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I. INTRODUCTION

The United States has been bedeviled by its inability to bring predictability and accountability to the products liability arena. Since the early 1970s, the number of products liability lawsuits filed in the United States has increased dramatically,[1] along with a continuing proliferation of nontraditional liability theories. Unlike other nations, the United States relies heavily on court determinations and jury awards to fashion protective remedies for injured plaintiffs and to deter manufacturers from marketing defective products.[2] The United

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1. Between 1974 and 1986, the number of products liability lawsuits filed in the federal courts increased 861% from 1579 in 1974 to 13,595 in 1986. George L. Priest, *Products Liability Law and the Accident Rate, in* LIABILITY, PERSPECTIVES AND POLICY 187 (Robert E. Litan & Clifford Winston eds., 1988). However, since 1974 the proportion of products liability trials and trial awards has decreased. Manufacturers possess strong incentives to settle lawsuits to avoid the broader, negative impact of adverse court judgments. *Id.* at 188-90. However, in the past six years, the number of state civil court actions has increased by more than four million. Michele Galen, *Guilty!*, BUS. WK., Apr. 13, 1992, at 61. Similar explosions have not been witnessed by the United States' competitors in the European Community ("EC") or Japan. A recent poll shows that 62% of the United States' senior executives claim that the civil court system "significantly hampers the ability" of United States businesses to compete with their EC and Japanese counterparts. *Id.* at 61, 66. In addition, 83% of these executives stated that the fear of civil lawsuits more greatly impacts corporate decision-making now than it did ten years ago. *Id.* Yet only 10% indicated that the fear of litigation greatly reduces a company's ability to introduce new products. *Id.* at 66.

2. Priest, *supra* note 1, at 184-85. Approximately 25% of the 500 largest United States corporations have withdrawn products from the market because of liability issues or liability insurance difficulties. *Id.* at 184 n.1 (citing NATHAN WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE 4-7 (1987)).

No one conscious of the dwindling budget and meager accomplishments of the Con-

States' focus on judicial remedies has produced inconsistent solutions to complex products liability matters. Defendant identification issues in product defect cases illustrate the lack of cohesion and reliability that results from relying on the courts to protect consumers and to police private sector manufacturers.

One of the thorniest legal issues in products liability is the proper identification of specific tortfeasors in individual plaintiff and mass tort litigation. Courts and attorneys have wrestled with nontraditional tort approaches in product cases in which the lapse of time and other factual obstacles make it difficult for plaintiffs, through no fault of their own, to identify one or all of the wrongdoers. In the absence of other societal protections for aggrieved plaintiffs, some courts have relaxed the application of the traditional tort principle of cause-in-fact. These courts have considered nontraditional causation theories that address defendant identification, and create some forms of industry-wide products liability.[3] These theories are based largely on the

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> sumer Product Safety Commission can pretend that the United States makes a serious effort to regulate product quality directly. Instead, our society relies on liability actions to police the manufacturing process. The prospect of liability judgments affects design and production decisions of all manufacturers, foreign and domestic, that sell to U.S. consumers (footnote omitted). And increasing numbers of corporate bankruptcies and reorganizations stem from such judgments. As recently as a decade ago, insurance for products liability was subsumed in general commercial liability coverage, of insufficient importance for separate categorization. Today it is a growing component of commercial underwriting—indeed growing at such a rate that foreign and domestic reinsurers have recently been frightened into withdrawing further coverage.

Priest, *supra* note 1, at 184.

Resorting to litigation may result from the overwhelming task facing budget-strapped, regulatory agencies such as the Consumer Product Safety Commission. In the United States, this Commission receives about 4000 complaints per day, while its Japanese counterpart receives slightly over 400 complaints in an entire year. Ai Nakajima, *Products Liability: How Tough a Law; Consumer Advocates Press for Endorsement in Planned Interim Report to Prime Minister*, NIKKEI WKLY., Aug. 31, 1991, at 4.

3. AM. LAW PROD. LIAB. 3D § 9:2 (1987) [hereinafter AM. LAW]; 63 AM. JUR. 2D § 167 (1992) [hereinafter AM. JUR.]; Annotation, *"Concert of Activity," "Alternative Liability," "Enterprise Liability," or Similar Theory as Basis for Imposing Liability Upon One or More Manufacturers of a Defective Uniform Product, in Absence of Identification of Manufacturer of Precise Unit or Batch Causing Injury*, 22 A.L.R. 4TH 183-94 (1983) [hereinafter *Manufacturers Liability*]. *See generally* Christina Urias, Comment, McCormack v. Abbott Laboratories: *Application of Market Share Liability to Resolve the DES Dilemma*, 29 ARIZ. L. REV. 155 (1987); Victor E. Schwartz & Liberty Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CAL. L. REV. 941 (1985); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981) [hereinafter *Market Share Liability*]; Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963 (1978) (providing comparisons of competing causation theories).

United States' reliance on judicial remedies, as well as the policies of protecting the injured and deterring wrongdoers.

Overall, there is a great deal of similarity between the basic United States, European Community ("EC"), and Japanese cause-in-fact approaches. Each requires plaintiffs, as part of their burden of proof, to identify defendants in products liability cases.[4] Despite these basic similarities, the EC and Japan have not yet embraced the United States' nontraditional approaches to cause-in-fact. While Japan has yet to adopt specific products liability laws, the new EC Products Liability Directive is in its earliest stages of implementation. At this time, it remains unclear whether the EC or Japan will expand cause-in-fact approaches to aid defendant identification in products liability cases in the future. However, a review of products liability perspectives in the EC and Japan provides insight and suggests that nontraditional causation theories, like those in the United States, are not likely to be adopted by these nations.

First, this Article will review traditional United States perspectives on cause-in-fact to identify potential tortfeasors and the established tort policies that support relaxing traditional causation approaches in many products liability cases. Second, this Article will discuss the main nontraditional cause-in-fact theories that broaden potential products liability and have been developed by judicial remedy case-by-case. Third, this Article will provide an overview of the EC Products Liability Directive, including defendant identification and statutory limitation provisions that are likely to prevent the development of expansive United States causation theories. In addition, EC barriers to litigation and social programs further favor extrajudicial remedies to aid injured parties, as opposed to resorting to the courts and possible nontraditional approaches to defendant identification. Finally, this Article will consider Japan's approach to products liability and its current cause-in-fact principles. In Japan, the availability of alternative dispute resolution, government regulatory authority and responsibility, as well as public insurance and compensation funds, suggests that nontraditional causation approaches in products liability matters are unlikely to be established.

4. This Article focuses on the strict liability and negligence tort theories for product defects cases in Japan, the EC, and the United States, rather than on contract or other forms of recovery.

II. TRADITIONAL CAUSE-IN-FACT PRINCIPLES IN THE UNITED STATES AND THE SECTION 433B(3) EXCEPTION

Under United States conventional tort theory, a showing of a factual, causal relationship between a defendant's wrongful conduct and the plaintiff's harm is required to assess liability.[5] As outlined in the *Restatement (Second) of Torts*, section 433B, the burden of proof rests on the plaintiff to show, by a preponderance of the evidence, that a specific defendant's acts or omissions were the cause-in-fact of the alleged harm.[6]

Regardless of the tort theory utilized, the plaintiff is required to identify the defendant manufacturer making the defective product that caused the alleged harm.[7] Largely through judicial interpreta-

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5. "An essential element of the plaintiff's cause of action for negligence, or for that matter for any other tort, is that there be some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41 (5th ed. 1984); AM. LAW, *supra* note 3, §§ 1:5, 3:1.

In the negligence context, "[i]n order that a negligent actor shall be liable for another's harm, it is necessary not only that the actor's conduct be negligent toward the other, but also that the negligence of the actor be a legal cause of the other's harm." RESTATEMENT (SECOND) OF TORTS § 430 (1965) [hereinafter RES. TORTS].

In addition, plaintiffs bringing a strict products liability case must also establish a causal connection between the harm, the defective product, and the nature and identity of the seller in accordance with the following elements:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if (a) the seller is engaged in the business of selling such product, and (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product, and (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. § 402A. *See also* Greenman v. Yuba Power Prods., 377 P.2d 897 (Cal. 1963).

6. As enunciated in the Restatement, "the burden of proof that the tortious conduct of the defendant has caused the harm to the plaintiff is upon the plaintiff." RES. TORTS, *supra* note 5, § 433B(1). *See* AM. LAW, *supra* note 3, § 1:5; AM. JUR., *supra* note 3, § 164.

The plaintiff must show that it is more likely than not that the defendant's conduct was a cause in fact of the plaintiff's harm. RES. TORTS, *supra* note 5, § 433B(1) cmt. a; KEETON ET AL., *supra* note 5, § 41. To avoid a directed verdict on the defendant's behalf, the plaintiff must show more than a bare possibility of causation based upon pure conjecture, speculation, or the balance of probabilities. RES. TORTS, *supra* note 5, § 433B(1) cmt. a; KEETON ET AL., *supra* note 5, § 41.

7. AM. LAW, *supra* note 3, §§ 1:5, 1:6, 9:1; AM. JUR., *supra* note 3, § 164; Annotation, *Products Liability: Necessity and Sufficiency of Identification of Defendant as Manufacturer or Seller of Product Alleged to Have Caused Injury*, 51 A.L.R. 3D 1344, 1347-88 (1973) [hereinafter *Products Liability*]. *See, e.g.*, Bradley v. Firestone Tire & Rubber Co., 590 F. Supp. 1177,

tion, potential defendants have expanded beyond manufacturers to include processors, nonmanufacturing sellers, and other participants in the chain of distribution of the defective product.[8] In some instances, products liability has been extended to those endorsing, certifying, or inspecting products, franchisors and trademark licensors, and may include those otherwise holding the product out as their own.[9]

However, under an explicit exception in section 433B, the burden of proof shifts to the defendants regarding cause-in-fact. The issue of uncertainty as to defendant identification is addressed by section 433B(3):

> Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each actor to prove that he has not caused the harm.[10]

Shifting the burden of proof in cases of unclear defendant identity is primarily an issue of fairness, based on the tort policy of preventing wrongdoers from unjustly escaping liability while innocent plaintiffs are denied an adequate remedy.[11] The dual tort policies of providing remedies for innocent, injured plaintiffs, and deterring the introduction of defective products into the marketplace, underlie the expansion of products liability through nontraditional causation theories.[12]

The *Restatement* notes that this exception should be used where

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1179 (W.D.S.D. 1984); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004, 1007 (D.S.C. 1982); Abel v. Eli Lilly & Co., 343 N.W.2d 164, 170 (Mich.), *cert. denied*, 469 U.S. 833 (1984) (citing Piercefield v. Remington Arms Co., 133 N.W.2d 129 (Mich. 1965)); Cousineau v. Ford Motor Co., 363 N.W.2d 721, 728 (Mich. Ct. App.), *cert. denied*, 474 U.S. 971 (1985) (citing Caldwell v. Fox, 231 N.W.2d 46 (Mich. 1975)). *See also Manufacturers Liability*, *supra* note 3, at 184; RES. TORTS, *supra* note 5, § 430; KEETON ET AL., *supra* note 5, § 41.

8. Normally, the plaintiff must prove that a particular defendant manufactured, sold, or otherwise participated in the distribution of the defective product. AM. LAW, *supra* note 3, §§ 1:6, 1:7; AM. JUR., *supra* note 3, § 164. *See also* AM. LAW, *supra* note 3, § 1:7; AM. JUR., *supra* note 3, § 164.

9. *See supra* note 8 and accompanying text.

10. RES. TORTS, *supra* note 5, § 433B(3).

11. *See* RES. TORTS, *supra* note 5, § 433B(3) cmt. f, stating that "the reason for the exception is the injustice of permitting proved wrongdoers, who among them have inflicted an injury upon the entirely innocent plaintiff, to escape liability merely because the nature of their conduct and the resulting harm has made it difficult or impossible to prove which of them caused the harm."

12. *See infra* notes 17-89 and accompanying text. *See generally* Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 736-49 (1982) (discussing the interrelationship of liability and compensation objectives and causation).

the actions of the wrongdoers are substantially simultaneous in time, or are substantially the same in character and in risk of harm to the plaintiff.[13] However, the *Restatement* also notes that:

> It is possible that cases may arise in which some modification of the rule stated may be necessary because of complications arising from the fact that one of the actors involved is not or cannot be joined as a defendant, or because of the effect of lapse of time, or because of substantial differences in the character of the conduct of the actors or the risks they have created . . . and the situations which might arise are difficult to forecast, no attempt is made to deal with such problems in this Section. *The rule stated in Subsection (3) is not intended to preclude possible modification if such situations call for it.*[14]

Clearly, the *Restatement* leaves the door open for the courts or legislature to craft new or modified cause-in-fact theories to address changing facts and circumstances. In the United States, judicial review and opinion have revised products liability causation on a case-by-case basis.

III. PROBLEMS OF CAUSATION-IN-FACT: UNITED STATES NON-TRADITIONAL THEORIES OF DEFENDANT IDENTIFICATION

The child of a war veteran who was exposed to toxic herbicides is born with serious birth defects. A shipyard worker suffers from a lung disease after years of working with asbestos materials. An adult daughter is diagnosed with cervical cancer some twenty years after her mother ingested diethylstilbesterol ("DES"). Faced with troubling defendant identification problems in products liability cases, the courts have been forced to balance the establishment of required cause-in-fact elements, while simultaneously protecting innocent plaintiffs from injustice and deterring manufacturer wrongdoing. The four main theories that have developed to address defendant identification difficulties in products liability cases are the "alternative," "enterprise," "market share," and "concerted action" liability approaches.[15] To protect injured plaintiffs, all four theories move

13. RES. TORTS, *supra* note 5, § 433B(3) cmt. h.

14. *Id.* (emphasis added). *See also* AM. LAW, *supra* note 3, §§ 9:2-9:3.

15. AM. LAW, *supra* note 3, § 9:3; AM. JUR., *supra* note 3, § 167; *Manufacturers Liability*, *supra* note 3, at 184-85. *See infra* notes 17-89 and accompanying text.

Several courts have rejected these theories in product cases while suggesting that the legislature or state supreme courts should recognize their application. *See, e.g.*, Tidler v. Eli Lilly

products liability toward a certain level of industry-wide liability.

