy. Liability is not expected to correspond with causation over the long run of cases. 115 Further, the court recognized that the use of a national market would not necessarily result in liability in proportion to the risk created by a defendant towards a particular plaintiff. 116 The Hymowitz court chose "to apportion liability so as to correspond to the overall culpability of each defendant, measured by the amount of risk of injury each defendant created to the public-at-large." 117

C. The "New Twist"

In contrast to previous versions of market share liability, the Hymowitz court refused to excuse a defendant from liability upon a showing that it could not possibly have manufactured the particular drug which injured the plaintiff. 118 The court stated that "because liability here is based on the over-all risk produced, and not causation in a single case, there should be no exculpation of the defendant who, although a member of the market producing..."
DES for pregnancy use, appears not to have caused a particular plaintiff's injury.\textsuperscript{119} The majority rationalized that "[i]t is merely a windfall for a producer to escape liability solely because it manufactured a more identifiable pill, or sold only to certain drug stores. These fortuities in no way diminish the culpability of a defendant for marketing the product, which is the basis of liability here."\textsuperscript{120} The majority did concede that a defendant could not be held liable if it did not make DES for use during pregnancy.\textsuperscript{121}

Finally, the \textit{Hymowitz} court found DES producers severally liable, not jointly and severally liable as had other jurisdictions.\textsuperscript{122} Liability "should not be inflated when all participants in the market are not before the court in a particular case."\textsuperscript{123} The court realized its rule would result in some plaintiffs failing to recover their total damages.\textsuperscript{124} The court explained that because it refused to allow a defendant exculpation from liability, it would not be fair to "increase a defendant's liability beyond its fair share of responsibility."\textsuperscript{125}

\textbf{D. Judge Mollen's Opinion}\textsuperscript{126}

Judge Mollen concurred in two of the underlying cases and dissented in part in the remaining two.\textsuperscript{127} Mollen agreed with the majority that market share liability based on a national market was the proper theory for the plaintiffs to pursue.\textsuperscript{128} He would, however, allow exculpation of a defendant who could prove, by a preponderance of the evidence, that it did not

\begin{itemize}
  \item \textsuperscript{119} Id.
  \item \textsuperscript{120} Id.
  \item \textsuperscript{121} Id. The court, however, noted that in this case no defendants had established that they were not in the national market of DES for pregnancy use. \textit{Id.} at n.2.
  \item \textsuperscript{122} Id.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} \textit{Id.} at 513, 539 N.E.2d at 1078, 541 N.Y.S.2d at 950.
  \item \textsuperscript{125} \textit{Id.} The majority explained in a footnote that one reason why they refused to adopt a theory of concerted action was because the theory requires joint and several liability, thus placing an unfair burden on small manufacturers. \textit{Id.} at n.3. The majority concluded its opinion with a discussion of the constitutionality of New York's revival statute, ultimately finding that it was constitutional. \textit{Id.} at 513-16, 539 N.E.2d at 1079-80, 541 N.Y.S.2d at 951-52.
  \item \textsuperscript{126} Judge Mollen was sitting by designation, pursuant to the N.Y. CONST., art. VI, § 2 (1977). \textit{Hymowitz}, 73 N.Y.2d at 516, 539 N.E.2d at 1080, 541 N.Y.S.2d at 952.
  \item \textsuperscript{127} \textit{Id.} at 516, 539 N.E.2d at 1080, 541 N.Y.S.2d at 952.
  \item \textsuperscript{128} \textit{Id.} He also agreed that the New York revival statute was constitutional. \textit{Id.} at 516, 539 N.E.2d at 1081, 541 N.Y.S.2d at 952.
\end{itemize}
manufacture the particular pill taken by the plaintiff's mother. Further, he would allow joint and several liability in order to ensure that a particular plaintiff obtains full relief.

Judge Mollen noted that in the California, Wisconsin, and Washington approaches, a defendant could exculpate itself by proving it could not have made the specific drug taken by the plaintiff. He realized "to preclude exculpation would directly and unnecessarily contravene the established common-law tort principles of causation." Mollen contended the majority "provide[s] DES plaintiffs with an unprecedented strict liability cause of action." He maintained the majority's rationale is "unfair and inequitable" to those defendants who could prove they did not manufacture the drug in question. In Mollen's opinion, the majority was merely adopting the Bichler "modified concerted action" theory which they explicitly purported to reject in their opinion.

