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## ESTABLISHING THE CAUSAL LINK IN ASBESTOS LITIGATION: AN ALTERNATIVE APPROACH\*

### INTRODUCTION

In the nineteenth and early part of the twentieth centuries, asbestos was one of the most widely used materials in industrialized society. An inexpensive and fireproof insulator, asbestos could be found in industrial sites, office buildings and residential homes as well as automotive parts and household appliances.<sup>1</sup> In fact in the twentieth century alone, more than 30 million tons of asbestos were used.<sup>2</sup> Many, if not most, who worked in fields such as construction, automotives and the like, were exposed to asbestos on a regular basis. At the beginning of the twentieth century, numerous studies emerged establishing a link between asbestos and lung disease.<sup>3</sup> With the passing of time, it became increasingly clear that asbestos was in fact a dangerous carcinogen. Despite this information, most companies continued their use of asbestos,<sup>4</sup>

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<sup>1</sup> Laborers have used asbestos in the manufacture of more than three thousand products. See *Special Project: An Analysis of the Legal, Social, and Political Issues Raised by Asbestos Litigation*, 36 VAND. L. REV. 573, 578-79 nn.1, 7 (1983).

<sup>2</sup> See Myra Paiewonsky Mulcahy, Note, *Proving Causation in Toxic Torts Litigation*, 11 HOFSTRA L. REV. 1299, 1303 (1983) (stating that by 1978, nearly thirty-two million tons of asbestos had been used).

<sup>3</sup> The earliest indication of a link between asbestos and lung disease dates back to 1900 when Dr. H. Montague Murray, a British physician, found traces of asbestos in the lungs of a thirty-three-year-old patient who died after working in an asbestos-textile factory for fourteen years. See PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT; THE ASBESTOS INDUSTRY ON TRIAL* 11 (1985). Additionally, by 1930, articles on the dangers of asbestos appeared in medical journals of the United States, Italy and France. BARRY I. CASTLEMAN, *ASBESTOS: MEDICAL AND LEGAL ASPECTS* 19 (4th ed., 1996). A 1943 report by Dr. Wilhelm C. Hueper suggested that lung cancer and asbestos were closely related. *Id.* at 45.

<sup>4</sup> In 1975, the annual report of Raybestos-Manhattan, a major asbestos company, revealed in exquisite detail the fact that industry leaders were fully aware of the dangers of asbestos as early as 1930 and explained the lengths to which they went to suppress publication of said dangers in the trade journal. BRODEUR, *supra* note 3, at 107-13. See also *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1106 (5th Cir. 1974) ("The unpalatable facts are that in the twenties and thirties the hazards of

thus subjecting their employees to unspeakable danger. The results have been nothing short of devastating. Many employees of the manufacturing companies as well as others down the distributive chain have serious physical illnesses such as pleural thickening,<sup>5</sup> asbestosis<sup>6</sup> and other respiratory ailments. The most damaging of all diseases caused by asbestos is mesothelioma,<sup>7</sup> a deadly and almost incurable form of cancer. Those who are diagnosed with the disease rarely live more than a year and are ultimately subjected to a most painful demise.<sup>8</sup> The pain and suffering of both the victims and their families is often compounded by the astronomical costs associated with the medical treatments.<sup>9</sup> Those most commonly affected are former laborers and other blue-collar workers, who are often of modest financial means and simply unable to shoulder the enormous financial burden that accompanies their illnesses. The thought of leaving their families in

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working with asbestos were recognized . . . [and] defendants issued no warnings until 1964-66, by which time adequate warnings would have come too late for [plaintiff]). A story that appeared on the front page of the *Washington Post* in 1978 detailed the evidence that was uncovered during litigation which clearly indicated a deliberate cover-up by the asbestos industry. The evidence included letters from asbestos companies noting efforts to suppress the information about the dangers of asbestos as early as 1934; documents indicating a refusal to accept the findings of medical researchers, hired by the companies themselves, who concluded that asbestos was dangerous to the employees; files indicating that personal injury suits were quietly settled years before the knowledge of asbestos dangers was widespread; and files indicating a company policy of not telling employees that their physical examinations revealed signs of asbestosis. Bill Richards, *New Data on Asbestos Indicate Cover-Up of Effects on Workers*, WASH. POST, Nov. 12, 1978, at A1.