Based on section 433B(3) of the *Restatement*, these theories developed and primarily applied in instances in which injured plaintiffs, through no fault of their own, were unable to identify the specific defendant whose product caused their injuries. Typically, in these instances, it is difficult to link the responsible defendant to the defective product because of: (1) a time lapse before the manifestation of harmful effects, decreasing record and witness accuracy; or, (2) the fungible nature or loss or obliteration of the harmful product.[16]

A. Alternative Liability

The alternative liability theory[17] addresses the case in which, although the actual tortfeasor is unknown, all possible tortfeasors are known and before the court. This causation theory was initially used in the classic case of *Summers v. Tice*.[18] In *Summers*, a member of a

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& Co., 851 F.2d 418 (D.C. Cir. 1988) (rejecting the expansion of tort theories in DES matters under Maryland or District of Columbia law); Senn v. Merrell-Dow Pharmaceuticals, Inc., 850 F.2d 611 (9th Cir. 1988) (Oregon law does not recognize alternative liability in vaccine cases); Lee v. Baxter Healthcare Corp., 721 F. Supp. 89 (D. Md. 1989), *affm'd without op.*, 898 F.2d 146 (4th Cir. 1990) (rejecting industry liability theories for defective breast prosthesis); Griffin v. Tenneco Resins, Inc., 648 F. Supp. 964 (W.D.N.C. 1986) (in a case of toxic chemical exposure no trend exists in North Carolina courts to accept nontraditional theories); Lillge v. Johns-Manville Corp., 602 F. Supp. 855 (E.D. Wis. 1985) (rejecting nontraditional tort theories in an asbestos fibers case); Mizell v. Eli Lilly & Co., 526 F. Supp. 589 (D.S.C. 1981) (the South Carolina Supreme Court must establish exceptions to the traditional cause-in-fact requirement); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981) (South Carolina's Supreme Court must carve out exceptions to the cause-in-fact requirement); Case v. Fibreboard Corp., 743 P.2d 1062 (Okla. 1987) (refusing to recognize new liability theories in asbestos cases); Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis. 1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc., 469 U.S. 826 (1984) (rejecting all nontraditional theories in a DES case); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (in a DES case, alternative causation theories do not apply without legislative action).

16. *See infra* notes 17-89 and accompanying text.

17. The burden of proof rests with the plaintiff except:

> 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 actor to prove that he has not caused the harm.

RES. TORTS, *supra* note 5, § 433B(3). *See* AM. LAW, *supra* note 3, § 9:4. *See also* Andrea Riger Potash, Note, Bichler v. Lilly: *Applying Concerted Action to the DES Cases*, 3 PACE L. REV. 85, 92-94 (1982); *Market Share Liability*, *supra* note 3, at 671-72; Sheiner, *supra* note 3, at 985-89.

18. 199 P.2d 1 (Cal. 1948), *overruled by* Sindell v. Abbott Laboratories, 26 Cal. 3d 588 (1980). The Restatement utilizes the fact situation of *Summers* to illustrate the alternative theory. RES. TORTS, *supra* note 5, § 433B(3) cmt. h, illus. 9.

In certain cases, alternative liability is rejected when the plaintiff knows or should know the identity of the offending manufacturer. *See generally* Layton v. Blue Giant Equip. Co., 599

hunting party sued two fellow hunters who negligently shot at a quail, wounding the plaintiff instead. Because both hunters fired simultaneously, the plaintiff was unsure which hunter wounded him. However, he could prove that he had been harmed by the conduct of one of the defendants and he brought all possible defendants before the court.[19] Each defendant was shown to have acted tortiously toward the plaintiff, although independently of the other. Yet, the nature of the accident made it difficult for the plaintiff, through no fault of his own, to prove which of the two had caused his harm.[20]

Citing the *Restatement* section 433B, the court determined that in fairness to the innocent injured party, the two defendants, both wrongdoers, should be jointly and severally liable.[21] The burden of proof shifted to the defendants, who were better positioned to prove their own innocence,[22] or else to apportion damages between themselves.[23]

Several courts have utilized a form of alternative liability approach in products liability cases, primarily when all potential defend-

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F. Supp. 93 (E.D. Pa. 1984); Lyons v. Premo Pharmaceutical Labs, Inc., 406 A.2d 185 (N.J. Super. Ct. App. Div. 1979), *cert. denied*, 412 A.2d 774 (N.J. 1979).

19. *Summers*, 199 P.2d at 2.

20. *Id.* at 2-3.

21. *Id.* at 3-4. The *Summers* court asserted:

> When we consider the relative position of the parties and the results that would flow if plaintiff was required to pin the injury on one of the defendants only, a requirement that the burden of proof on that subject be shifted to defendants becomes manifest. They are both wrongdoers—both negligent toward plaintiff. They brought about a situation where the negligence of one of them injured the plaintiff, hence it should rest with them each to absolve himself if he can. The injured party has been placed by defendants in the unfair position of pointing to which defendant caused the harm. If one can escape the other may also and the plaintiff is remediless. Ordinarily defendants are in a far better position to offer evidence to determine which one caused the injury . . . . It is up to the defendants to explain the cause of the injury.

Id. at 4.

22. *Id.* at 4-5. *Summers* can be viewed primarily as a damages apportionment case, rather than one of defendant identification, since both defendants were known and before the court.

23. Section 433B(2) indicates than when the combined conduct of two or more parties harms a plaintiff, any resolution of uncertainty as to the apportionment of damages between known defendants is placed upon the wrongdoers, not the plaintiff—an important concept underlying the assessment of damages in nontraditional causation theories. The provision states:

> (2) Where the tortious conduct of two or more actors has combined to bring about harm to the plaintiff, and one or more of the actors seeks to limit his liability on the ground that the harm is capable of apportionment among them, the burden of proof is upon each such actor.

RES. TORTS, *supra* note 5, § 433B(2).

ants have been brought before the court.[24] For example, in *Abel v. Eli Lilly & Co.*,[25] the court undertook an extensive review of alternative liability policy as discussed in the *Summers* case. The court concluded that it would not only extend the *Summers* policy of protecting innocent, injured plaintiffs from a lack of remedy, but would also tailor the legal theory of alternative liability to this type of DES litigation.[26]

In *Abel*, similar to *Summers*, the nearly 200 plaintiff DES daughters could initially demonstrate that they had been injured by the conduct of one of the defendants where all known DES manufacturers promoting Michigan sales were before the court.[27] Through no fault of their own, the plaintiffs were unable to identify specifically the responsible tortfeasors due to the fungible nature of DES and the time lapse.[28] The burden of proof as to causation was then shifted to each defendant to either exonerate itself or apportion damages between all defendants.[29]

In distinguishing *Summers*, the *Abel* court noted that each defendant had been proven negligent toward the plaintiff. In this in-

24. AM. LAW, *supra* note 3, § 9:7. *See, e.g.*, Menne v. Celotex Corp., 861 F.2d 1453 (10th Cir. 1988) (recognizing alternative liability in an asbestos case when all possible defendants were before the court); Poole v. Alpha Therapeutic Corp., 696 F. Supp. 351 (N.D. Ill. 1988) (an HIV-infected hemophiliac sued all possible defendant manufacturers of the defective blood product); *In re* "Agent Orange" Product Liab. Lit., 597 F. Supp. 740 (E.D.N.Y. 1984), *affm'd in part and rev'd in part*, 818 F.2d 226 (2d Cir. 1987) (all possible defendant manufacturers of the herbicide "Agent Orange" were before the court); Abel v. Eli Lilly & Co., 343 N.W.2d 164 (Mich.), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Abel, 469 U.S. 833 (1984) (all manufacturers distributing DES in Michigan were before the court); Ferrigno v. Eli Lilly & Co., 420 A.2d 1305 (N.J. Super. Ct. Law Div. 1980) (analogizing to automobile "chain collision" cases). This alternative approach seems impractical in mass toxic tort cases in which hundreds of potential defendants may exist.

25. 343 N.W.2d 164 (Mich. 1984), *cert. denied sub nom.* E.R. Squibb & Sons, Inc. v. Abel, 469 U.S. 833 (1984).

26. *Abel*, 343 N.W.2d at 173-74.

27. *Id.* at 174 n.16.

28. *Id.* at 175. Due to the fungible nature of DES, plaintiffs were unable to specifically identify the offending manufacturers. The defendants had utilized a generic marketing approach to the product. In addition, a significant time lapse created a lack of supportable pharmacy records, since Michigan law required pharmacists to maintain records for only a five year period. *Id.*

Some 70 plaintiffs argued ingeniously that they both could, and could not, identify the specific manufacturers. The court applied the established pleading practices which allow for inconsistent claims. Approximately 113 plaintiffs stated that they were unable to identify the specifically offending DES manufacturer. *Id.*

29. *Abel*, 343 N.W.2d at 174. Defendants might avoid liability by showing that they did not market the drug in the Michigan area during the relevant time period that the plaintiff's mother ingested the drugs. *Id.*

stance, however, each defendant was negligent toward one plaintiff but not toward each and every plaintiff.[30] To accommodate this distinction, the court applied the alternative liability theory after shifting the cause-in-fact burden to the defendants, even if it were ultimately determined that only one unidentifiable defendant caused the plaintiff's harm.[31] Application of alternative liability theory in this way certainly aids aggrieved plaintiffs, but also places an entire industry at risk of products liability for harm they may not have caused.

Many courts have rejected the alternative approach in product cases where the plaintiffs failed to bring in all potential defendants, reasoning that the actual wrongdoers might escape liability, or that otherwise innocent defendants might be held liable for a wrong that they did not commit.[32] Other courts have dismissed claims based on alternative liability where the plaintiff could have identified the actual tortfeasors through reasonably diligent efforts, or the wrongdoer's identification was not properly established due to some fault of the plaintiff.[33]

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30. *Id.* at 172-73.

31. *Id.* at 174.

32. *See* Marshall v. Celotex Corp., 651 F. Supp. 389 (E.D. Mich. 1987) (although Michigan recognizes alternative liability in product cases, it was not applicable because all possible asbestos manufacturers were not before the court); Enright v. Eli Lilly & Co., 533 N.Y.S.2d 224 (App. Div. 1988), *cert. denied*, 112 S. Ct. 197 (1991) (only six of nearly 100 possible DES manufacturers were before the court); Smith v. Eli Lilly & Co., 527 N.E.2d 333 (Ill. App. 1988), *rev'd on other grounds*, 560 N.E.2d 324 (Ill. 1990) (no showing that all DES defendants were before the court); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986) (no showing that the three defendants before the court were the only possible wrongdoers in a DES case); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (not all possible DES defendants were before the court; the actual wrongdoer could escape liability); Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583 (1983) (failure to show that any vaccine manufacturers were tortfeasors); Centrone v. C. Schmidt & Sons, Inc., 452 N.Y.S.2d 299 (App. Div. 1982) (in an exploding bottles case, there was no showing that all defendants were before the court or that each had acted tortiously); Namm v. Charles E. Frost & Co., 427 A.2d 1121 (N.J. Super. Ct. App. Div. 1981) (only 44 potential defendants were before the court).

33. *See* Layton v. Blue Giant Equip. Co., 599 F. Supp. 93 (E.D. Pa. 1984) (alternative theory not applicable as plaintiff failed to exercise reasonable diligence in identifying the actual lift-jack manufacturer); Bradley v. Firestone Tire & Rubber Co., 590 F. Supp. 1177 (D.S.D. 1984) (plaintiff failed to identify the manufacturer number stamped on a tire rim); Cousineau v. Ford Motor Co., 363 N.W.2d 721 (Mich. Ct. App.), *cert. denied*, 474 U.S. 971 (1984) (identification of the manufacturer of a tire rim was possible from wheel); Lyons v. Premo Pharmaceutical Labs, Inc., 406 A.2d 185 (N.J. Super. Ct. App. Div. 1979) (plaintiff had already identified and settled with the particular manufacturer).

B. Enterprise Liability

Similar to alternative liability, "enterprise" liability theory[34] was first enunciated in *Hall v. E.I. DuPont de Nemours & Co.*[35] Under this theory, the actual tortfeasors have not been identified through no fault of the plaintiffs. The court sought to mold creatively the traditional cause-in-fact requirements in order to provide judicial protection of innocent, injured claimants and deter manufacturers of defective products. Enterprise theory joins as defendants virtually all members of a small, centralized industry of generically similar products (five to ten producers)[36] who have joint control of the risk that caused the plaintiffs' injuries.[37] Once the plaintiffs demonstrate that the defendants breached a duty of care and that they controlled a joint risk that resulted in plaintiffs' harm, the burden shifts to the defendants to exculpate themselves from liability.[38]

In *DuPont*, the plaintiffs were children in different states, injured in blasting cap explosions.[39] Their complaint did not identify a specific tortfeasor of the obliterated product, but brought suit against six

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34. Enterprise liability is not available if the manufacturer is identified or if the plaintiff fails to undertake diligent efforts to identify the applicable manufacturer. *See* Bradley v. Firestone Tire & Rubber Co., 590 F. Supp. 1177 (D.S.D. 1984) (exploding tire case); Prelick v. Johns-Manville Corp., 531 F. Supp. 96 (W.D. Pa. 1982) (asbestos case); Lyons v. Premo Pharmaceutical Labs, Inc., 406 A.2d 185 (N.J. Super. Ct. App. Div. 1979) (DES case). *See* AM. JUR., *supra* note 3, at 147.

Enterprise liability is viewed as a hybrid of the alternative and concerted action theories of liability, providing for absolute liability for industry members and their attendant industry association. Sheiner, *supra* note 3, at 974-75; AM. LAW, *supra* note 3, § 9:24; AM. JUR, *supra* note 3, at 147; *Manufacturers Liability*, *supra* note 3, at 185. *See also* Potash, *supra* note 17, at 95-106 (discussing the concerted action theory as an offshoot of enterprise liability theory).

35. 345 F. Supp. 353 (E.D.N.Y. 1972). *See* Schwartz, *supra* note 3, at 952-54; Sheiner, *supra* note 3, at 995-1002 (providing detailed discussion of *DuPont*).

36. *DuPont*, 345 F. Supp. at 378. As to enterprise liability, the *DuPont* court emphasized its "special applicability to industries composed of a small number of units. What would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers." *Id.*

Moreover, California's courts rejected the application of the enterprise theory to the DES industry because that industry involved over 200 manufacturers. *See* Sindell v. Abbott Lab., 607 P.2d 924, 935 (Cal. 1980), *cert. denied*, 449 U.S. 912 (1980). *But see* Sheiner, *supra* note 3, at 995-1007 (providing detailed analysis and recommending the use of enterprise liability in DES litigation).

37. *DuPont*, 345 F. Supp. at 378; *Sindell*, 607 P.2d at 935; AM. LAW, *supra* note 3, § 9:25; *Manufacturers Liability*, *supra* note 3, at 185; AM. JUR., *supra* note 3, at 147.

38. *DuPont*, 345 F. Supp. at 379-80; *Sindell*, 607 P.2d at 935; AM. LAW, *supra* note 3, § 9:26; AM. JUR., *supra* note 3, at 147; *Manufacturers Liability*, *supra* note 3, at 185.