Judge Mollen appears to embrace the Sindell approach. He advocates the shifting of the burden of proof on the issue of causation to the defendants and [he] would impose liability upon all of the defendants who produced and marketed DES for pregnancy purposes, except those who were able to prove that their product could not have caused the injury.

Judge Mollen further advocates imposing joint and several liability on those defendants who are unable to exculpate themselves. Mollen's version of market share liability differs from Sindell in this respect. Joint and several liability ensures plaintiffs a full recovery for their injuries.

129. Id. at 516, 539 N.E.2d at 1081, 541 N.Y.S.2d at 953.
130. Id.
131. Id. at 519, 539 N.E.2d at 1082, 541 N.Y.S.2d at 954. See supra notes 35-82 and accompanying text for a discussion of the California, Wisconsin, and Washington approaches to market share liability.
132. Hymowitz, 73 N.Y.2d at 519, 539 N.E.2d at 1082, 541 N.Y.S.2d at 954 (citations omitted).
133. Id. at 520, 539 N.E.2d at 1083, 541 N.Y.S.2d at 955.
134. Id.
135. Id. See supra notes 103-109 and accompanying text for a discussion of the Bichler "modified concerted action" theory.
136. Hymowitz, 73 N.Y.2d at 521, 539 N.E.2d at 1083, 541 N.Y.S.2d at 955. Thus, Mollen would let two defendants off the hook in the underlying actions because, to him, these defendants proved that they could not have manufactured the pill taken by the plaintiff. Id. at 523, 539 N.E.2d at 1085, 541 N.Y.S.2d at 957.
137. Id. at 523, 539 N.E.2d at 1085, 541 N.Y.S.2d at 957.
138. See supra notes 60-62.

139. Id.
This procedure also provides defendants with an incentive to implead DES manufacturers not joined by the plaintiff.\textsuperscript{140} This opportunity reduces unfairness to innocent defendants.\textsuperscript{141} Mollen claims this approach furthers the "valid public policy of imposing the burden of bearing the cost of severe injuries upon those who are responsible for placing into the stream of commerce the causative instrumentality of such injuries."\textsuperscript{142} Finally, Judge Mollen concludes the majority engages in judicial legislation by eliminating fundamental causation requirements.\textsuperscript{143}

IV. COMMENT

This Note uses the policy behind tort law and products liability as a framework for analysis. This policy framework warrants a terse review. Further, the Note examines attempts to expand market share liability outside the DES arena, and evaluates a potential legislative solution.

A. Policy Framework

Compensation\textsuperscript{144} and deterrence\textsuperscript{145} are the two most widely announced purposes underlying tort law. Other frequently mentioned purposes are the assessment of moral blame in the eyes of society,\textsuperscript{146} and the punishment of wrongdoers.\textsuperscript{147} A major purpose of the cause in fact requirement in tort law is to limit the scope of potential liability.\textsuperscript{148} Professor David Fischer writes that the "cause-in-fact requirement is one way in which the law

\textsuperscript{140} Hymowitz, 73 N.Y.2d at 522, 539 N.E.2d at 1084, 541 N.Y.S.2d at 956.
\textsuperscript{141} Id.
\textsuperscript{142} Id. Mollen analogizes to the doctrine of res ipsa loquitur to illustrate the proposition that his suggested methodology is not a radical departure from traditional doctrines of tort law. Id.
\textsuperscript{143} Id.
\textsuperscript{145} W. Prosser and W. Keeton, supra note 144, at 25; J. Henderson, Jr. and R. Pearson, supra note 144, at 33; Special Committee, supra note 144, at 4-3.
\textsuperscript{146} W. Prosser and W. Keeton, supra note 144, at 21. See also Fischer, supra note 10, at 1638-39.
\textsuperscript{147} J. Henderson, Jr. and R. Pearson, supra note 144, at 33; Special Committee, supra note 144, at 4-170.
\textsuperscript{148} Fischer, supra note 10, at 1629 (citing W. Prosser, Handbook of the Law of Torts 236-37 (4th ed. 1971)).
limits the scope of liability and attempts to avoid discouraging socially desirable activity.\textsuperscript{149}

There are six generally recognized goals of a strict products liability regime.\textsuperscript{150} These goals include (1) compensation (or loss spreading); (2) deterrence; (3) encouraging useful conduct; (4) overcoming proof problems; (5) protection of consumer expectations; and (6) cost internalization.\textsuperscript{151}