<sup>5</sup> Pleural thickening is the formation of calcified tissue on the "pleura" which are the membranes surrounding the lungs. Despite the fact that pleural thickening is detectable in x-rays and may develop into asbestosis or mesothelioma at a later time, it has generally not been held to be a compensable injury. See, e.g., *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996) (holding that pleural thickening was not a compensable injury).

<sup>6</sup> Asbestosis is a condition where there are actual particles of asbestos in the lungs of the victim. It is accompanied by numerous physical symptoms such as shortness of breath, chest pains and blood in the sputum. The disease was first discussed in an article by British pathologist Dr. W.E. Cook in which he chronicled the findings of an autopsy he conducted on a young woman who died after working for an asbestos company for many years. See W.E. Cook, *Pulmonary Asbestosis*, 2 BRIT. MED. J. 1024 (1927).

<sup>7</sup> Mesothelioma is the formation of a malignant tumor either in the pleura—the membrane that encases the lung, or in the peritoneum—the membrane that lines the abdominal cavity. BRODEUR *supra* note 3, at 30.

<sup>8</sup> See Roger R. Connelly et al., *Demographic Patterns for Mesothelioma in the United States*, 78 J. NAT'L. CANCER INST. 1053 (1987).

<sup>9</sup> The medical costs associated with the treatment of asbestos victims runs in the billions of dollars. See David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1693 (1986) (book review).

insurmountable debt is understandably unacceptable to them. Many victims have therefore turned to litigation as a means of being properly compensated by the companies and manufacturers responsible for their predicament.

What began as a trickle has turned into a flood and, in recent years, court dockets have been filled with asbestos-related litigation.<sup>10</sup> In many instances, plaintiffs have succeeded in recovering significant awards from the asbestos manufacturers and many such companies have been forced into bankruptcy.<sup>11</sup> In other cases, however, recovery under traditional tort law is difficult at best and frequently unattainable. One such scenario is where the plaintiffs are unable to identify any specific manufacturer as the cause of their injuries.<sup>12</sup> Even if the plaintiffs can prove conclusively that their injuries are the result of exposure to asbestos, the inability to correctly and definitively identify a defendant makes recovery a virtual impossibility.<sup>13</sup> These cases often conclude with an injured party who is unable to recover and a negligent defendant who cannot be sued. Realizing this dilemma, plaintiffs have attempted the use of numerous alternative theories of liability, but with little success.<sup>14</sup>

While there are many asbestos cases that pose complex legal challenges, this Note will focus on the aforementioned scenario which has proven to be most frustrating for both litigants and the courts. Part I of this Note will describe the legal framework under which these circumstances arise and will discuss alternative theories of liability utilized in similar

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<sup>10</sup> Close to a quarter million asbestos lawsuits have been filed to date. Matthew C. Stiegler, *The Uncertain Future of Limited Fund Settlement Class Actions in Mass Tort Litigation After Ortiz v. Fibreboard Corp.*, 78 N.C. L. REV. 856, 857 (2000); see also Fairness in Asbestos Compensation Act of 1999, H.R. 1283, 106th Cong. § 2 (1999) (stating that there are "more than 150,000 [asbestos related] lawsuits currently pending in the tort system and tens of thousands of new cases filed every year").

<sup>11</sup> Companies claim to have paid more than \$10 billion in settlements and as a result, twenty six major corporations have filed for bankruptcy thus far. Quenna Sook Kim, *Asbestos Claims Continue to Mount*, WALL ST. J., Feb. 7, 2001, at B1.

<sup>12</sup> One example is a mechanic who was charged with replacing failing (asbestos-laden) brake pads but is unable to identify their makers because they were entirely worn out at the time that he came in contact with them. See, e.g., *Black v. Abex Corp.*, 603 N.W.2d 182 (N.D. 1999).

<sup>13</sup> See *id.* (rejecting plaintiff's attempted use of alternative theories of liability and granting summary judgment to all defendants).

<sup>14</sup> The two most commonly attempted theories are "market share liability" and "alternative liability," both of which will be discussed in detail *infra* in Parts I.B and I.C.

situations, specifically the theories of market share liability and alternative liability. Part II will explore why those alternative theories of liability are not applicable to asbestos litigation. Part III will discuss the public policy issues to be considered in crafting an alternative method of determining liability. In conclusion, this Note proposes a new approach to prove causation and apportionment of damages in asbestos litigation. Under the proposed theory, a plaintiff need only prove that he had sufficient exposure to defendant's product to give rise to a substantial likelihood that his injuries were caused by defendant's conduct.<sup>15</sup> Once this has been established, plaintiff will be entitled to recovery of medical expenses and attorney's fees incurred as a result of the injuries. If adopted, this theory would ensure that the basic needs of plaintiffs are met while only subjecting defendants to judgments that are fair and in proportion to the probability of fault.