39. *DuPont*, 345 F. Supp. at 358-59. The court joined *DuPont* and *Chance v. E.I. DuPont de Nemours & Co.*, 57 F.R.D. 165 (E.D.N.Y. 1972), which involved injuries to children from blasting caps between 1955 and 1959. *DuPont*, 345 F. Supp. at 358-59.

blasting cap companies that comprised nearly the entire United States industry and the industry's trade association.[40] Under the facts of the case, the blasting caps manufacturers acted in compliance with an allegedly insufficient industry-wide labelling standard, after delegating safety, functionality, labelling, and design responsibilities to their trade association.[41]

Based on a review of section 433B of the *Restatement*, the court determined that the plaintiff must show by a preponderance of the evidence that the defective, generic product was made by one of the defendants, but need not identity the specific manufacturer who made the injurious blasting cap.[42] The *DuPont* court determined that this small group of manufacturers and their industry association had jointly controlled the risk that resulted in the injury to the plaintiffs and, therefore, could be held jointly and severally liable for the harm. As to causation, the burden of proof then shifted to the defendants to extricate themselves from the joint enterprise.[43]

Unlike the alternative liability theory, the enterprise theory does not require that all potential tortfeasors appear before the court.[44] Plaintiffs must show by a preponderance of the evidence that one of the defendants before the court caused the injury.[45] The defendants are not viewed as acting independently in their tortious activities but as maintaining joint control over the tortious risks of injury.[46]

Under the doctrine of products liability, the enterprise theory ex-

40. The plaintiffs in *Chance* were unable to determine the actual manufacturers of the blasting caps, while in *DuPont* the defendant manufacturers were known. *DuPont*, 345 F. Supp. at 358. The *DuPont* court adopted the notion of enterprise liability. *Id.* at 376-80.

41. *Id.* at 359. *DuPont* raised the specter of trade associations handling safety, certification and associated duties for industry manufacturers incurring liability in products liability cases. *See generally* Ralph G. Wellington & Vance G. Camisa, *The Trade Association and Product Safety Standards: Of Good Samaritans and Liability*, 35 WAYNE L. REV. 37 (1988); William C. Becker, *Trade Association and Product Liability*, 16 CAP. U. L. REV. 581 (1987).

42. *DuPont*, 345 F. Supp. at 379. The defendants contended that the enterprise theory was inappropriate because the blasting caps involved in the accidents may have come from foreign manufacturers or defunct domestic firms, and not the named domestic manufacturers. *Id.* However, the court indicated that the chance of unknown businesses having supplied the blasting caps did not alter the plaintiffs' burden of proof. *Id.* The plaintiffs needed only to show that it was more likely than not that the caps involved were made by one of the named domestic manufacturers. *Id.*

43. *Id.* at 378-79.

44. Plaintiffs should sue 75% to 80% of the relevant market to maximize the probability that the offending manufacturer is one of the named defendants. AM. LAW, *supra* note 3, § 9:24.

45. *DuPont*, 345 F. Supp. at 379. *See also supra* notes 42-43 and accompanying text.

46. *Id.* at 378-79. *See also supra* note 20 and accompanying text.

pands potential liability to an industry-wide level. No other courts have directly embraced the theory, although some have considered its viability within certain fact situations.[47] Many courts have expressly rejected the enterprise approach as violating traditional causation principles.[48] Other courts have refused to apply enterprise liability theory because the defendants were not part of a small, centralized industry. These cases reject the theory when there is an unwieldy number of potential defendants in industries with large numbers of manufacturers.[49] Furthermore, courts have rejected the theory for failure to show inadequate industry-wide standards or joint control of the risk through delegation of product safety functions to an industry-wide trade association.[50]

C. *Market Share Liability*

Market share liability theory is one of the most controversial alternative approaches to defendant identification.[51] *Sindell v. Abbott Laboratories*,[52] introduced the theory. In *Sindell*, the plaintiff class members were unable to identify the specific manufacturer of the DES purchased due to its fungible nature. Plaintiffs were unable to locate

47. Although other courts have not embraced *DuPont*, certain cases have adopted aspects of the enterprise liability theory. *See* Centrone v. C. Schmidt & Sons, Inc., 452 N.Y.S.2d 299 (N.Y. App. Div. 1982) (a deficient industry-wide bottling standard may support the concerted action or enterprise liability theories); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex.), *rev'd in part on other grounds*, 681 F.2d 334 (5th Cir. 1981) (utilizing a form of industry-wide enterprise liability in an asbestos case).

48. *See, e.g.*, Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir.), *cert. denied*, 404 U.S. 1102 (1983) (asbestos case); Marshall v. Celotex Corp., 651 F. Supp. 389 (E.D. Mich. 1987) (asbestos case); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981) (DES case); Enright v. Eli Lilly & Co., 533 N.Y.S.2d 224 (Sup. Ct. 1988) (DES case); Mulcahy v. Eli Lilly & Co., 386 N.W.2d 67 (Iowa 1986) (DES case); Namm v. Charles E. Frost & Co., 427 A.2d 1121 (N.J. Super. Ct. App. Div. 1981) (DES case).

49. *See, e.g.*, Marshall v. Celotex Corp., 651 F. Supp. 389 (E.D. Mich. 1987) (asbestos case); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1989) (DES case); Smith v. Eli Lilly & Co., 527 N.E.2d 333 (Ill. App. 1988), *rev'd on other grounds*, 560 N.E.2d 324 (Ill. 1990); Farmer v. City of Newport, 748 S.W.2d 162 (Ky. App. 1988) (mattress industry case).

50. *See, e.g.*, Marshall v. Celotex Corp., 651 F. Supp. 389 (E.D. Mich. 1987) (asbestos case); Vigiolto v. Johns-Manville Corp., 643 F. Supp. 1454 (W.D. Pa), *aff'd without opinion*, 826 F.2d 1058 (3d Cir. 1986) (asbestos case); Farmer v. City of Newport, 748 S.W.2d 162 (Ky. App. 1988) (mattress industry case); Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583 (Ct. App. 1983) (DES case); Centrone v. C. Schmidt & Sons, Inc., 452 N.Y.S.2d 299 (App. Div. 1982) (exploding bottles case).

51. For an excellent discussion of market share liability and variant forms of the theory in the United States, see Andrew B. Nace, *Market Share Liability: A Current Assessment of a Decade-Old Doctrine*, 44 VAND. L. REV. 395 (1991).

52. 607 P.2d 924, *cert. denied*, 449 U.S. 912 (1980). *See* Schwartz, *supra* note 3, at 954-60; *Market Share Liability*, *supra* note 3, at 672-80; Nace, *supra* note 51, at 398-403.

applicable records or relevant witnesses due to the lapse of time.[53] The court expressed its concern that plaintiffs' inability to identify the specific manufacturer would leave injured parties without a remedy while allowing wrongdoers to escape liability.[54]

After rejecting the alternative and enterprise theories of liability, the court fashioned a market share theory. This invention required plaintiffs to join a "substantial share" of the market manufacturers of generically similar DES.[55] Liability was based on the manufacturer's share of the relevant market of the defective product.[56] The court reasoned that with a substantial share of the market before it, the actual wrongdoers were less likely to escape liability and could approximate their own corresponding liability in accordance with their share of the market.[57] Once plaintiffs joined a substantial portion of the market, the burden shifted to each defendant to prove it could not have made the product that injured the plaintiffs.[58] Damages were then apportioned among the remaining defendants.[59]

Similar to the enterprise theory, but unlike the alternative liabil-

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53. *Sindell*, 607 P.2d at 936. In some instances, attempts to use market share have been rejected when the plaintiff knew, or through reasonable efforts could determine, the actual manufacturer's identity and join it in the case. *See* Poole v. Alpha Therapeutic Corp., 696 F. Supp. 351 (N.D. Ill. 1988) (HIV-tainted blood products); Prelick v. Johns-Manville Corp., 531 F. Supp. 96 (W.D. Pa. 1982) (asbestos case).

54. The *Sindell* court stated:

> In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs .... The Restatement comments that modification of the *Summers* rule may be necessary in a situation like that before us .... The most persuasive reason for finding plaintiff states a cause of action is that advanced in *Summers*: as between an innocent plaintiff and negligent defendants, the latter should bear the cost of injury.

607 P.2d at 936. *See also* AM. LAW, *supra* note 3, § 9:30.

55. *Sindell*, 607 P.2d at 937. Plaintiffs sued manufacturers who comprise approximately 90% of the market. *Id.* The court recognized the potential difficulties in defining the market and identifying market share, but left it to the jury to determine the appropriate relationship as in comparative fault decisions. *Id.* Commentators have criticized the failure of the *Sindell* court to deal more specifically with these practical concerns. Schwartz, *supra* note 3, at 956-58; Urias, *supra* note 3, at 156-57, 160-62; Nace, *supra* note 51, at 420-25.

56. *Sindell*, 607 P.2d at 937. *See* AM. LAW, *supra* note 3, § 9:28.

57. *Sindell*, 607 P.2d at 937. *See Market Share Liability*, *supra* note 3, at 678; Nace, *supra* note 51, at 402; AM. LAW, *supra* note 3, § 9:33; Robinson, *supra* note 12, at 736-49 (criticizing the *Sindell* market share approach to fairness in allocating liability).

58. *Sindell*, 607 P.2d at 937. *See also* Schwartz, *supra* note 3, at 955-56; *Market Share Liability*, *supra* note 3, at 672; Nace, *supra* note 51, at 401-02.

59. *Sindell*, 607 P.2d at 937. *See also* Schwartz, *supra* note 3, at 955-56; *Market Share Liability*, *supra* note 3, at 672-73; Nace, *supra* note 51, at 401-02.

ity theory, the market share liability theory only requires plaintiffs to join a substantial number of all potential defendants.[60] The market share liability theory is better suited to a plaintiff class action against a large, decentralized industry than is the enterprise theory.[61] Plaintiffs' burden of proof is eased by holding industry participants potentially liable for injuries that their competitors may have caused.

Other courts hearing DES cases have accepted the *Sindell* approach or some variation of the market liability theory.[62] Outside the DES context, several courts have applied some form of the market share liability theory.[63] Courts that decline to apply the approach do so because the plaintiff failed to join a substantial share of the market or to show that the defective products were generically similar.[64] Beyond this, courts that refuse to adopt other nontraditional causation theories similarly reject the market share liability theory in any context.[65]

D. Concerted Action

The doctrine of concerted action is another nontraditional theory that expands tort products liability where defendant identification is

60. *Sindell*, 607 P.2d at 937.

61. *Market Share Liability*, *supra* note 3, at 675.

62. McCormack v. Abbott Lab., 617 F. Supp. 1521 (D. Mass. 1985); McElhaney v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D. 1983), *aff'd*, 739 F.2d 340 (8th Cir. 1984); Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y.), *cert. denied*, 493 U.S. 944 (1989); Conley v. Boyle Drug Co., 477 So. 2d 600 (Fla. App. 1984), *rev'd on other grounds*, 570 So. 2d 275 (Fla. 1991); Martin v. Abbott Lab., 689 P.2d 368 (Wash. 1984); Collins v. Eli Lilly & Co., 342 N.W.2d 37 (Wis.), *cert. denied sub. nom.* E.R. Squibb & Sons, Inc. v. Collins, 469 U.S. 826 (1984); Miles Lab., Inc. v. Superior Court, 133 Cal. App. 3d 587 (1982).

63. *See* Morris v. Parke Davis & Co., 667 F. Supp. 1332 (C.D. Cal. 1987); Morris v. Parke Davis & Co., 573 F. Supp. 1324 (C.D. Cal. 1983) (applying California's substantive law to allow market share liability in a vaccine case); Hardy v. Johns-Manville Sales Corp., 509 F. Supp. 1353 (E.D. Tex.), *rev'd in part on other grounds*, 681 F.2d 334 (5th Cir. 1981) (utilizing a form of market share in asbestos litigation). *But see* Senn v. Merrell-Dow Pharmaceuticals, Inc., 850 F.2d 611 (9th Cir. 1988) (rejecting the use of market share in a vaccine case); Vigiolto v. Johns-Manville Corp., 643 F. Supp. 1454, *aff'd without opinion*, 826 F.2d 1058 (3rd Cir. 1986) (rejecting the use of market share in asbestos litigation); Lillge v. Johns-Manville Corp., 602 F. Supp. 855 (E.D. Wis. 1985) (rejecting market share liability in asbestos fibers case); Shackil v. Lederle Lab., 561 A.2d 511 (N.J. 1989) (rejecting market share liability in a vaccine case).

64. *See, e.g.*, Marshall v. Celotex Corp., 651 F. Supp. 389 (E.D. Mich. 1987) (holding that asbestos is not a fungible product and no substantial share of market was joined in the case); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987) (asbestos products are not fungible and the largest manufacturer was not joined as a defendant); Tirey v. Firestone Tire & Rubber Co., 513 N.E.2d 825 (Ohio Com. Pl. 1986) (no showing that tire rims are fungible products).

65. *See supra* note 15 and accompanying text.

not possible. The concerted action theory serves the policy of providing a remedy for innocent, injured plaintiffs while deterring wrongdoers. Section 876 of the *Restatement* indicates that liability will flow to all those whose tortious conduct, pursuant to a common design or plan, causes harm to a third party.[66] The common design or scheme may be based upon an express agreement or a tacit understanding between the wrongdoers.[67]

The concerted action theory expands liability beyond those actually taking part in the tortious action and includes those who both aid or encourage the actual wrongdoer or ratify and adopt the wrongdoer's action for their own benefit.[68] Each defendant is held jointly and severally liable for the damages and may seek contribution from other tortfeasors.[69]

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66. RES. TORTS, *supra* note 5, § 876, states:

> For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he
>
> (a) does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id. *See also* AM. LAW, *supra* note 3, §§ 9:18, 9:20; AM. JUR., *supra* note 3, § 167; KEETON ET AL., *supra* note 5, § 46.

67. RES. TORTS, *supra* note 5, § 876 cmt. a; AM. LAW, *supra* note 3, § 9:21; KEETON ET AL., *supra* note 5, § 46.

Most courts and commentators indicate that "conscious parallelism" alone supports the establishment of a tacit understanding under the concert of activity theory. *See, e.g.*, Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y.), *cert. denied*, 493 U.S. 944 (1989); Bradley v. Firestone Tire & Rubber Co., 590 F. Supp. 1177 (D.S.D. 1984) (multi-rim tire case); Smith v. Eli Lilly & Co., 527 N.E.2d 333 (Ill. App.), *rev'd on other grounds*, 560 N.E.2d 324 (Ill. 1988) (DES case); Sindell v. Abbott Lab., 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980) (DES case). *See also* Timothy J. Langella, Note, Bichler v. Eli Lilly: *An Improper Use of Conscious Parallelism as Evidence of Concerted Action*, 62 B.U. L. REV. 633, 645 (1982) ("Conscious parallelism" is a term drawn from antitrust law concerning "the common practice of conducting similar businesses in a uniform manner, with each business aware that the others are pursuing the same course of action."). *But see* Bichler v. Eli Lilly & Co., 436 N.Y.S.2d 625 (App. Div. 1981), *aff'd*, 436 N.E.2d 182 (N.Y. 1982) (lower court in a DES case accepted conscious parallelism as sufficient for a concerted action claim).