The compensation goal is based on the premise that in our modern society injuries to individual consumers caused by the use of complex products are inevitable.\textsuperscript{152} Because of the gravity of potential injury, it is fair to impose liability on the manufacturers of these products who can, in turn, shift the loss back to consumers via price increases or insurance.\textsuperscript{153}

The deterrence goal rests on the proposition that the threat of liability motivates manufacturers to make safer products.\textsuperscript{154} Strict liability is believed to be a stronger deterrent than negligence.\textsuperscript{155} Under a negligence standard a manufacturer is held to a reasonable person benchmark, while the strict liability standard may require a manufacturer to go beyond this reasonable person criterion if the cost of added safety is less than the cost of potential liability.\textsuperscript{156}

The third goal, and perhaps the most important for purposes of analyzing the New York version of market share liability, is encouraging useful conduct.\textsuperscript{157} The deterrence and compensation goals nearly always indicate liability.\textsuperscript{158} Yet, until the New York version of market share liability:

\begin{quote}

no court has imposed the liability of an insurer on manufacturers by requiring them to pay for all harm caused by their products. This is because of the fear that such absolute liability would place unreasonable burdens on manufacturers and discourage them from producing useful
\end{quote}
products. The policy of avoiding over-deterrence by balancing the needs of defendants against needs of plaintiff is clearly at work, although it is seldom articulated.\[159]

The fourth goal of products liability law is to help plaintiffs overcome difficult proof problems.\[160] Often the defendant is in a much better position than an individual plaintiff to prove fault or lack of fault.\[161] Some commentators conclude that the market share liability theory reflects "courts' policy judgment that as between an innocent plaintiff and defendants who are allegedly guilty of some wrongful conduct, the plaintiff should prevail—even if the alleged (not necessarily established) conduct in question did not cause the plaintiff's injury."\[162] In products liability actions courts often simplify the plaintiff's \textit{prima facie} case or shift the burden of proof on an issue to the defendant.\[163]

The final two commonly articulated goals of product liability law include the protection of consumer expectations\[164] and the policy of cost internalization.\[165] The consumer expectation policy is grounded in the notion that manufacturers induce consumers to rely on safe products, thus the consumer should be protected from hidden perils.\[166] The cost internalization goal depends on manufacturers passing liability costs back to consumers, who can then make intelligent purchases based upon the true costs of products.\[167]

\[159. \textit{Id.}\]
\[161. \textit{Id.}\]
\[162. Schwartz & Mahshigian, \textit{supra} note 11, at 942.\]
\[163. D. FISCHER & W. POWERS, JR., \textit{supra} note 150, at 51.\]
\[166. \textit{Id.}\]
B. Policy Implications of New York’s Version of Market Share Liability

The traditional tort requirement of causation in fact fails to further tort goals of deterrence and compensation. Professor Fischer provides the following illustration:

[S]uppose a falling tree that had been struck by lightning injured plaintiff. If plaintiff were able to establish that a railroad company was negligent in failing to equip its locomotive with a whistle, a court could further the tort policies of compensation and deterrence by imposing liability for plaintiff’s injury upon the railroad company, even though no causal connection existed between the company’s negligence and plaintiff’s injury. As long as the railroad company understood that liability was being imposed upon it because of its negligence, it would have an incentive to equip its locomotives properly in the future. At the same time, requiring the railroad company to compensate the injured party would further society’s interest in compensating accident victims.

Thus, market share liability fails to profoundly effect these goals.

The goal of assessing moral blame flounders in the context of "traditional" market share liability. The plaintiff may not have even joined the culpable defendant. This problem is magnified under the New York theory, where there certainly will be cases where a defendant could exculpate itself if given an opportunity. The policy of assessing moral blame is further watered down as courts decrease the threshold of "substantial market share"

168. Fischer, supra note 10, at 1628. See supra notes 154-56 and accompanying text for a discussion of the goals of deterrence and compensation applied in both a traditional tort context and in a products liability context. The punishment goal is also unaffected by market share liability.