## PART I

### A. *The Problem*

Prior to the twentieth century, asbestos was one of the most commonly used materials in industrial manufacturing. As the twentieth century unfolded, however, many people who had previously worked with asbestos began suffering respiratory disorders including various forms of lung cancer, and a definitive link between the two began to emerge.<sup>16</sup> Despite the mounting evidence demonstrating the dangers of asbestos, industry leaders showed little interest in curtailing its use.<sup>17</sup> The dangers therefore remained and the associated illnesses began to mount. As it became clear that industrial leaders utilized asbestos despite full knowledge of its dangers,<sup>18</sup> those who suffered from asbestos-related illnesses began to initiate suits against the companies who manufactured the materials. In all asbestos litigation, however, proof of causation is often

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<sup>15</sup> Because of the nature of asbestos products, the determination of whether this requirement has been met will have to be made on a case-by-case basis as explained *infra* note 63.

<sup>16</sup> See *supra* note 3.

<sup>17</sup> In fact, between the years of 1934 and 1964, the industrial use of raw asbestos actually increased by 500% from 500,000 tons to 2,500,000 tons. Thomas E. Willging, TRENDS IN ASBESTOS LITIGATION 10 (1987) (citations omitted).

<sup>18</sup> See *supra* note 4.

difficult. In some cases, courts have differed as to the level of proof necessary for a plaintiff who, aside from asbestos exposure, was also a smoker and now claims that he has contracted lung cancer from the asbestos.<sup>19</sup> Even for non-smokers, however, it is often difficult to prove that exposure to any specific asbestos product was the cause of plaintiff's injuries. Most asbestos plaintiffs were exposed to numerous products and cannot conclusively prove that their injuries are the result of one specific product over another.<sup>20</sup> To allow for recovery in virtually any asbestos case, therefore, courts would be required to relax the standard causation requirements. Noting this dilemma, many courts have done just that.<sup>21</sup> The Eleventh Circuit requires only that a plaintiff prove *exposure* to the asbestos-containing product whose maker he sues.<sup>22</sup> Whether or not the injury was actually *caused* by that product is of no interest to the court.<sup>23</sup>

Washington state as well as the Fifth Circuit have gone even further by adopting the "job site test."<sup>24</sup> Under this approach, plaintiff need only prove that the asbestos-containing product was used at a job site simultaneous with his employment.<sup>25</sup> However, a plaintiff need not prove that he actually came in contact with the product at any time.<sup>26</sup>

The approaches taken by the courts in the above cases illustrate the considerable difficulty virtually all asbestos plaintiffs encounter in adequately proving causation. Despite the fact that in all of those cases the identities of the defendants were known and the plaintiff was undoubtedly

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<sup>19</sup> See, e.g., *In re Manguno*, 961 F.2d 533 (5th Cir. 1992).

<sup>20</sup> See generally *Mulcahy*, *supra* note 2.

<sup>21</sup> See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1103 (5th Cir. 1974) (requiring that plaintiff need only prove that defendant's conduct "contributed substantially" to plaintiff's injury but not that it actually caused the harm).

<sup>22</sup> *Blackstone v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985).

<sup>23</sup> *Id.* See also *Lane v. Celotex Corp.*, 782 F.2d 1526, 1528 (11th Cir. 1986) (requiring the plaintiff to show that he was "directly exposed" to the defendant's asbestos products); *Lee v. Celotex Corp.*, 764 F.2d 1489, 1490 (11th Cir. 1985) (requiring that the plaintiff prove that he was "directly exposed to th[e] defendant's asbestos-containing product").

<sup>24</sup> *Lockwood v. AC & S, Inc.*, 722 P.2d 826 (Wash. App. 1986); see also *Richoux v. Armstrong Cork Corp.*, 777 F.2d 296 (5th Cir. 1985) (adopting the "job site test" set forth in *Lockwood*).

<sup>25</sup> See cases cited *supra* note 24.