68. RES. TORTS, *supra* note 5, § 876 ("[a]dvice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged is known to be tortious it has the same effect upon liability of the adviser as participation or physical assistance."). *Id.* cmt. d. *See* KEETON ET AL., *supra* note 5, § 46; AM. LAW, *supra* note 3, §§ 9:18, 9:20; AM. JUR., *supra* note 3, § 167.

69. RES. TORTS, *supra* note 5, § 876 cmt. a; AM. LAW, *supra* note 3, § 9:19; KEETON ET AL., *supra* note 5, §§ 46, 52. As explained in RES. TORTS, *supra* note 5, § 876 cmt. a, "each becomes subject to liability for the acts of the others, as well as his own acts. The theory of the

The concerted action theory is usually applied instead of other nontraditional theories when the plaintiff knows the actual tortfeasor but wishes to expand the liability to include others who acted in concert with the wrongdoer.[70] The principle of the concerted action theory derives from criminal guilt arising from aiding and abetting another in a crime.[71] Unlike the other nontraditional approaches, the concerted action theory has unintentionally been used to ease the plaintiff's burden of proof for causation in civil actions.[72]

The *Cousineau v. Ford Motor Co.*[73] case exemplifies the recent application of concerted action to tort products liability cases in which the actual wrongdoer's identity is unknown. In *Cousineau*, plaintiff's decedent was killed when a truck tire with a multi-piece rim exploded upon repair.[74] The rim parts of the tire were initially set aside at the manufacturer, but over time they were mixed with the general rim stock. The interchangeable nature of these rims, coupled with the time lapse, made identifying the specific manufacturer impossible.[75] The plaintiff sued all multi-rim tire manufacturers, as well

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early common law was that there was a mutual agency of each to act for the others, which made all liable for the tortious acts of any one." *Id.*

70. Rastelli v. Goodyear Tire & Rubber Co., 565 N.Y.S.2d 889, 891 (App. Div. 1991); Smith v. Eli Lilly & Co., 527 N.E.2d 333, 350 (Ill. App. Ct. 1988); Cousineau v. Ford Motor Co., 363 N.W.2d 721, 728 (Mich. Ct. App.), *cert. denied*, 474 U.S. 971 (1985); Abel v. Eli Lilly & Co., 343 N.W.2d 164, 176 (Mich.), *cert. denied*, 469 U.S. 833 (1984); AM. LAW, *supra* note 3, § 9:19.

71. KEETON ET AL., *supra* note 5, § 46; AM. LAW, *supra* note 3, § 9:18.

Initially, it was assumed that the concerted action principle would deter criminal or antisocial activities. *See, e.g.*, Aebischer v. Reidt, 704 P.2d 531 (Ore. Ct. App.), *reh'g denied*, 710 P.2d 147 (Ore. 1985) (passenger refilling marijuana pipe for driver); Price v. Halstead, 355 S.E.2d 380 (W. Va. 1987) (passenger encouraging drug and alcohol use by driver); Herman v. Westgate, 464 N.Y.S.2d 315 (App. Div. 1983) (tortfeasors encouraged others to push people off a barge at a stag party); Lemmons v. Kelly, 397 P.2d 784 (Ore. 1964) (tortfeasors encouraged drag racing); Hood v. Evans, 126 S.E.2d 898 (Ga. Ct. App. 1962) (tortfeasors encouraged drag racing); Bierczynski v. Rogers, 239 A.2d 218 (Del. 1968) (tortfeasors encouraged drag racing); Carney v. DeWees, 70 A.2d 142 (Conn. 1949) (tortfeasors encouraged drag racing).

For an excellent discussion of the historical purposes and uses of concerted action and criticism of its use in a products liability context, see Burton N. Lipshie & Jay Mayesh, *Recent Ruling Resurrecting Concerted Action Sounds Sour Note for U.S. Manufacturers*, N.Y. L.J., July 10, 1991, at 1.

72. *Abel*, 343 N.W.2d at 176; AM. LAW, *supra* note 3, § 9:19. Some courts have rejected concerted action in product liability cases stating that it cannot overcome defendant identification problems. *See* Smith v. Eli Lilly & Co., 527 N.E.2d 333 (Ill. App. Ct. 1988) (DES case); Lyons v. Premo Pharmaceutical Labs, Inc., 406 A.2d 185 (N.J. Super. Ct. App. Div. 1979).

73. 363 N.W.2d 721 (Mich. Ct. App.), *cert. denied*, 474 U.S. 971 (1985).

74. *Cousineau*, 363 N.W.2d at 725.

75. *Id.* at 727.

as the vehicle's manufacturers.[76]

The *Cousineau* court rejected the plaintiff's alternative liability claim, because the inability to identify the rim did not stem from the defendants' conduct and the rims had been set aside for possible identification by the plaintiff for a long period after the accident.[77] Similar to the enterprise and market share theories, but unlike alternative liability, the plaintiff need not demonstrate that all potential wrongdoers are before the court because the concerted action theory provides for joint and several liability.[78] The court indicated that the plaintiff could utilize the concerted action theory by showing that the defendants before the court had jointly engaged in the tortious activity that caused the plaintiff's harm.[79] Here, the alleged joint activity occurred when the tire rim industry acted pursuant to a common design in jointly breaching their duty to warn rim users of the danger of multi-rim products.[80] The plaintiff claimed that the tire rim industry's joint efforts for rim standardization and interchangeability posed a known safety hazard.[81] Through industry lobbying efforts, the plaintiff alleged that the defendants failed to meet their duty of care when they shifted their responsibility to warn employers of the potentially dangerous rims.[82] In addition, the plaintiff claimed that the decedent received no prior warning of the danger from the tire rim

76. *Id.* at 725. The plaintiff sued the six major manufacturers of multi-piece wheel rims, as well as three vehicle manufacturers. However, the court's review of concerted action focused exclusively on the wheel manufacturers. *See id.* at 728-30.

77. *Id.* at 727. In reviewing *Abel*, the *Cousineau* court noted important factual distinctions. In *Abel*, the type of DES ingested by the mothers could not be identified due to the number of possible defendants, the passage of time, the drug's generic nature, and the industry's marketing scheme. *Cousineau*, 363 N.W.2d at 727. In *Cousineau*, the type of rim was interchangeable, but not generic, and was identifiable if plaintiff had retrieved it from the employer. *Id.* As to the vehicle manufacturers, the court noted that they did not participate in the generic manufacture and marketing of multi-piece rims, and incurred no liability for a component that they did not manufacture. *Id.* at 727-28.

78. The *Cousineau* court noted that,

> [T]he identification problem is not a sine qua non of a concert of action claim. Each defendant who acted jointly and tortiously is liable, even though his conduct is not the direct cause of the action. Thus, in the context of this case, we hold that it does not matter if the party causing the injury in fact is not joined in the concert of action claim, since all those acting in concert, named and unnamed defendants, are jointly and *severally* liable for the entire harm [citation omitted].

Cousineau, 363 N.W.2d at 728.

79. *Id.*

80. *Id.* at 729.

81. *Id.* The plaintiff supplied documentation showing that the manufacturers shared information and charts indicating which products were safe to interchange and which were not while making no efforts to improve their products' designs. *Id.*

82. *Cousineau*, 363 N.W.2d at 729. The manufacturers, through their industry associa-

manufacturers, nor did the industry supply any warnings with their products.[83] The court indicated that it was up to a jury to determine legal responsibility as to whether this joint conduct caused the harm under the theory of concerted action.[84]

Several other courts have accepted the use of concerted action in product defect cases in which defendant identification is not possible.[85] Concerted action has also been sanctioned to expand tort products liability to other manufacturers within an industry, even when the actual manufacturer is known and before the court.[86] This nontraditional theory also expands liability to an industry-wide level based on industry lobbying efforts or trade association activities.

A number of courts have rejected this principle in products liability cases,[87] some out of concern that all industry manufacturers would become liable for the products of their competitors.[88] Other courts have refused to adopt concerted action in product defect cases in which the guilty manufacturer has been identified, thereby providing viable remedies and effective deterrents.[89]

All four nontraditional theories illustrate the efforts of United States courts to deal creatively with the cause-in-fact requirement of defendant identification. In most instances, the plaintiff's inability to identify the specific defendant arises from time lapses that destroy op-

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tion, undertook a lobbying campaign to prevent the establishment of safety regulations requiring safety warnings that might burden their industry. *Id.* at 726, 729.

83. *Id.* at 729.

84. *Id.*

85. Farmer v. City of Newport, 748 S.W.2d (Ky. Ct. App. 1988) (defective, combustible mattress case); Abel v. Eli Lilly & Co, 343 N.W.2d 164 (Mich.), *cert. denied*, 469 U.S. 833 (1984) (DES case); Bichler v. Eli Lilly & Co., 436 N.Y.S.2d 625 (App. Div. 1981), *aff'd*, 436 N.E.2d 182 (1982) (the lower court embraced concerted action, but the appellate court held only that the trial court's instructions on concerted action were not erroneous).

86. Rastelli v. Goodyear Tire & Rubber Co., 565 N.Y.S.2d 889 (App. Div. 1991) (defective multi-rim tire case).

87. *See, e.g.*, Bradley v. Firestone Tire & Rubber Co., 590 F. Supp. 1177 (D.S.D. 1984) (multi-piece rim tire case); McCreery v. Eli Lilly & Co., 564 F. Supp. 265 (D.S.D. 1983) (DES case); Gaulding v. Celotex Corp., 772 S.W.2d 66 (Tex. 1989) (asbestos case); Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691 (Ohio 1987) (asbestos case); Celotex Corp. v. Copeland, 471 So. 2d 533 (Fla. 1985) (asbestos case); Sheffield v. Eli Lilly & Co., 144 Cal. App. 3d 583 (Ct. App. 1983) (DES case); Zafft v. Eli Lilly & Co., 676 S.W.2d 241 (Mo. 1984) (DES case); Ferrigno v. Eli Lilly & Co., 420 A.2d 1305 (N.J. Super. Ct. 1980) (DES case).

88. *See, e.g.*, Tirey v. Firestone Tire & Rubber Co., 513 N.E.2d 825 (Ohio Com. Pl. 1986); Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963 (Pa. Super. Ct. 1985) (multi-piece tire rim cases).

89. *See, e.g.*, Prelick v. Johns-Manville Corp., 531 F. Supp. 96 (W.D. Pa. 1982) (asbestos case); Ryan v. Eli Lilly & Co., 514 F. Supp. 1004 (D.S.C. 1981) (DES case); Lyons v. Premo Pharmaceutical Labs, Inc., 406 A.2d 185 (N.J. Super. Ct. App. Div. 1979) (DES case).

portunities to secure supportive evidence, or from the fungible or obliterated nature of products that defy separate identification. Some United States courts balance the protection of an injured plaintiff with the deterrence of defective product marketing.

In some cases, these efforts have yielded industry-wide liability, with manufacturers being held responsible for the defective products of their competitors. Other courts have adhered strictly to traditional cause-in-fact requirements, that leave injured plaintiffs without remedies and manufacturers without a deterrent. These differing views on cause-in-fact continue to confuse United States plaintiffs, manufacturers, industry associations, and others in the chain of distribution in products liability litigation.

IV. CAUSE-IN-FACT PRINCIPLES AND THE EC PRODUCTS LIABILITY DIRECTIVE

A. Overview of EC Products Liability Directive

In 1957, several European nations joined to form a single market of common trade policies with harmonized national laws facilitating the unhampered movement of people, goods, and capital among the member states.[90] To further this objective, the Council of Ministers of the European Communities promulgated council directives on agricultural, monetary, consumer, transportation, and other commercial policies governing trade within and outside the EC.[91] After the adoption of a directive, member states are required to implement national laws consistent with EC directives by a particular deadline with certain allowances for local deviations.[92]

Early in the mid-1970s, the EC recognized that differences in products liability laws might restrain the free flow of products, lessen competition among producers, and lead to the unequal protection of consumers.[93] During nearly ten years of debate on a uniform prod-

90. The EC's current twelve Member States are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, and the United Kingdom. Patrick Thieffry et al., *Strict Product Liability in the EEC: Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 TORT & INS. L.J. 65, 65-66 (1989); Heinz J. Dielmann, *The European Economic Community's Council Directive on Product Liability*, 20 INT'L LAW 1391, 1391-92 (1986).

91. Thieffry et al., *supra* note 90, at 65.

92. *Id.* at 66; Dielmann, *supra* note 90, at 1392. The directive creates no individual rights or remedies but compels member nations to pass national legislation implementing each directive. Thieffry et al., *supra* note 90, at 83; Dielmann, *supra* note 90, at 1392.

93. Thieffry et al., *supra* note 90, at 65-67; Dielmann, *supra* note 90, at 1391-92; Lori M. Linger, Note, *The Products Liability Directive: A Mandatory Development Risks Defense*, 14

ucts liability directive, the EC wrestled with a number of major issues, including the consideration of a fault-based or strict liability system, the proper application of a "development risks" defense (the state-of-the-art defense in the United States), and possible limitations on damages and time periods for producer liability.[94] Finally, in 1985, the EC adopted a compromise council directive on liability for defective products for harmonization by member communities.[95] In a compromise, the 1985 directive contains options for national implementation of development risks[96] and damage limitation issues.[97]

The EC Directive addressed the need for a unified perspective on

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FORDHAM INT'L L.J. 478, 479 (1990-91). Prior to the enactment of the council directive on products liability, the only uniformity on product defect lawsuits was a convention dealing with conflicts of laws issues. *Id.*

94. Dielmann, *supra* note 90, at 1391-92; Linger, *supra* note 93, at 480-83; Sara F. Liebman, Note, *The European Community's Products Liability Directive: Is the U.S. Experience Applicable?*, 18 LAW & POL'Y INT'L BUS. 795, 800 (1986).

95. Council Directive 85/374, 1985 O.J. (L 210) [hereinafter Directive]. *See generally* Linger, *supra* note 93, at 479-83 (providing historical background on the development of the EC product liability directive). Because of the difficult obstacles in harmonizing products liability laws, the member states resisted implementing the directive, with only three nations (the United Kingdom, Greece, and Italy) adopting harmonized laws prior to the 1988 deadline. Anita Bernstein, *L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community*, 31 VA. J. INT'L L. 673, 708 (1991).

96. Article 7(e) of the EC Directive provides a state-of-the-art defense for producers, which is then undermined by Article 15 of the Directive. Article 15 states that each member state may,

> (b) by way of derogation from Article 7(e), maintain or . . . provide in this legislation that the producer shall be liable even if he proves that the state of scientific and technical knowledge at the time when he put the product into circulation was not such as to enable the existence of a defect to be discovered.

Directive, *supra* note 95, art. 15.