169. Fischer, supra note 10, at 1628 (citing Klemme, The Enterprise Liability Theory of Torts, 47 U. Colo. L. Rev. 153, 163-65 (1976)). Strict liability is based on three factors: causation, defect, and injury. See Comment, supra note 10, at 991. If causation is taken away, as under the New York theory of market share liability, plaintiff then arguably only has to show defect and injury. The absurdity of this result is readily apparent. In DES cases, however, this issue is probably irrelevant because the law tends to set a negligence standard when the defective product is a drug. Id. at 967, 967-68 n.18; see also RESTATEMENT (SECOND) OF TORTS § 402A Comment k (1965). This does, however, manifest the danger in applying market share liability outside the DES arena. See infra notes 184-203 and accompanying text for a discussion of efforts to apply market share liability outside the DES context.

170. Fischer, supra note 10, at 1639. By "traditional" market share liability, the author is referring to the Sindell variety.

171. Id.
MARKET SHARE LIABILITY

below the ninety percent level.\textsuperscript{172} This problem is intensified if market share is expanded to industries which, unlike the DES market, are not concentrated in a relatively few firms.\textsuperscript{173}

Perhaps the most profound policy effect of market share liability transpires in the area of encouraging useful conduct,\textsuperscript{174} or avoiding over-deterrence.\textsuperscript{175} The consequences of over-deterrence include disincentives for safety to unsafe manufacturers, and a reluctance by "leading edge" companies to introduce new products for fear of potential liability. "By apportioning damages throughout an industry solely on the basis of market shares and irrespective of safety efforts, it enables unsafe manufacturers to spread the burden of their accident costs and thereby creates disincentives for safety."\textsuperscript{176} Further, [it has also been pointed out that imposing the market-share theory in a strict liability tort case 'gives rise to a form of absolute liability by relieving the plaintiff of proving defendant's breach of duty and by guaranteeing plaintiff's proof of causation,' which 'forces an industry into the position of an insurer' of a product.\textsuperscript{177}

In reflecting on the over-deterrence issue, liability expert Peter Huber asks and answers the question "[w]ho fled most quickly from the baying tort pack? Those quickest on their feet, of course—the person of action, the company of initiative, the mover, the shaker, and the doer.\textsuperscript{178} In characterizing the damper placed on innovation by excessive tort liability, he states "in the very markets where the legal pursuit was the most intense ... the mood

\textsuperscript{172} As the threshold percentage for establishing market share liability is decreased, the probability of actually joining the culpable defendant also decreases. Thus, the moral blame policy weakens.

\textsuperscript{173} Fischer, supra note 10, at 1639.

\textsuperscript{174} See supra notes 157-59 and accompanying text.

\textsuperscript{175} See, e.g., Fischer, supra note 10, at 1629 ("[I]f a defendant's potential liability is excessive, then its useful conduct might be inhibited along with its undesirable behavior.").

\textsuperscript{176} Schwartz & Mahshigian, supra note 11, at 960. See also Mahoney & Littlejohn, Innovation on Trial: Punitive Damages Versus New Products, 246 SCIENCE 1395, 1395 (1989) ("Because a high level of legal uncertainty and scientific innovation cannot coexist, new, safe products may be kept off the market and the scope of research and development restricted.").

\textsuperscript{177} Schwartz & Mahshigian, supra note 11, at 960 (citing Note, The Market Share Theory: Sindell's Contribution to Industry-Wide Liability, 19 HOUS. L. REV. 107, 135-36 (1981)).

\textsuperscript{178} P. HUBER, LIABILITY—THE LEGAL REVOLUTION AND ITS CONSEQUENCES 155 (1988).
among suppliers became most sullen, hostile, defensive, and then coldly stagnant."  

As an example, Huber states "[r]esearch expenditures by U.S. companies working on contraceptives peaked in 1973 and plummeted 90% percent in the next decade." Huber quotes the president of a major pharmaceutical company, reflecting on the amount of litigation and asking "[w]ho in his right mind would work on a product today that would be used by pregnant women?" Society suffers because "[i]t is the innovative and unfamiliar that is most likely to be condemned."  

Empirical evidence on the over-deterrence effect is difficult to find. According to one author, "[t]he inquiry is enormous because virtually every corner of society has been reached by the liability revolution, and frustrating because each story is unique, with much of the evidence anecdotal in nature and hard to document or quantify." In the pharmaceutical industry, much of the evidence that is available centers around the highly visible areas of contraception and vaccines. It is safe to say, however, that the number of product liability lawsuits filed in the U.S. is increasing at a staggering rate. Between 1974 and 1988 the number of product liability lawsuits filed in federal district courts increased by 983 percent. 