<sup>26</sup> *Lockwood*, 722 P.2d at 840 (agreeing with the trial court that "[n]o direct evidence of specific product identification was necessary").

exposed to their products, the nature of asbestos and the resulting harm is such that proof of causation would not have been feasible had the courts not relaxed the causation requirements.<sup>27</sup>

Where the identity of the defendant is unclear, proof of causation becomes considerably more challenging. Very often, the manner in which a plaintiff was exposed to asbestos was such that he is unable to identify any specific company as having been responsible for the manufacture of the products that caused his injury.<sup>28</sup> While the courts have demonstrated a willingness to relax the level of necessary proof to accommodate asbestos plaintiffs,<sup>29</sup> a situation in which the plaintiff is unable to definitively identify a defendant seems to exceed the bounds of judicial generosity. Relaxing causation requirements can only go so far.<sup>30</sup> At the same time, the inability to identify a defendant should not diminish the validity of a claim. The fact remains that the plaintiff suffered significant harm as the result of another party's negligent conduct. Nonetheless, without a defendant recovery is impossible. Such situations result in plaintiffs who are unable to recover damages to which they should be entitled and negligent companies escaping liability.

While plaintiffs have attempted to apply various novel theories of liability, they have been met with great skepticism, if not flat out rejection, by virtually all of the courts that have been asked to apply them. To call this unfair would be most

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<sup>27</sup> The cases discussed *supra* Part II subsections A and B, that rejected the alternative theories of liability, only addressed the issue because traditional causation would not have worked. So, in essence, they all applied the traditional causation requirements which is why the plaintiff lost once the alternative approaches were rejected.

<sup>28</sup> See *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691 (Ohio 1987); *Black v. Abex Corp.*, 603 N.W.2d 182 (N.D. 1999); *Vigolto v. Johns-Manville Corp.*, 643 F. Supp. 1454 (W.D. Pa. 1986).

<sup>29</sup> See, e.g., *In re Hawaii Federal Asbestos Cases*, 960 F.2d 806, 818 (9th Cir. 1992) (adopting "the less restrictive approach to questions of asbestos causation embodied in cases like *Lockwood*."); *Lohrmann v. Pittsburgh*, 782 F.2d 1156 (4th Cir. 1986) (requiring that an asbestos plaintiff prove the conduct of the defendant to have been a "substantial factor" in causing his injuries); *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1974) (same); *Lockwood*, 722 P.2d 826 (applying the job site test).

<sup>30</sup> Legal scholars have cautioned against modifying causation requirements without considerable justification. See James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992) (concluding their section on "Alternative Liability" by stating that "when defendant identification is possible, courts should be reluctant to abandon traditional causation principles.").

charitable. A system must be adopted in which the prohibitive financial burdens of the victims are eased while the fairness in apportionment of liability among the companies remains uncompromised. Although neither party may be entirely satisfied, a system in which the basic expenses of a blameless victim are imposed upon those most likely responsible for the harm should be acceptable to all. The fact remains that the conduct of the defendant was precisely the type responsible for the plaintiff's harm, and to hold them minimally liable is certainly within reason. At the same time, the failure to establish a definitive link between the plaintiff and defendant should restrict the plaintiff's ability to recover any damages other than medical expenses and attorney's fees. To date, the establishment of a system fair to both plaintiffs and defendants has proved to be a most daunting and elusive task. Courts correctly reject the attempted application of existing modified causation theories, because, as the following sections demonstrate, the nature of asbestos litigation is such that it requires an approach designed specifically for it. Such a theory has thus far failed to emerge.

#### B. *Market Share Liability*

The dilemma of victims who cannot recover from negligent defendants is not exclusive to asbestos litigation. In 1941, a drug known as diethylstilbesterol ("DES") was produced and sold by various companies for the purpose of preventing miscarriages. As DES use increased, so did reports of birth defects among children whose mothers had taken the drug during pregnancy. In 1971, the FDA ordered all companies to cease production of DES and required them to warn physicians that it no longer be administered to pregnant women.<sup>31</sup> In 1978, numerous parties who were injured as a result of DES brought a class action suit.<sup>32</sup> These plaintiffs faced a problem quite similar to that faced by the asbestos plaintiffs described above. Because of the manner in which the drug was administered and the amount of time that had elapsed, no plaintiff could identify the company that manufactured or marketed the specific DES dose administered to the expectant mother. While DES undoubtedly caused the

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<sup>31</sup> *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

<sup>32</sup> *Id.*



birth defects, plaintiffs could not determine the identity of the company that produced or administered the specific product.