Therefore, each member nation may decide whether to include a state-of-the-art defense in their enabling national legislation. This option will likely divide the community and result in nonuniform products liability practices, particularly for research-driven products such as chemicals or pharmaceuticals. Thieffry et al., *supra* note 90, at 74-76; Liebman, *supra* note 94, at 805. For example, Germany adopted the notion of the development risks defense for pharmaceuticals, while France supports the defense in many product cases, but not those involving pharmaceuticals. Thieffry et al., *supra* note 90, at 75. However, most member states are expected to adopt a state-of-the-art defense, with the exception of Luxembourg, France, and Belgium. Linger, *supra* note 93, at 490-91.

97. Article 16 of the Directive states that "a producer's total liability for damage resulting from a death or personal injury and caused by identical items with the same defect shall be limited to an amount which may not be less than 70 million ECU." Directive, *supra* note 95, art. 16. *See* Thieffry et al., *supra* note 90, at 76; Dielmann, *supra* note 90, at 1399. Allowing a cap was supported by some member nations as necessary to mitigate the rigors of strict liability. Liebman, *supra* note 94, at 806-07. The vague language of article 16 makes it unclear whether claims should be aggregated to reach the ceiling amount or the effect on remaining injured plaintiffs if the fund has been exhausted. *Id.*

products liability based on trade and consumer concerns, stating at the outset that:

> approximation of the laws of the Member States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary because the existing divergences may distort competition and affect the movement of goods within the common market and entail a differing degree of protection of the consumer against damage caused by a defective product to his health and property . . . .[98]

Article 1 of the EC Directive states that "[t]he producer shall be liable for damage caused by a defect in his product."[99] The term "product" basically includes all movables, even those incorporated into immovables, with the main exception of game and agricultural products.[100] Similar to the United States approach, the term "producer" includes manufacturers of finished goods or component parts, importers, suppliers, and any party that presents himself as the producer through name, trademark, or other distinguishing feature.[101]

The EC Directive mandates the implementation of the theory of strict liability without requiring a demonstration of fault or privity of contract, similar to the United States strict liability.[102] Under the EC Directive, defectiveness is based upon the consumer's expectation of

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98. Directive, *supra* note 95, pmbl.

99. *Id.* art. 1.

100. Article 2 of the EC Directive states:

> For the purpose of this Directive "product" means all movables, with the exception of primary agricultural products and game, even though incorporated into another movable or into an immovable. "Primary agricultural products" means the products of the soil, of stock-farming and of fisheries, excluding products which have undergone initial processing. "Product" includes electricity.

Directive, *supra* note 95, art. 2.

The EC Directive allows member states the option to decide if agricultural products and game should be included within the meaning of the term "product." Directive, *supra* note 95, art. 15(a). *See* Thieffry et al., *supra* note 90, at 69-71 (discussing unstated and excluded products).

101. The EC Directive provides the definition of "producer" as follows:

> 1. "Producer" means the manufacturer of a finished product, the producer of any raw material or the manufacturer of a component part and any person who, by putting his name, trade mark or other distinguishing feature on the product presents himself as its producer.
>
> 2. Without prejudice to the liability of the producer, any person who imports . . . in the course of his business shall be deemed to be a producer within the meaning of this directive and shall be responsible as a producer.

Directive, *supra* note 95, art. 3.

102. The EC Directive states:

safety,[103] analogous to the United States strict liability approach to "unreasonably dangerous" products.[104]

The injured party is required to prove the damage,[105] the defect,[106] and the causal relationship between the defect and the damage.[107] Basically, this causation approach is identical to United States cause-in-fact principles. As with the United States traditional approach, a portion of the causal relationship requires the injured party

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> Whereas liability without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production . . . .
>
> Whereas liability without fault should apply only to movables which have been industrially produced . . . .

Directive, *supra* note 95, pmbl.

Some member nations have no previous experience with strict liability and may encounter difficulties transitioning to its use. Linger, *supra* note 93, at 483; *EEC: "Legal Minefield" in Liability Directive*, WORLD INS. REP., May 27, 1988. For example, Italy has traditionally followed the notion of proof of negligence in product defect cases, derived from the Napoleonic Code. *Id.*

Many northern European nations have had some experience with strict liability. *Id.* France, Belgium, and Luxembourg have always imposed strict liability for defective product cases. Linger, *supra* note 93, at 483 n.35. In 1976, Germany implemented strict liability for pharmaceuticals in response to the thalidomide catastrophe. Dielmann, *supra* note 90, at 1393; Liebman, *supra* note 94, at 803.

Regardless of member nations' experience with strict liability, most commentators agree that product defect insurance rates will likely rise by five to twenty percent. Bernstein, *supra* note 95, at 685; Brad Durham, *Who's Liable Now?*, WORLDPAPER, Aug. 1988, at 13.

103. The EC Directive states:

> 1. A product is defective when it does not provide the safety which a person is entitled to expect, taking all circumstances into account, including:
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> (a) the presentation of the product;
>
> (b) the use to which it could reasonably be expected that the product would be put;
>
> (c) the time when the product was put into circulation.
>
> 2. A product shall not be considered defective for the sole reason that a better product is subsequently put into circulation.

Directive, *supra* note 95, art. 6.

In determining defectiveness, there is no reference to fitness for its intended purposes, but one may consider the issue of consumer misuse of the product. *Id.* pmbl.

104. Under the notion of strict products liability, an "unreasonably dangerous" product is determined by the "dangerous extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." RES. TORTS, *supra* note 5, § 402A cmt. i. *See* Thieffry et al., *supra* note 90, at 71 n.34.

105. Damage means death, personal injuries or property destruction, or damage when such property is intended for private use and consumption, under the Directive. However, it does not advocate other than compensatory damages, leaving the option available to member states to include non-material damages. Directive, *supra* note 95, art. 9.

106. *See supra* note 103 and accompanying text.

107. In Article 4, the EC Directive states that "[t]he injured person shall be required to prove the damage, the defect and the causal relationship between defect and damage." Directive, *supra* note 95, art. 4. *See supra* notes 5-6.

to identify the producer.[108]

As in the United States, producers have a number of defenses available to them, including the ability to exonerate themselves from liability if they can show that they did not manufacture or distribute the defective product.[109] However, to assure protection of the consumer, a producer is not allowed to contractually exclude its tort liability for manufacturing or distributing a defective product.[110]

Although the EC Directive has not resulted in a uniform approach to products liability,[111] it does provide strong guidance on products liability trends within the EC, particularly with defendant identification. However, despite some basic similarities between United States and EC causation approaches, the EC will not likely follow the United States' nontraditional approaches to cause-in-fact. Many United States defendant identification issues have arisen in cases where the victim's ability to identify the defendant is complicated by time lapse or loss of the defective product. The EC, on the other hand, will most likely avoid the need for developing such nontraditional theories since the explicit language of the Directive attempts to prevent defendant identification problems from ever arising.

B. Defendant Identification under the EC Directive

With so many different products flowing between nations, the EC Directive addresses the problem consumers have identifying defendants by setting out clearly defined responsibilities for product suppliers. The EC Directive states:

> Where the producer of the product cannot be identified, each supplier of the product shall be treated as its producer unless he informs the injured person, within a reasonable time, of the identity

108. The EC Directive requires the supplier of a defective product to provide the identity of the producer to the injured person for prosecution of a claim. Directive, *supra* note 95, art. 3(3).

109. Article 7 of the Directive spells out six main defenses for producers. *See* Directive, *supra* note 95, art. 7. *See* Thieffry et al., *supra* note 90, at 73-76; Dielmann, *supra* note 90, at 1396-98; Linger, *supra* note 93, at 488-89. The EC Directive states that producers are not liable for a defective product if they can show that they did not manufacture, distribute, or otherwise put the product into circulation. Directive, *supra* note 95, art. 7(a), (c).

110. Directive, *supra* note 95, art. 12. The directive policy for this limitation is based upon an effort to effectively protect consumers. *Id.* pmbl., para. 12.

111. The options in the EC Directive, the vagaries of its language, and future interpretations in national courts will likely erode a monolithic approach to products liability in the EC. Thieffry et al., *supra* note 90, at 84-85. In addition, the EC Directive does not impact product warranty actions brought under contractual liability in the buyer-seller relationship. Directive, *supra* note 95, art. 13; Bernstein, *supra* note 95, at 684.

> of the producer or of the person who supplied him with the product. The same shall apply, in the case of an imported product, if this product does not indicate the identity of the importer referred to in paragraph 2, even if the name of the producer is indicated.[112]

The Directive confronts defendant identification problems by requiring the supplier or other known member in the chain of distribution to inform the injured consumer of the producer's identity within a reasonable period of time. If the supplier fails to do so, the supplier will be viewed as the producer for liability purposes.[113] This requires suppliers, or those members in the chain of product distribution who are known, to maintain adequate records for ten years[114] if they wish to avoid liability.[115] This approach identifies a defendant and provides a potential remedy without the cumbersome case-by-case development of expansive liability theories found in the United States.

For example, if a consumer is injured by DES and is unaware of the identity of the actual producer, the injured plaintiff has the option to seek compensation from the retailer. If the retailer wishes to avoid liability, the retailer must maintain clear records about the DES wholesalers and inform the consumer of their identities. If the retailer can identify the actual DES manufacturer, the DES wholesalers will not be liable. If identified, the actual manufacturers may try to exonerate themselves under available defenses.[116]

Under the EC Directive, proper record-keeping will facilitate rapid and conclusive identification of the responsible party in the chain of distribution.[117] Therefore, injured plaintiffs are not left without a remedy, while the potential for industry-wide liability is skillfully averted. Unlike the broadened United States causation theories, parties in the chain of distribution are aware of their potential liability at the outset and can take adequate steps to protect themselves through proper record-keeping. EC plaintiffs and defendants are unlikely to be subjected to the lack of predictability resulting from case-

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112. Directive, *supra* note 95, art. 3(3).

113. *Id.*; Thieffry et al., *supra* note 90, at 69; Dielmann, *supra* note 90, at 1392; Linger, *supra* note 93, at 485-86; R. Redmond Cooper, *Product Liability: The Problem of the Unknown Defendant - II*, SOLIC. J., Aug. 29, 1986, at 643.

114. Directive, *supra* note 95, art. 11; Cooper, *supra* note 113, at 643.

115. Cooper, *supra* note 113, at 643.

116. *See id.*

117. *See* Thieffry et al., *supra* note 90, at 69; Dielmann, *supra* note 90, at 1392; Cooper, *supra* note 113, at 643.

by-case consideration of nontraditional causation approaches, as found in the United States.

C. Statutes of Limitation and Repose

Statutes of limitation set a maximum time period in which one must bring a claim or lose that claim forever.[118] These statutes try to prevent defendants from being subjected to an unlimited time period of liability. By focusing on plaintiff conduct, these statutes compel plaintiffs to bring claims promptly, rather than purposely and unfairly delaying claims to disadvantage defendants. The statutes also help avoid loss of memory, witness testimony, or other vital documents which refute or support claims.[119]

Statutes of limitation vary depending on the nature of the specific cause of action.[120] In tort actions, generally, these statutes begin to run on the date of the alleged injury.[121] This practice presumes that the plaintiff is aware of the injury, the cause of the injury, and the party responsible for the injury.[122] Therefore, the statute of limitations in tort is best used where injury is immediately perceptible, such as an auto accident, but is less useful in cases of latent or imperceptible injuries.[123] Courts have developed the discovery rule to avoid the harsh effects of leaving innocent, injured plaintiffs without remedies.[124]

The discovery rule focuses on the plaintiffs' conduct and knowledge about the facts and circumstances of their injury.[125] The discovery rule tolls the statute of limitations, which begins to run on the date the injured parties knew or should have discovered their injury, the cause of the injury, and the responsible party.[126]

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118. AM. LAW, *supra* note 3, § 47:1. The product manufacturer or seller may plead the statute of limitations as an affirmative defense. *Id.* The burden of proof is on the plaintiff to prove that the statute was tolled or the discovery rule applies. *Id.*

119. *Id.*; John M. Felder, Comment, Kensinger v. Abbott Laboratories: *DES and the Statute of Limitations*, 17 PAC. L.J. 1529, 1537 (1986).

120. AM. LAW, *supra* note 3, §§ 47:2, 47:3, 47:5.

121. *Id.* § 47:18.

122. *See* Felder, *supra* note 119, at 1538; AM. LAW, *supra* note 3, §§ 47:27, 47:28.

123. AM. LAW, *supra* note 3, §§ 47:18, 47:28. *See* Felder, *supra* note 119, at 1538-43.

124. AM. LAW, *supra* note 3, §§ 47:27, 47:28.

125. *Id.* §§ 47:28, 47:34, 47:55. It is important to note that "[t]he discovery rule is not intended to reward a plaintiff's ignorance as to the nature of the injury or its cause, but generally imposes a burden upon the claimant to exercise within the limitations period reasonable diligence in ascertaining the operative facts and whether the injury is legally compensable." *Id.* § 47:55.

126. *Id.* §§ 47:28, 47:29; Felder, *supra* note 119, at 1538-39.

Through no fault of their own, many products liability plaintiffs may not be aware of their injury, the product that caused their injury, or the manufacturer of the product. The discovery rule is responsible for the opportunities many delayed products liability claims have received to even be heard by courts. In the United States, nontraditional causation theories have often been introduced when the harmful effects of a product are not discovered until decades later. The discovery rule has allowed United States courts to deal with product defect cases where the time lapse complicates defendant identification. Therefore, United States courts often must consider nontraditional approaches to causation to remedy injured consumers and to punish manufacturers.

The EC Directive outlines a three-year statute of limitations with a discovery rule that extends the potential liability period. The Directive states:

> Member States shall provide in their legislation that a limitation period of three years shall apply to proceedings for the recovery of damages as provided for in this Directive. The limitation period shall begin to run from the day on which the plaintiff became aware, or should reasonably have become aware, of the damage, the defect and the identity of the producer.[127]

Coupled with the defendant identification clause in Article 3, the statute of limitations allows the injured plaintiff an opportunity to discover the defendant's identity, with the assistance of applicable suppliers, within three years of the date the plaintiff knew or should have known of the injury. The EC Directive seeks to strike a balance, however, between the protection of consumers and the economic needs of producers on the issue of time limitations.[128] In exchange for providing plaintiffs with the defendant identification provision, the Directive contains a ten-year overall ceiling on producer liability for defendants.[129] The EC Directive mandates that:

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127. Directive, *supra* note 95, art. 10(1). Article 10(2) indicates that the Directive will not impact tolling periods permitted under national laws. *Id.* art. 10(2).

128. Policy statements within the directive state:

> Whereas a uniform period of limitation for the bringing of an action for compensation is in the interests both of the injured person and of the producer;
>
> Whereas products age in the course of time, higher safety standards are developed and the state of science and technology progresses; whereas, therefore, it would not be reasonable to make the producer liable for an unlimited period for the defectiveness of his product; whereas, therefore, liability should expire after a reasonable length of time, without prejudice to claims pending at law . . . .