Because of the limited availability of concrete evidence, it becomes necessary to infer over-deterrence from certain market characteristics. For instance, 

[i]n 1980, experts writing in International Family Planning Perspectives predicted that "long-acting hormonal rings, vaginal rings, new injectable preparations, postaglandins to induce early abortions, IUDs causing less bleeding and pain, and cervical caps are in advanced field trials with thousands of women, and should be widely available [in the contraceptive industry] within the next three to five years." 

179. Id. 
180. Id. (citing Carson-Parker, The Liability Crisis: Who's At Risk, CHIEF EXECUTIVE 19 (Summer 1986)). As a further example of the effect of over-deterrence, Huber states that "[b]etween 1965 and 1985, the number of U.S. vaccine manufacturers shrank by more than half; by 1986 the nation depended on a single supplier for vaccines against polio, rubella, measles, mumps, and rabies. . . . And only two major companies . . . were still investing heavily in vaccine research." Id. at 156. 
181. Id. 
182. Id. 
183. Olson, Overdeterrence and the Problem of Comparative Risk, 37 NEW DIRECTIONS IN LIABILITY L. 42, 43 (1988)). 
185. Current Issue, A Contractual Solution to the Contraceptive Crisis, 8 YALE
Though some of these products are now available in Europe, nine years later not one is available in the U.S. A plausible explanation for the availability of the drugs in Europe and not in the United States is the liability crisis.

C. Attempts to Expand Market Share Liability Outside the DES Arena

Courts limit the doctrine of market share liability to DES cases. Innovative plaintiffs attorneys, however, diligently attempt to apply market share liability outside the DES context. Examples of actual attempts at expansion range from vaccines to asbestos and even to a ruptured breast prosthesis. The Sindell court implied that "[t]he market share theory... conceivably could apply to all potentially harmful fungible products made from an identical formula." Thus, market share liability could conceivably embrace "the manufacturing and marketing of cigarettes, food additives, generic drugs, asbestos, pesticides,"

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L. & POL. REV. 101, 108 (unpublished as of 3-3-90) (citing Atkinson, Schearer, Harkavy & Lincoln, Prospects for Improved Contraception, INT'L FAM. PLAN. PERSP. 43 (June 1980) (emphasis added)).

186. Id. (citation omitted).


192. Id. (citing Note, supra note 191, at 1002; Note, supra note 191, at 301 n.82).

193. Id.

194. Id. (citing Comment, supra note 10, at 974 n.36; Note, Industry-Wide Liability and Market Share Allocation of Damages, 15 GA. L. REV. 423, 425 n.10 (1981); Note, supra note 191, at 301 n.82; Note, 49 U. CIN. L. REV. 926, 934 n.63 (1980)).
aluminum wire, industrial waste, and products that cause environmental pollution. Fortunately, at this juncture attempts at expansion fail.

A recent New Jersey case illustrates careful reasoning by a court in refusing to expand market share liability. In Shackil v. Lederle Laboratories, the plaintiffs filed a medical malpractice and products liability action arising out of the 1972 inoculation of an infant plaintiff with what is commonly known as the DPT vaccine. The plaintiffs could not identify the specific manufacturer, so attempted to invoke market share liability. In refusing to accept the theory, the court rationalized that the imposition of market share liability would frustrate public policy and public health considerations by "threatening the continued availability of needed drugs and impairing the prospects of the development of safer vaccines." The court also paid heed to the fact that recent market trends threatened the supply of DPT and that due to extreme liability exposure there were only two current producers of the drug. While the Shackil court found no liability, it addresses the potential problems inherent in imposing too much liability on an industry as vital to our health and welfare as the drug industry.

D. Legislative Question

Some commentators suggest a legislative or administrative compensation plan when injured persons cannot identify the specific manufacturer responsible. Suggested alternatives include:

(1) a limited no-fault product liability fund for plaintiffs unable to identify the manufacturer of a generic product that produced a latent injury;

195. Id. (citing Comment, supra note 10, at 974-75 n.36; Note, supra note 191, at 301 n.82).

196. Id. (citing Note, supra note 194, at 934 n.63).

197. Id. (citing Note, supra note 191, at 1002).

198. Id. (citing Note, supra note 191, at 1002; Note, supra note 188, at 475; Note, supra note 191, at 301 n.82).


200. Id. at 156, 561 A.2d at 512.

201. Id.

202. Id.

203. Id. at 167, 561 A.2d at 523.

204. Schwartz & Mahshigian, supra note 11, at 964-75. These alternatives stem from market share liability's "wake [of] extraordinary legal costs, delay, injustice, and the imposition of tort law liability on a party who is, in fact, not responsible for plaintiff's harm." Id. at 942.
(2) suits against the federal agency responsible for regulating the particular industry using the Federal Tort Claims Act and the Administrative Procedure Act;