The case, *Sindell v. Abbott Laboratories*,<sup>33</sup> ultimately reached the Supreme Court of California. Rather than bar plaintiffs' suit on the grounds that causation could not be proved against an unknown defendant, the court took a different approach. In a landmark ruling, the court adopted a new theory of liability which apportioned damages based on the share of the market owned by a specific company at the time that the injury occurred.<sup>34</sup> This novel approach has come to be known as "market share liability." The court set the following three criteria for recovery: (1) the manufacturer of the defective product cannot be identified;<sup>35</sup> (2) all defendants produced an identical product; and (3) the named defendants represent a substantial percentage of the market.<sup>36</sup> Where these conditions are met, each company will be liable to the extent of its market share.

The predicament in which many asbestos plaintiffs find themselves is similar to that of the DES plaintiffs. For a variety of reasons including the passage of time and the number of asbestos products to which plaintiffs were exposed,

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<sup>33</sup> *Id.*

<sup>34</sup> The theory, based on the student note, *DES and a Proposed Theory of Enterprise Liability*, is one grounded in sound logic. Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963 (1978). Since its implementation is contingent upon the identification of defendants whose activities were precisely those of the party actually responsible for the harm, the percentage of the market that they owned at the time is likely to be indicative of the percentage of overall liability to all victims, which they share with other responsible parties. This theory is unlike any other in tort law in that it allows recovery from a group of defendants despite the distinct possibility that none were responsible for the actual harm suffered by the plaintiff. Mindful of that possibility, not all courts have greeted this theory with untempered enthusiasm. See *Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187, 190 (Ohio 1998) (stating that the possibility of imposing liability on a party not responsible for the specific harm, "collides with traditional tort notions of liability by virtue of responsibility, and imposes a judicially created form of industry-wide insurance upon those manufacturers subject to market-share liability"); *Wood v. Eli Lilly & Co.*, 38 F.3d 510 (10th Cir. 1994) (holding that market share liability is never available under Oklahoma law based on *Case v. Fibreboard Corp.*, 743 P.2d 1062, 1067 (Okla. 1987) (rejecting market share liability because "the public policy favoring recovery on the part of an innocent plaintiff does not justify the abrogation of the rights of a potential defendant")); See also *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985) (quoting *Starling v. Seaboard Coast Line R.R. Co.*, 533 F. Supp. 183, 190 (S.D. Ga. 1982) (referring to market share liability as a "novel theory of causation" and stating that its application in asbestos litigation would "raise serious questions of fairness"))).

<sup>35</sup> If a defendant can be identified then it would follow that imposing liability upon other parties would be unjust.

<sup>36</sup> See *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980).

the identification of a single company whose asbestos laden products were used by the plaintiff is often not possible. Understandably, many asbestos victims invited the courts to apply the theory of market share liability. Unfortunately for them, the invitation has been summarily declined.<sup>37</sup> Given the fact that market share liability is a substantial relaxation of traditional causation requirements, some courts rejected its use under any circumstances.<sup>38</sup> However, even among those jurisdictions that have considered market share liability in DES cases, there has been great reluctance to expand its application to asbestos litigation.<sup>39</sup> The difficulty in defining an "asbestos market" and the wide range of risks posed by varying levels of asbestos makes the application of market share liability entirely inappropriate.<sup>40</sup>

### C. *Alternative Liability*

While the *Sindell* decision marked a radical departure from the traditional requirements of causation, it was not the first to do so. In the oft cited case of *Summers v. Tice*,<sup>41</sup> the California Supreme Court faced a troubling set of facts. The plaintiff sustained an eye injury when a single bullet struck him after two hunters negligently fired their weapons in his direction.<sup>42</sup> Determining which hunter fired the shot was not possible, and the plaintiff was therefore unable to prove who

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<sup>37</sup> *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3d Cir. 1990); *White v. Celotex Corp.*, 907 F.2d 104 (9th Cir. 1990); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985); *In re Asbestos Litigation*, 509 A.2d 1116 (Del. Super. Ct. 1986); *Celotex Corp. v. Copeland*, 471 So. 2d 533 (Fla. 1985); *Leng v. Celotex Corp.*, 554 N.E.2d 468 (Ill. 1990); *Sholtis v. Am. Cyanamid Co.*, 568 A.2d 1196 (N.J. Super. Ct. App. Div. 1989); *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691 (Ohio 1987); *Case v. Fibreboard Corp.*, 743 P.2d 1062 (Okla. 1987); *Gaulding v. Celotex Corp.*, 772 S.W.2d 66 (Tex. 1989).