Id. pmbl., paras. 9-10.

129. Directive, *supra* note 95, art. 11.

> Member States shall provide in their legislation that the rights conferred upon the injured person pursuant to this Directive shall be extinguished upon the expiry of a period of 10 years from the date on which the producer put into circulation the actual product which caused the damage, unless the injured person has in the meantime instituted proceedings against the producer.[130]

The ten-year ceiling is a statute of repose layered on top of the statute of limitations, which begins on the date of product distribution. A statute of repose provides a clearly defined time limit on the duration of manufacturer liability, regardless of plaintiff knowledge of injury or its cause.[131] By focusing on the product rather than the plaintiff's conduct or knowledge, the statute of repose provides predictability to manufacturers by reducing the risk of limitless liability for products sold decades ago.[132]

The considerable time lapse often associated with latent injuries from defective products will leave many innocent, injured plaintiffs without civil remedies and allow tortfeasors to escape liability. This same concern led to the development of nontraditional theories of cause-in-fact in United States DES and asbestos product liability actions. Clearly, this EC provision tolerates circumstances in which injured claimants are left without civil remedies, while producers of defective products avoid responsibility for injurious products.

In the United States, only a few states have enacted statutes of repose in products liability actions.[133] Generally, United States statutes of repose run from specific dates, such as the date of purchase or delivery of the product.[134] Statutes of repose for tort products liability claims have not been widely embraced in the United States, in part because of the concern that a plaintiff's rights may expire before the

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130. *Id.*

131. AM. LAW, *supra* note 3, § 47:55; Felder, *supra* note 119, at 1543. Claimants bringing an action in states with a statute of repose must still comply with the time limits imposed by the statute of limitations. AM. LAW, *supra* note 3, § 47:57.

132. AM. LAW, *supra* note 3, § 47:55; Felder, *supra* note 119, at 1543.

133. Some form of statute of repose for products liability matters can be found in Arizona (12 years), Colorado (7 years), Connecticut (10 years), Georgia (10 years), Indiana (10 years), Nebraska (10 years), North Carolina (6 years), Oregon (8 years), and Tennessee (10 years). AM. LAW, *supra* note 3, § 47:55 n.7. Some states also limit the application of the statute of repose to certain theories of liability. *Id.* § 47:60.

134. AM. LAW, *supra* note 3, § 47:65. Depending upon the statute of repose, the liability period might also commence on the date a product was first leased for use or consumption, first used by other than the manufacturer, lessor or seller, or the date the manufacturer or seller gives up possession or control of the product. *Id.*

latent, ill-effects of a product are manifested.[135] Thus, the notion of statutes of repose violates the established tort principle of providing remedies to innocent, injured plaintiffs, while holding tortfeasors culpable for their tortious conduct. To avoid this result, many states with statutes of repose have excepted product claims which are based on latent injuries appearing years after exposure, such as injuries caused by asbestos.[136]

The EC statute of repose provision will likely deter the development of nontraditional approaches to causation because many products liability actions will be barred even before the product manifests its harmful effects. This result is not as harsh as it would be if consumer protection were based solely on judicial remedies because of European extrajudicial remedies.[137]

D. Remedies Outside the Litigation Process

In Europe, there are numerous disincentives for plaintiffs who wish to litigate products liability and other civil claims. Primarily, the notion of pre-trial discovery, including document production, depositions, and interrogatories, is unheard of in civil law nations and severely limited even in common law nations like the United Kingdom.[138] Also, product accident and defect data is not as readily available in Europe as in the United States.[139] The lack of discovery

135. Felder, *supra* note 119, at 1543; AM. LAW, *supra* note 3, § 47:63. In addition, a number of lawsuits have erupted challenging statutes of repose on both equal protection and due process grounds for improperly denying plaintiffs access to the courts. *See* Thomas J. Dennis, Note, *Product Liability Statutes of Repose as Conflicting with State Constitutions: The Plaintiffs Are Winning*, 26 ARIZ. L. REV. 363, 363-76 (1984); Jay M. Zitter, Annotation, *Validity and Construction of Statute Terminating Right of Action for Product Caused Injury at Fixed Period After Manufacture, Sale or Delivery*, 25 A.L.R. 4TH 641, 641-56 (1983).

136. AM. LAW, *supra* note 3, § 47:63. For example, Indiana, Oregon, Nebraska, and Tennessee exempt asbestos claims from the statute of repose. Oregon also excepts cases based on IUDs from its statute. Colorado and Connecticut exempt cases based on prolonged exposure to hazardous substances, while Georgia and North Carolina exclude those product defects which result in death or personal injury from diseases or birth defects. *Id.*

137. *See supra* note 2. *See infra* notes 146-48.

138. Thieffry et al., *supra* note 90, at 88-89; Liebman, *supra* note 94, at 813; Randolph J. Stayin, *The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers*, 14 CANADA-U.S. L.J. 193, 197 (1988). *See generally* Galen, *supra* note 1, at 60-66.; Lee White, *Trial Lawyers Face A New Charge*, FORTUNE, Aug. 26, 1991, at 85-86, 88-89. The costs of discovery normally compose approximately 80% of the legal costs of United States companies. Galen, *supra* note 1, at 62.

139. Stayin, *supra* note 138, at 197. In the coming years, this situation may improve through the implementation of a 1989 EC Product Safety Directive that mandates central reporting and collection of product hazard and accident data. Bernstein, *supra* note 95, at 711-12.

opportunities and product information often makes it difficult for plaintiffs to maintain products liability actions that normally require detailed, technical product information and analysis.[140]

In addition, the absence of class action opportunities and contingency fee arrangements, common in United States products liability actions, raises further obstacles. Unlike United States claimants, those already bearing the civil litigation expenses face the added risk of paying the legal fees of the victorious opponent under the EC.[141] Even in successful civil suits, damage awards are generally much lower in Europe than in the United States. This is because there is no right to a civil jury trial and therefore judges, rather than more sympathetic juries, determine damage amounts.[142] Unlike the United States, damage awards in European nations are typically limited to compensatory damages for lost wages and medical expenses and not punitive damages.[143] Also, European courts place little value on nonmaterial damages such as pain and suffering.[144]

With the procedural and remedial barriers and limitations discussed above, European plaintiffs can turn to social programs to remedy their personal and economic injuries. In contrast to United States citizens, Europeans can rely on a host of social programs in their own nations including health coverage, disability payments, income maintenance, and other forms of social insurance.[145] In some nations,

140. Technical expertise and specialization in products liability so common in the United States are underdeveloped in the EC and Japan, which complicates opportunities for successful plaintiff outcomes in product liability actions. Stayin, *supra* note 138, at 196-97.

141. Thieffry et al., *supra* note 90, at 90; Liebman, *supra* note 94, at 809-11, 813; Stayin, *supra* note 138, at 196.

142. Thieffry et al., *supra* note 90, at 89; Bernstein, *supra* note 95, at 692-93, 713; Stayin, *supra* note 138, at 196; Liebman, *supra* note 94, at 811-12. Low damage awards may also be traced to the less adversarial nature of civil hearings where judges call and question witnesses. Thieffry et al., *supra* note 90, at 89; Liebman, *supra* note 94, at 811-12. For example, a review of jury damage awards in Ireland illustrates that such awards were four to six times higher than damage awards determined by judges in England. Stayin, *supra* note 138, at 196.

143. Thieffry et al., *supra* note 90, at 89-90; Dielmann, *supra* note 90, at 1399; Stayin, *supra* note 138, at 196. Some commentators suggest that United States juries are often tempted to try to change or improve the life of injured plaintiffs. White, *supra* note 138, at 88. Commenting on jury damage awards, Professor Lester Brickman of the Cardozo Law School stated, "Some juries think it is their duty to transfer wealth from corporations to those lucky enough to appear before them." *Id.* at 86.

144. Thieffry et al., *supra* note 90, at 90; Liebman, *supra* note 94, at 810-11. *See infra* notes 146-48 and accompanying text.

145. Bernstein, *supra* note 95, at 688-89; Thieffry et al., *supra* note 90, at 90. It has been argued that the Directive's strict liability approach, by not requiring a showing of fault, seeks to shift some of the burden of increased health costs to private companies and insurers and away from state-administered health programs. Bernstein, *supra* note 95, at 689-90. But the

manufacturers of certain products must contribute to compulsory tort compensation programs that aid injured consumers, which produces a fixed cost for industry producers without resorting to industry-wide liability.[146] Europeans, unlike their United States counterparts, can access these social programs and public compensation schemes to address the economic and physical effects of products liability injuries. Therefore, they do not require the more expensive and restrictive processes of litigation.[147] As one commentator noted,

> EC countries do not use litigation for the instrumentalist or public law function that prevails in the United States; lawsuits do not achieve social goals. . . . Americans waged a consumerist revolution in products liability law of necessity, because they could not bring themselves to require the regulation and social insurance needed for consumer protection.[148]

Disincentives to litigate and protective social programs reduce plaintiffs' desire for and access to the courts for products liability recovery. Because there is less litigation, EC courts have fewer opportunities to review and analyze novel causation approaches to product defects than do the United States' courts. Limited court review and interpretation of products liability cases will likely prevent, or at least greatly impede, future development of nontraditional defendant identification theories. However, the pervasive social safety net found in European nations will help avoid remediless innocent plaintiffs, an important policy basis for nontraditional causation theories in the United States.

V. CAUSE-IN-FACT PRINCIPLES AND JAPANESE APPROACHES TO PRODUCT DEFECT ISSUES

A. Overview of Japanese Law on Products Liability

Japan's civil code legal system blends Japanese tradition with

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Directive is unlikely to change the fact that Europeans will continue to use the social health and welfare programs rather than utilizing the limited course of litigation as their safety net as found in the United States. *Id.* at 688-89, 714-15.

146. *See generally* John G. Fleming, *Drug Injury Compensation Plans*, 30 AM. J. COMP. L. 297 (1982) (comparing West German, Swedish, and Japanese approaches to socializing risks for defective drug products). *See infra* note 219 and accompanying text.

147. Bernstein, *supra* note 95, at 688-89, 714-15.

148. *Id.* at 714-15. The commentator suggested that the Directive shifts the EC emphasis toward litigation and away from social programs. Yet the commentator notes that, as the national courts review and interpret the directive, the EC will continue their unified commitment to economic equality and care for the afflicted, unlike in the United States. *Id.* at 714-15.

Western influences.[149] In this civil law system, the governmental bureaucracy wields significant authority while the judiciary maintains a very limited role.[150] Japanese civil law courts lack the breadth of equitable and interpretive powers found in common law courts. In Japan, the expanded legal liability flows primarily from legislative or codical revisions.[151]

Under Japanese law, there is no specific products liability theory governing product defect cases. Instead, liability is derived from piecing together various provisions of the Japanese Civil Code pertaining to contractual and tort liability.[152] Despite pressures from Japanese consumers and attorney groups, the Ministry of International Trade and Industry ("MITI") and business groups have blocked efforts to implement strict liability law in product defect cases.[153]

The Japanese government claims such a law is premature and cautions that rapid changes will disrupt a necessary balance between consumer and business interests.[154] Asserting that current negligence law is adequate to deal with product defect cases, the government warns that imposing strict liability will lead to judicial system abuses and consumer prices increases.[155]

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149. Kohji Tanabe, *The Process of Litigation: An Experiment with the Adversary System*, *in* LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 73-74 (A. von Mehren ed., 1963); Younghee Jin Ottley & Bruce L. Ottley, *Product Liability Law in Japan: An Introduction to a Developing Area of Law*, 14 GA. J. INT'L COMP. L. 29, 32 (1984); Richard B. Parker, *Law, Language, and the Individual in Japan and the United States*, 7 WISC. INT'L L.J. 179, 202 (1988). Much of Japan's civil and criminal codes are patterned after German legal codes. Tanabe, *supra*, at 73-74; Ottley & Ottley, *supra*, at 32 n.15., Parker, *supra*, at 202 n.41. Family law matters often codify Japanese custom. Ottley & Ottley, *supra*, at 33 n.15. The Constitution of 1946 was heavily influenced by United States political philosophy, while Japanese labor and antitrust statutes were modeled after United States federal statutes. Parker, *supra*, at 203 n.41.

150. Parker, *supra* note 149, at 202. *See generally* Tanabe, *supra* note 149 (discussing the limited role and development of Japanese courts and legal profession).

151. Ottley & Ottley, *supra* note 149, at 59.

152. David Cohen & Karen Martin, *Western Ideology, Japanese Product Safety Regulation and International Trade*, 19 U.B.C. L. REV. 315, 324-25 (1985); John O. Haley, *Law and Society in Contemporary Japan: American Perspectives; Introduction: Legal vs. Social Controls*, 17 LAW IN JAPAN 1, 1-2 (1984); Ottley & Ottley, *supra* note 149, at 42-55; Kijuro Arita, *Products Liability Law of Japan*, *in* 3A PRODUCTS LIABILITY §§ 59.01-59.04 (L. Frumer & M. Friedman eds., 1991).

153. Yoko Inoue, *Consumers Press for More Protection; Efforts Stepped up to Enact a Japan Law on Products Liability*, NIHON KEIZAI SHIMBUM (JAPANESE ECONOMIC JOURNAL), Dec. 22, 1990, at 4; Ai Nakijima, *Products Liability: How Tough a Law; Consumer Advocates Press for Endorsement in Planned Interim Report to Prime Minister*, NIKKEI WKLY., Aug. 31, 1991, at 4.

154. *See* sources cited *supra* note 153.

155. *See* sources cited *supra* note 153. Critics of Japanese policies have stated that the

Due to limitations under contract theory,[156] most product defect cases are brought under a negligence tort theory.[157] Although negligence is a more accessible theory in Japan than contract, proving negligence is still extremely difficult due to litigation costs, procedural obstacles and the difficulty in obtaining corporate records necessary to evaluate complex product technology.

Under section 709 of the Civil Code, "a person who intentionally or negligently violates another person's right must pay damages."[158] Similarly, under the theory of negligence, the manufacturer, non-manufacturing seller, distributor, wholesaler, retailer, and other marketing outlets may be liable to the buyer or other third party injured by the defective product, just as they would be in the United States.[159]

Japanese negligence theory places the burden of proof on the injured party to show that: (1) the defendant owed a duty to the plaintiff, (2) the defendant breached a duty of reasonable care, (3) the defendant negligently sold or manufactured a defective product,

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government's resistance to strict products liability stems from a desire to maintain an international competitive edge in product innovation and costs in light of European and United States strict liability laws. Inoue, *supra* note 153, at 4. *See* Nakijima, *supra* note 153, at 4. Despite government and business efforts to avoid strict liability, a recent survey indicated that about 80% of major Japanese corporations anticipate that a product liability law will be passed within five years due largely to growing public opinion and international trade pressures. *Products Liability Law Looking More Likely; Corporate Execs Wary of Opposing Idea but Concerned about Content*, NIHON KEIZAI SHIMBUM (JAPANESE ECONOMIC JOURNAL), April 20, 1991, at 15.