(3) ad hoc congressional responses to mass injuries caused by products of unidentifiable manufacturers;

(4) legislation designed to hold certain industries liable through trade associations for all injuries caused by those industries' products whenever the manufacturer of an injury-causing product is not identifiable;

(5) a no-fault compensation system for persons injured by DES which would be funded by a tax imposed upon all manufacturers who produced DES for use as a miscarriage preventative; and

(6) a toxic tort compensation system not limited to a single industry or a single type of product-injury but designed to deal with the toxic tort problem as a whole.\textsuperscript{205}

Schwartz and Mahshigian suggest a particularly appealing legislative solution which grasps the following general principles:

(1) the tort system should guide recovery when a particular defendant can be identified;\textsuperscript{206}

(2) in non-identification cases, the claimant should be required to show fault, causation, damages, and a good-faith, genuine attempt to identify the manufacturer;\textsuperscript{207}

(3) legislation should penalize plaintiffs and counsel who falsely identify a defendant... including defendant's legal costs and a possible civil fine;\textsuperscript{208}

(4) the legislation should strongly emphasize causation—that the product actually caused plaintiff's injury;\textsuperscript{209} and
(5) damages should be limited to the claimant's true excess economic losses, which means no damages for pain and suffering. 210

Specific provisions of the Schwartz and Mahshigian plan remedy many problems cited in this Note. First, this scheme places the burden of proof on the defendant only when information is in the defendant's control. 211 Second, the plan provides that all manufacturers of DES should contribute to compensation paid to plaintiffs, calling this provision "fairer than the random targeting of defendants that occurs under current judicial theories." 212 Third, payment by the individual manufacturers "further[s] the cause of effective deterrence of (and where appropriate, penalty for) tortious behavior." 213 Fourth, a properly applied legislative solution would lower the administration costs of the present tort system. Finally, limiting recovery to economic damages lessens the burden on manufacturers. This relief conceivably inures to the benefit of society in the form of lowered prices and increased innovation.

Another attractive legislative solution is the adoption of a federal products liability statute that pays more credence to FDA approval. An Institute of Medicine study recently advocated that, as a general matter, there be no liability for design defect or inadequate warning if the FDA has reviewed and approved the contraceptive product or the warning and has addressed the characteristics of the product that caused the plaintiff's injury. The defense should not be available if the manufacturer withheld relevant information from the FDA in the approval process or if information developed after approval was not reviewed by the FDA for the purpose of determining whether the product or its labeling should be changed. 214

The added certainty which a uniform statute provides would allow manufacturers to divert more funds into the research and development area, and would allow the introduction of innovative new products without fear of excessive liability.

V. CONCLUSION

Looked at from a societal perspective, market share liability fails horribly. It merely perpetuates the overall liability crisis in America. Society suffers

210. Id. at 968.
211. Id. at 969-70.
212. Id. at 970.
213. Id. at 970-71.
from increased prices, decreased safety, and a reluctance to market beneficial new products. This crisis begs for a return to traditional tort theory.

The New York version of market share liability assumes a perfect world. It requires uniformity to meet its initial goal of averaging. Thus, it only "works" if all fifty states apply the same rationale. Absent uniformity it becomes grossly unfair to defendants. Given that at least six states explicitly reject market share liability, and that only a half dozen others adopt the theory, the prospect of uniformity is slim. Therefore, if one buys into the market share concept, the only way to assure perfect compliance is through comprehensive federal legislation.

The *Hymowitz* decision allows "offensive" use of market share liability even when the defendant DES manufacturer can prove that it absolutely did not manufacture the particular drug taken by the plaintiff. Extending this logic to its natural conclusion, perhaps a defendant should be able to use market share "defensively" when the plaintiff *can* identify the culpable manufacturer. Thus, a defendant marketing five percent of the DES produced for use during pregnancy would only be liable for five percent of plaintiff's damages even when identified as the culpable party. The overall liability of a particular defendant would then coincide perfectly with culpability. To hold otherwise "transform[s] the market share liability theory into a lottery based on the fortuity of the availability of evidence in a particular case."215 The outcome, of course, is absurd.

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