<sup>38</sup> *See, e.g., Sutowski v. Eli Lilly & Co.*, 696 N.E.2d 187 (Ohio 1998); *Wood v. Eli Lilly & Co.*, 38 F.3d 510 (10th Cir. 1994).

<sup>39</sup> *See supra* note 37 (collecting cases in which courts refused to apply market share liability to asbestos litigation).

<sup>40</sup> As explained in detail in Part II, there is no shortage of reasons why market share liability is inappropriate for asbestos litigation. However the most compelling argument against its application to asbestos cases is that unlike DES, asbestos products vary greatly in their composition and the level of harm that they cause. As a result, the share of the market that a particular company may have owned is in no way indicative of the actual harm that resulted from its product. *See, e.g., Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691 (Ohio 1987); *Celotex Corp. v. Copeland*, 471 So. 2d 533, 537 (Fla. 1985).

<sup>41</sup> 199 P.2d 1 (Cal. 1948).

<sup>42</sup> *Id.*

was responsible for his injury. Instead of naming one shooter as a defendant, plaintiff initiated a suit against both. Realizing that both defendants were negligent and that plaintiff suffered great harm, the court created a new theory of recovery, which has come to be known as "alternative liability."<sup>43</sup>

The alternative liability theory applies the doctrine of *res ipsa loquitur* to create an inference of negligence and to shift the burden of proof to the defendants.<sup>44</sup> A plaintiff must satisfy two prerequisites in order to proceed under this approach: (1) all parties who could have been responsible for the harm are named; and (2) all of the named defendants acted tortiously.<sup>45</sup> The rationale for *Summers* is that under such circumstances, the defendants are in a better position to determine what occurred than is the plaintiff.<sup>46</sup> The fairness of this approach is readily apparent. Where numerous parties act wrongly and one or more causes the harm, the plaintiff's ability to receive just compensation should not be hampered by the technical difficulty of defendant identification.

The *Summers* ruling, like the DES decision that later followed,<sup>47</sup> was a departure from traditional principles of tort law. The court adopted the alternative liability theory expressly to assist plaintiffs who had little chance of success under traditional causation requirements. Many asbestos plaintiffs attempted to apply the theory of alternative liability in situations that they deemed analogous.<sup>48</sup> Asbestos plaintiffs argued that the burden of proof should be placed on the defendant company as it was in *Summers*.<sup>49</sup> As with market share liability, the courts unanimously rejected applying

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<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> This reasoning may not be that apparent under the facts of *Summers* since it is quite possible that neither hunter had any greater understanding of what took place than did the plaintiff. However in a 1944 California case that adopted the *Summers* rule, the rationale was more obvious. In *Ybarra v. Spangard*, 154 P.2d 687 (Cal. 1944), plaintiff was injured while undergoing a medical procedure and sued the entire surgical team that was tending to him. Considering the fact that plaintiff was not conscious during the procedure, defendants were obviously better suited to determine who specifically was responsible for the harm. As such, the court held that the doctrine of *res ipsa loquitur* applied and created an inference of negligence against all of the defendants present during the surgery.

<sup>47</sup> *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (creating the theory of market share liability) discussed *supra* Part I.B.

<sup>48</sup> See, e.g., *Goldman v. Johns-Manville Corp.*, 514 N.E.2d 691 (Ohio 1987) (discussed in detail *infra* Part II subsection B).

<sup>49</sup> *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

alternative liability to asbestos litigation.<sup>50</sup> In distinguishing the asbestos plaintiff from the *Summers* plaintiff, the courts have emphasized that in *Summers* it was known that both named defendants acted tortiously towards the plaintiff and that the harm resulted from one of them. In asbestos litigation, however, the identity of all suppliers is often not known. Thus it cannot be said with any degree of certainty that the harm resulted from the actions of one of the named parties.<sup>51</sup>

The refusal of the courts to adopt either market share liability or alternative liability has left an entire class of legitimate asbestos victims without legal recourse. For those unable to identify the company responsible for the product that harmed them, the potential for recovery seems bleak. Admittedly, the rejections of market share liability and alternative liability have been judicially sound. The differences between asbestos and DES are far more significant than the similarities. While market share liability may have been fair in the DES setting, it would lead to an unjust apportionment of liability in asbestos litigation. The difficulty in determining an asbestos market, as well as the great variance of dangers posed by different asbestos products, makes apportionment of fault based on "market share" an unjust approach. Additionally, the inability of many asbestos plaintiffs to identify all of the possible defendants responsible for the harm makes alternative liability equally inappropriate.