156. In Japan, contract theory under the Civil Code provides a much more restricted form of the breach of warranty theory available in the United States. Arita, *supra* note 152, §§ 59.01-02; Cohen & Martin, *supra* note 152, at 332-34; Ottley & Ottley, *supra* note 149, at 43-45. Under the theory of incomplete performance of contractual obligations (Civil Code § 415), liability is primarily limited to the buyer-seller relationship. The seller is only able to escape liability if the defect was outside the seller's control. Arita, *supra* note 152, § 59.02(a); Cohen & Martin, *supra* note 152, at 333; Ottley & Ottley, *supra* note 149, at 43. The second theory of warranty for latent defects (Civil Code § 570) limits recovery largely to the cost of the defective product, without the opportunity for personal injury, economic loss, or property damages. Cohen & Martin, *supra* note 152, at 332-3; Ottley & Ottley, *supra* note 149, at 44-45.

157. Because of the limitations on contract theory, most products liability cases are brought under the more flexible tort theory of negligence. Koichi Hamada et al., *The Evolution and Consequences of Product Liability Rules, in* LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY 89 (Gary Saxonhouse & Kozo Yamamura eds., 1986); Cohen & Martin, *supra* note 152, at 327-28; Ottley & Ottley, *supra* note 149, at 45.

158. General tort theory demands that the defendant negligently manufactured, and sold a defective product, the plaintiff suffered harm, and the defective product caused the harm. Arita, *supra* note 152, § 59.03(2)(a)(ii). Additional negligence requirements are then layered over these elements. *Id.* § 59.03(2)(b)(ii).

159. Ottley & Ottley, *supra* note 149, at 31; Arita, *supra* note 152, § 59.03(2)(iii)(f), (g).

(4) the plaintiff suffered an injury, and (5) the defendant's product caused the injury.[160] The plaintiff has the burden of proving causation by linking the defendant's acts or omissions to the plaintiff's injuries.[161] The Japanese approach to negligence reflects the burden of proof found in the United States.

However, the Japanese Civil Code contains no article on causation and the Japanese courts have not fully recognized the distinct nature of cause-in-fact, including defendant identification.[162] Japanese courts have eased the burden of proof by allowing an inference of negligence under the principle of res ipsa loquitur or through statistical or epidemiological evidence.[163] Findings of negligence based on inferential information arise primarily from pollution cases in Japan.[164] Although this inferential approach could be applied to products liability cases, courts have not yet commonly relaxed the plaintiff's burden of proof for causation.[165]

In Japan, as in the United States, a defendant can be liable for negligent design, manufacture, and warning.[166] Manufacturers are obligated to use the utmost care in producing reasonably safe products and give the highest regard to scientific investigation. The standard is equivalent to the state-of-the-art defense in the United States.[167] Defendant manufacturers can be held jointly and severally liable for their negligence.[168] As in the United States, plaintiffs must bring their claim within three years from the date of their knowledge

160. Arita, *supra* note 152, §§ 59-03(2)(a),(b); Cohen & Martin, *supra* note 152, at 329.

161. Hamada et al., *supra* note 157, at 91; Arita, *supra* note 152, § 59.03(2)(d)(i),(ii).

162. Seimei Hyashida, *The Necessity for the Rational Basis of Duty-Risk Analysis in Japanese Tort Law: A Comparative Study*, 1981 UTAH L. REV. 65, 72-73.

163. Hamada et al., *supra* note 157, at 90-91; Cohen & Martin, *supra* note 152, at 331; Arita, *supra* note 152, § 59.04(2).

164. Cohen & Martin, *supra* note 152, at 331.

> In pollution cases, courts permit epidemiological and statistical proofs to counter the problems caused by wealthy and uncooperative defendants, multiple injuries, and elusive evidence of causation. In doing so, a plaintiff may recover by showing that a defendant controls the source of pollution. These developments also allow a plaintiff to establish proximate causation where the precise origin of the injury is unclear.

Id.

165. *Id.* In products liability cases, use of the inferential approach is limited to cases of widespread harm. *Id.*

166. Cohen & Martin, *supra* note 152, at 329; Ottley & Ottley, *supra* note 149, at 47-55; Arita, *supra* note 152, § 59.03(2)(f).

167. Arita, *supra* note 152, § 59.04(6). It has been suggested that one can infer responsibility without fault based upon this required high degree of care. *Id.* This high standard of care makes it easier to prove causation, particularly in food poisoning cases. Hamada et al., *supra* note 157, at 91-92.

168. Ottley & Ottley, *supra* note 149, at 48; Arita, *supra* note 152, § 59.03(2)(s)(i).

of the injury and the party causing the harm, allowing potential open-ended liability.[169]

Tortfeasors in Japan are responsible for all monetary damages associated with the tortious conduct,[170] including damages for death, personal injury, property damage, pain and suffering of the individual and for close relatives in death cases (*solatium*), attorney's fees, and interest.[171] This is similar to practice in the United States. Although Japan does not recognize contributory negligence, it does apply the concept of comparative negligence.[172]

Clearly, the main requirements of United States and Japanese negligence theories used in product defect cases are similar. But the similarities to United States legal theory do not ensure similar legal developments or judicial interpretations in the future. It is difficult to predict whether Japan will develop nontraditional cause-in-fact theories similar to those in the United States. Unlike the EC, there is no central directive or statutory authority for Japanese products liability law. Yet a review of Japanese legal traditions, alternative dispute resolution mechanisms, governmental liability, enforcement issues, and public compensation schemes support the notion that Japanese courts are unlikely to develop such nontraditional cause-in-fact approaches.

B. Alternative Dispute Resolution and Barriers to Litigation

In Japan, only 150 cases have received court review and final determination since 1945.[173] In Japan, the number of civil suits per capita is approximately four to ten percent that of many Western nations.[174] Until the 1960s, products liability cases in Japan were virtually nonexistent.[175]

Many commentators have discussed the nonlitigious nature of Japanese society, often attributing it to either cultural concerns for social harmony and respect for authority,[176] or a lack of legal con-

169. Arita, *supra* note 152, § 59.03(2)(q)(iii).

170. Hamada et al., *supra* note 157, at 103; Arita, *supra* note 152, § 59.03(2)(q)(i).

171. Arita, *supra* note 152, § 59.03(2)(q)(ii).

172. *Id.* § 59.03(2)(r).

173. Nakijima, *supra* note 153, at 4.

174. Cohen & Martin, *supra* note 152, at 325 n.46.

175. Hamada et al., *supra* note 157, at 103; Cohen & Martin, *supra* note 152, at 326.

176. Takeyoshi Kawashima, *Dispute Resolution in Contemporary Japan*, *in* LAW IN JAPAN 41, 43-45 (A. von Mehren ed., 1963); Cohen & Martin, *supra* note 152, at 326; Ottley & Ottley, *supra* note 149, at 33-34; Hideo Tanaka, *The Role of Law in Japanese Society: Comparisons with the West*, 19 U.B.C. L. REV. 375, 379-80 (1985).

sciousness and notions of individual rights.[177] Commentators also point to societal mistrust of the courts and lawyers because judicial decisions emphasize conflict, assign moral fault, and deprive parties of participation in the resolution of the dispute.[178] Yet attitudes are changing, as more Japanese are now willing to sue in cases that have a good chance of success. An example is mass tort products liability cases involving community, rather than just individual interests.[179]

The scarcity of lawsuits, including products liability litigation, may be traced to well-developed extrajudicial and quasi-judicial methods of dispute resolution. Such alternatives are only beginning to receive attention in the United States.[180] In Japan, there are three principal forms of alternative dispute resolution: reconcilement, conciliation, and *chotei*.[181]

Traditional reconcilement involves negotiation sessions between the affected parties in an effort to reach a resolution within the nature and needs of the relationship.[182] Reconcilement relies heavily on the status of the social groups involved in the dispute and does not adhere to any particular legal rules. The more powerful party (*oyabun*) within the relationship is supposed to exercise power in the best interests of the less powerful party (*kobun*). Typically, the decision of the superior is more or less imposed on the party with lower social status, which can lead to unfairness.[183]

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177. Kawashima, *supra* note 176, at 43-45. Commentators often discuss the work of Professor Kawashima about the sociological reasons for the nonlitigious nature of Japanese society, utilizing the concepts of law consciousness (ho-ishiki) and right consciousness (kenri-ishiki). Professor Kawashima's approach emphasizes the Japanese distaste for rigid codes of law and focuses on social duties and relationships, rather than legal rights, as limiting litigation. Ottley & Ottley, *supra* note 150, at 34-35; Tanaka, *supra* note 176, at 379-80. *But see* Tanaka, *supra* note 176, at 381-86 (disputing sociological basis for nonlitigious nature of Japanese society).

178. Kawashima, *supra* note 176, at 43-45, 50; Ottley & Ottley, *supra* note 149, at 35-36; Tanaka, *supra* note 176, at 378-79.

179. Cohen & Martin, *supra* note 152, at 326-27; Tanaka, *supra* note 176, at 381, 384. The major mass tort cases focused on the widespread injuries resulting from the thalidomide, chloroquine, and tainted food cases. *See* Hamada et al., *supra* note 157, at 89-90; Ottley & Ottley, *supra* note 149, at 47-55 (discussing major mass tort cases). Very little attention or assistance is provided to isolated plaintiffs trying to uphold individual rights in civil matters. Cohen & Martin, *supra* note 152, at 327.

180. Cohen & Martin, *supra* note 152, at 325-26; Ottley & Ottley, *supra* note 149, at 35-38; Tanaka, *supra* note 176, at 384-86.

181. Kawashima, *supra* note 176, at 50-51, 53-54; Ottley & Ottley, *supra* note 149, at 35-38.

182. Kawashima, *supra* note 176, at 50; Ottley & Ottley, *supra* note 149, at 36.

183. Kawashima, *supra* note 176, at 50; Tetsuya Obuchi, *Role of the Court in the Process of Informal Dispute Resolution in Japan: Traditional and Modern Aspects with Special Emphasis*

Conciliation is the second informal method of dispute resolution. It is a modified form of reconcilement employing an intermediary.[184] Although not differentiated in traditional Japan, conciliation has two main forms that are similar to mediation and arbitration found in the United States. While mediation is not binding, it often leads to settlement. Similar to arbitration, this method allows the third party to make a binding decision.[185] The intermediary determines whether the conciliation takes the form of mediation or arbitration.[186] Typically, conciliation is used in local domestic, neighborhood, and employment disputes,[187] and is not well-suited to cases outside of such social relationships. Products liability claims, for instance, would not be well suited to be resolved by conciliation.

After the post-World War I breakdown of traditional social relationships, a new dispute resolution process called *chotei* was implemented.[188] *Chotei* involves a hearing conducted by a committee, which is composed of a judge and two or more lay conciliators.[189] This approach may be invoked by the parties or a judge prior to filing a claim or at any time during the trial. The *chotei* committee attempts to forge a compromise between the parties which will be put in writing and filed in court as a final judgment. If no compromise is reached, the *chotei* committee may present opinions to the court which may then issue a final decision.[190]

Although these options allow parties to participate in the outcome of the controversy, these forms of dispute resolution are informal and normally closed to the public.[191] Their private, informal nature prevents the collection of product defect information, vital to other injured consumers considering litigation and to increasing public awareness of product risks. In most negligence actions, proof of fault becomes virtually impossible without access to the vital technical

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on In-Court Compromise, 20 LAW IN JAPAN 74, 88-89 (1987); Ottley & Ottley, *supra* note 149, at 36-37.

184. Kawashima, *supra* note 176, at 50-51; Ottley & Ottley, *supra* note 149, at 36-37.

185. Kawashima, *supra* note 176, at 50-51; Ottley & Ottley, *supra* note 149, at 36-37.

186. Kawashima, *supra* note 176, at 50-51. The Japanese Civil Code explicitly allows formal arbitration, particularly in labor-management disputes, but it is seldom invoked. *Id.* at 56.

187. *Id.* at 53; Ottley & Ottley, *supra* note 149, at 37.

188. Kawashima, *supra* note 176, at 51-53.

189. *Id.* at 54; Ottley & Ottley, *supra* note 149, at 37.

190. Ottley & Ottley, *supra* note 149, at 37-38. Parties are entitled to challenge the final determination within two weeks, otherwise the decision is final. *Id.* at 38. In some instances, when parties are unable to reach a compromise, the *chotei* committee may be terminated and the situation may move through the litigation process. *Id.*

191. Ottley & Ottley, *supra* note 149, at 38; Obuchi, *supra* note 183, at 88-89.

information gleaned from other product defect cases.[192]

In addition, well-established barriers to litigation within the court system often motivate injured consumers to pursue extrajudicial avenues of dispute resolution. Before bringing a civil case, plaintiffs must pay an initial "commencing fee" of up to eight percent of the damages sought as well as attorneys' fees and court costs.[193] Similar to the EC, there is no pretrial discovery process in Japan, which precludes plaintiff review of relevant company records prior to trial.[194] Government agencies further restrict public access by not maintaining formal records on product defect and accident information.[195] Without the precedures for class action lawsuits and contingency fee arrangements, opportunities for sharing product information and legal costs among similarly injured plaintiffs are additionally restricted.[196]

Furthermore, trial judges allow intervals of days, or sometimes months, between the days of the trial, hoping to encourage a private settlement.[197] Those who are able to weather these procedural obstacles and delays find, as in the EC, that damage awards are much lower than in the United States. This is because judges set the awards instead of juries, and opportunities for pain and suffering and punitive

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192. *See* Cohen & Martin, *supra* note 152, at 330-31; Ottley & Ottley, *supra* note 149, at 39; Stayin, *supra* note 138, at 197. As one commentator notes:

> Even where injuries are relatively numerous, a potential plaintiff may not be aware of, or have access to, relevant evidence regarding the frequency or incidence of injury to others who have chosen not to litigate. This problem will be exacerbated to the extent that individual Japanese plaintiffs choose not to single themselves out and take the initiative to litigate or to join plaintiff litigation associations as in the case of mass torts.

Cohen & Martin, *supra* note 152, at 331.

In addition, most lawsuits are settled without court decisions in Japan, with settlements viewed as secret corporate records. Ottley & Ottley, *supra* note 149, at 55; Nakijima, *supra* note 153, at 4.

193. Hamada et al., *supra* note 157, at 103; Tanabe, *supra* note 149, at 79; Galen, *supra* note 1, at 64-65.

194. Cohen & Martin, *supra* note 152, at 339-434; Ottley & Ottley, *supra* note 149, at 39; Stayin, *supra* note 138, at 197; Galen, *supra* note 1, at 64-65. Generally, "victims face considerable obstacles. Not only will they be ignorant of the relevant technology, they may not have the resources or tools to pierce the veil of industrial secrecy surrounding many commercial and industrial enterprises in the absence of a discovery process." Cohen & Martin, *supra* note 152, at 330.

195. Cohen & Martin, *supra* note 152, at 330-31; Ottley & Ottley, *supra* note 149, at 39; Stayin, *supra* note 138, at 197.

196. Cohen, *supra* note 152, at 340; Stayin, *supra* note 138, at 196; Galen, *supra* note 1, at 65.

197. Kawashima, *supra* note 176, at 48; Tanabe, *supra* note 149, at 106; Ottley & Ottley, *supra* note 149, at 38-39, 55; Harold See, *The Judiciary and Dispute Resolution in Japan*, 10 FLA. ST. U. L. REV. 339, 360-61 (1982).

damages are limited.[198] These limitations are likely to force injured consumers to seek alternative dispute resolution, often without the benefit of sharing important technical data or legal costs with other similarly injured plaintiffs.

These obstacles to litigation, coupled with the availability of private, informal dispute resolution, hinder judicial interpretation and application of positive law.[199] Often, litigation increases public awareness and social pressure for products liability reform.[200] By limiting litigation and encouraging the use of alternative dispute resolution mechanisms, Japanese courts have few meaningful opportunities for detailed legal analysis of causation or for more expansive interpretations of cause-in-fact theories,[201] as found in the United States. With such restricted court review and interpretation of negligence products liability matters, the development of expansive, nontraditional cause-in-fact theories in Japan is unlikely in the near future.

C. Reliance on Governmental Protection of the Consumer

In Japan, there is a growing body of administrative regulations aimed at preventing product hazards from ever reaching the marketplace.[202] The powerful Japanese government bureaucracy, in cooperation with major business groups, has established rigorous product safety standards, including requirements for detailed design specifications and strict certification procedures.[203] In addition, governmental agencies use "administrative guidance" (*gyosei shido*) to maintain both formal and informal control over corporations in Japan.[204]

198. Ottley & Ottley, *supra* note 149, at 39-40; Stayin, *supra* note 138, at 196; Galen, *supra* note 1, at 64-65. For example, in the United States, the state court average damage award for product liability cases was $1.5 million per case. Galen, *supra* note 1, at 64. In February 1992, a chemical poisoning case involving 42 victims resulted in a total court award of $1.3 million or only $31,000 per victim. *Id.*

199. Obuchi, *supra* note 183, at 89.

200. *Id.*

201. *Id.*; Ottley & Ottley, *supra* note 149, at 56; Cohen & Martin, *supra* note 152, at 327.

202. Cohen & Martin, *supra* note 152, at 365-67; Ottley & Ottley, *supra* note 149, at 40-41; Arita, *supra* note 152, §§ 59.02(2)(b), 59.03(2)(c)(i).

203. Cohen & Martin, *supra* note 152, at 365-67.

204. Hamada et al., *supra* note 157, at 103-04; Ottley & Ottley, *supra* note 149, at 39. Through unofficial suggestions, the Japanese government is able to secure the voluntary cooperation of businesses who may be subject to a range of sanctions for failing to comply. These unofficial activities tend to provide little documentation on corporate wrongdoing, which, in turn, benefits business but hurts injured plaintiffs. *See generally* John O. Haley, *Administrative Guidance versus Formal Regulation, Resolving the Paradox of Industrial Policy, in* LAW AND TRADE ISSUES OF THE JAPANESE ECONOMY (G. Saxonhouse & K. Yamamura eds., 1986) (discussing notion of administrative guidance in Japan).

Government resolve to promulgate even more demanding product regulations hardened when several serious products liability cases occurred involving widespread harm in Japan.[205] Japanese administrative agencies license or certify products to be marketed and are responsible for proper supervision of the design and manufacturing activities of the industries they regulate.[206] The Japanese government has resisted pressures to soften their compliance mandates, stating:

> The United States has been requesting that the Japanese Government allow United States manufacturers to self-certify compliance with Japanese standards on safety, etc. This suggests that we should adopt the approach of dealing with accidents, etc., *after the fact*, i.e., through recall of cars from the market, civil judicial procedures, etc. However, Japan's system on automobile accidents, pollution, etc. has long been predicated on the idea that they should be prevented *before the fact*.[207]

Unlike United States law, Japanese regulatory law relies heavily on government action to protect consumers rather than encouraging private litigation to enforce laws that protect the public.[208] The government stop all sales of an allegedly hazardous product until the manufacturer can provide evidence of its safety.[209] In addition, the Civil Code expressly grants the government the authority to prosecute individual corporate officers for criminal negligence for injuries or death caused by a defective product.[210]

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205. Cohen & Martin, *supra* note 152, at 366-67.

206. *Id.* at 328; *see* Ottley & Ottley, *supra* note 149, at 47-55 (discussing negligence liability of the Ministry of Health and Welfare).

207. Cohen & Martin, *supra* note 152, at 367 n.247 (quoting MITI, REVIEW OF STANDARDS AND CERTIFICATION SYSTEMS 7 (1983)).

208. Cohen & Martin, *supra* note 152, at 366-68; Ottley & Ottley, *supra* note 149, at 40. One commentator has noted that "Japanese judges have not and could not challenge the ruling governmental bureaucracy in Japan in any significant way . . . . Also working against the authority of law in Japan is the bureaucracy's resistance to the loss of prestige and power which a legalization or politicization of its role would bring about." Parker, *supra* note 149, at 202 (footnotes omitted).

209. Ottley & Ottley, *supra* note 149, at 41.

210. Cohen & Martin, *supra* note 152, at 334-35; Ottley & Ottley, *supra* note 149, at 41-42. The best known criminal prosecution involved the *Morinaga Dairy* case in which two company officials were charged with accidental homicide for tainted milk that killed more than 100 children. Hamada et al., *supra* note 157, at 89-90; Ottley & Ottley, *supra* note 149, at 42. At the end of a long trial, the defendants were acquitted at the district court level because they could not have known of a variation of the quality of the chemicals used in the milk. Hamada et al., *supra* note 157, at 89; Ottley & Ottley, *supra* note 149, at 42. On appeal, a retrial was ordered against only one defendant, the manufacturing chief, for failure to properly inspect the milk in accordance with requirements of the food trade. Hamada et al., *supra* note 157, at 90.

Unlike consumers in the United States, Japanese consumers frequently rely on government administrative agencies, rather than the courts, to protect them from defective products.[211] By promoting product safety under the Civil Code, rather than products liability, Japanese courts lack the authority and opportunity to fashion creative approaches to product defect cases such as nontraditional cause-in-fact theories.[212] Because of the major role of Japanese regulatory agencies in product design, manufacture and marketing, injured Japanese consumers, unlike their United States counterparts, are unlikely to find themselves without a remedy if they are unable to identify the actual manufacturer of a product. Additionally, while United States courts have reshaped cause-in-fact theories to provide remedies for injured plaintiffs, Japanese laws allow injured plaintiffs to sue the government for compensation, as opposed to expanding causation to industry-wide liability.

Unlike the United States, the Japanese system does not recognize the notion of sovereign immunity and allows an injured party to sue the appropriate government ministry for breaching its duty to protect the public from a defective product.[213] The Japanese government has been sued for negligence in defective design, manufacture, and warning cases for their failure to properly supervise the offending product or industry.[214] Japanese law adds the government as another potential defendant who injured plaintiffs may sue for compensation in product defect cases to address cause-in-fact issues.[215]

The S.M.O.N. case dealt with pharmaceuticals containing the drug clioquinol which caused viruses of the nervous system. The Kanazawa District court handed down the first decision against the Ministry of Health and Welfare. The court decision found both the drug manufacturers and the government ministry liable to the injured plaintiffs.[216] The ratio of negligence was forty percent for the govern-

211. Cohen & Martin, *supra* note 152, at 366-67; Ottley & Ottley, *supra* note 149, at 40-42.

212. *See* Cohen & Martin, *supra* note 152, at 367; Ottley & Ottley, *supra* note 149, at 56; Parker, *supra* note 149, at 202.

213. Ottley & Ottley, *supra* note 149, at 48; Cohen & Martin, *supra* note 152, at 328-29.

Article 17 of the Constitution of Japan states, "Every person may sue for redress as provided by law from the States or a public entity, in case he has suffered damage through an illegal act of any public official. Arita, *supra* note 152, § 59.(4)(a), (b). The government's liability is codified under the State Compensation Law. *Id.*

214. Ottley & Ottley, *supra* note 149, at 47-55.

215. *Id.* at 48-50.

216. Ottley & Ottley, *supra* note 149, at 53; Arita, *supra* note 152, § 59.03(2)(s)(i).

ment, for breaching its duty to confirm the safety of the drugs, and sixty percent for the three drug companies.[217] Despite a number of findings against the plaintiffs in other districts, the drug companies and Ministry ultimately settled the cases with remaining plaintiffs.[218]

In addition, the Japanese government has implemented a number of compulsory public insurance programs and requires the establishment of compensation trust funds that shift the focus away from identifying specific defendants to ensuring the compensation of injured consumers for certain defective products. Under these schemes, injured consumers are required to identify the defective product, rather than the source of the product.[219] Similar to the EC safety net of social programs, these Japanese government-mandated insurance programs and trust funds provide consumers with alternative remedies without creating nontraditional causation approaches, as found in the United States. Like the EC, Japan operates outside the litigation process to effectively deal with the protection of injured consumers in product defect matters.

Japanese public insurance programs ensure compensation for consumers injured by certain defective products. Based on the payment of insurance premiums, the risk of loss spreads among industry participants, employers, and the Japanese government, ultimately reaching Japanese consumers and taxpayers. Consumers are provided with a remedy, while insurance fund contributors face a fixed insurance premium cost, rather than unknown future damage awards.[220]

Aside from public insurance programs, compensation trust funds are common in Japan.[221] Under Japanese law, certain manufacturers associations exact mandatory contributions from manufacturers of particular products, such as pharmaceutical or consumer products manufacturers. Contributions to these compensation funds may be based upon the proportion of sales and the risk rate of each manufac-

217. Arita, *supra* note 152, § 59.03(2)(s)(i).

218. Ottley & Ottley, *supra* note 149, at 52-53. *See* Seiichi Yoshikawa, *The Judge's Power to Propose Terms for Settlement: The S.M.O.N. Case*, 11 LAW IN JAPAN 74-90 (1978) (discussing history and settlement of S.M.O.N. cases, including government and corporate responsibility).

219. Fleming, *supra* note 146, at 309-10. European compensation plans require the injured consumers to identify the responsible producer, while the Japanese fund models require only the identification of the defective product. *Id.*

220. Cohen & Martin, *supra* note 152, at 335-36.

221. Ottley & Ottley, *supra* note 149, at 53 n.124; Cohen & Martin, *supra* note 152, at 336-37.

turer or funded through mandatory safety stickers on products.[222] The association determines the compensation to be awarded the injured consumer based on a fixed schedule, with the maximum benefit usually totalling to less than tort damage awards.[223]

For example, after the S.M.O.N. cases, the Japanese government passed legislation to secure compensation for victims of mass drug injuries. The pharmaceutical trust fund required contributions from domestic manufacturers and drug importers as well as the government. The trust fund contained a set schedule of benefits for medical expenses, disability allowances, disability care and death benefits. Recovery from the fund does not require a showing of fault, but does provide a lower level of monetary compensation than tort litigation. In fact, if the manufacturer can be proven negligent, the injured parties must pursue their tort remedies.[224] Therefore, plaintiffs who can identify the manufacturer of the defective product can litigate their claims, while those unable to identify the wrongdoer are assured of some level of compensation without requiring courts to create nontraditional cause-in-fact approaches.

In Japan, the public's reliance on the government to protect consumers from unsafe products is based upon the imposition of tough governmental product standards, with the administrative authority to police full compliance. When the Japanese government fails to prevent a hazardous product from reaching the public, consumers may sue the government or seek compensation outside the litigation process from government-mandated insurance and compensation funds. These governmental approaches to product safety and liability weaken the authority of the judiciary to explore causation theories and resolve products liability cause-in-fact issues. As in the EC, the Japanese courts are unlikely to be called upon to fashion novel cause-in-fact theories because other alternative remedies are already available to injured Japanese consumers.

VI. CONCLUSION

The EC and Japan are not predisposed to confront product defect matters through the courts, so it is unlikely that either will develop nontraditional approaches to causation. The United States has

222. Cohen & Martin, *supra* note 152, at 336-37.

223. Ottley & Ottley, *supra* note 149, at 53 n.124; Cohen & Martin, *supra* note 152, at 336-37.

224. Fleming, *supra* note 146, at 304; Ottley & Ottley, *supra* note 149, at 53 n.124.

imposed the responsibility to protect consumers and to police manufacturers on the courts in product defect cases. This focus on the courts to protect injured plaintiffs and to deter tortfeasors has led to inconsistency and confusion over the application of cause-in-fact principles. Greater predictability and consistency in causation approaches to products liability may be possible in the United States through the implementation of some of the extrajudicial mechanisms found in the EC and Japan.

One option that may preserve traditional causation theories, while protecting consumers and deterring liable manufacturers, is to consider uniform defendant identification clauses, as found in the EC Directive. At all levels in the distribution chain, product suppliers could be responsible for identifying the producer of a product to the injured consumer, or else be viewed as the producer. To protect themselves from liability, suppliers would maintain adequate records. In exchange for this responsibility, a reasonable statute of repose could be enacted to protect producers from unending liability. The possible harsh results of such a statute could be ameliorated by appropriate safety net programs to meet the basic health and economic needs of injured consumers, such as national health care coverage.

Another option is to implement compulsory public insurance programs or trust funds for products liability cases, like those employed in Japan. These programs might target certain high-risk products that have often resulted in creative approaches to traditional causation, such as pharmaceuticals or hazardous chemicals. Such public insurance or trust programs could be funded through contributions from applicable manufacturers and importers. Contributions could be based upon the proportion of sales and the risk rate of each manufacturer. Injured consumers would not have to identify a specific manufacturer, only the particular defective product. Plaintiffs would be assured some level of compensation for injuries based upon a set schedule of benefits, while contributors would pay a fixed, predictable amount.

Regardless of the model considered, either approach could be supplemented by more active government regulation and certification of products. Rather than relying on expansive court interpretations of products liability law, the government could strive to protect the public from injury and deter irresponsible manufacturers through more stringent, enforced safety standards. Furthermore, corporate willingness to move from a products liability to a product safety per-

spective would help prevent defective products from ever reaching the marketplace.

The time has come for a more creative, extrajudicial approach to product defect concerns. Unless the United States turns its focus away from the courts and seeks extrajudicial remedies, unpredictable and inconsistent approaches to products liability concepts, including cause-in-fact, will continue.