While the exclusion of these theories may have served the interests of justice, the interests of fairness suffered as a result. In many circumstances, blameless asbestos victims cannot recover for the damages that negligent actors inflicted on them. A system must be adopted in which the basic needs of the plaintiffs are served without unfairly jeopardizing potentially innocent defendants. The *Summers*<sup>52</sup> and *Sindell*<sup>53</sup> decisions were inspired by an appreciation for the judicial

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<sup>50</sup> See Henderson & Twerski, *supra* note 30, at 1518 (noting that "even courts that have embraced alternative liability . . . have not done so in asbestos injury cases."). See also Thompson v. Johns-Manville Sales Corp., 714 F.2d 581 (5th Cir. 1983); Marshall v. Celotex, 651 F. Supp. 389 (E.D. Mich. 1987); Black v. Abex Corp., 603 N.W.2d 182 (N.D. 1999); Rutherford v. Owens-Illinois, Inc., 941 P.2d 1203 (Cal. 1997); Gaulding v. Celotex, 772 S.W.2d 66 (Tex. 1989); Sholtis v. American Cyanamid Corp., 568 A.2d 1196 (N.J. Super. Ct. App. Div. 1989); Nutt v. AC & S Co., 517 A.2d 690 (Del. Super. Ct. 1986).

<sup>51</sup> *Goldman*, 514 N.E.2d 691.

<sup>52</sup> *Summers*, 199 P.2d 1.

<sup>53</sup> *Sindell*, 607 P.2d 924.

responsibility to greet troubling fact patterns with novel approaches. The plight of asbestos victims should be met with equal ingenuity. The courts should adopt an approach whereby companies who acted negligently can be held liable for the medical expenses of those who suffer as a result of conduct such as theirs. This would ensure that the elementary needs of asbestos victims are met, while not subjecting defendants to the enormous awards that have accompanied previous asbestos settlements. Under this system, the interests of both justice and fairness would be well served.

## PART II

### A. *The Rejection of Market Share Liability for the Asbestos Plaintiff*

The requirements that a plaintiff must meet in order to employ the theory of market share liability seem to form a harmonious blend of logic and justice. As stated by the *Sindell* court, the only time that liability should be spread among numerous parties is where the actions of those parties are identical, making their consequences, therefore, comparable.<sup>54</sup> Once a plaintiff establishes equal liability among defendants, apportionment of liability based on a particular company's share of the market is within reason. However, where the defendants marketed products with varying levels of danger, the percentage of the resulting damages cannot be measured merely in proportion to the defendant's market share.<sup>55</sup> In such cases, culpability can only be apportioned based on the nature of each individual product and the amount of danger that it posed. Needless to say, a product-specific analysis would be entirely inconsistent with the principles upon which market share liability was founded.

In asbestos litigation, many plaintiffs are faced with situations analogous to that of *Sindell*. Often, a victim who suffers from an asbestos related illness is unable to identify the specific manufacturer responsible for his injuries.<sup>56</sup> Plaintiffs are then faced with an uphill battle with grim prospects. Because a conventional attempt at recovery would fail without an identified defendant, many plaintiffs turn to market share

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<sup>54</sup> *Id.* at 936.

<sup>55</sup> *Id.*

<sup>56</sup> See *supra* notes 34, 37-38 for examples.

liability as an alternative approach. While the attempt may be understandable, the requirements set forth by the *Sindell* court have posed an insurmountable burden to these plaintiffs.

The first requirement of market share liability is that the plaintiff be unable to identify any defendant.<sup>57</sup> In asbestos litigation this can often be difficult to satisfy. In 1985, a former boilermaker who was diagnosed with asbestosis<sup>58</sup> filed suit against sixteen defendant companies who produced asbestos-containing boilers during the time that he was employed.<sup>59</sup> The plaintiff advanced market share liability among other theories.<sup>60</sup> The case ultimately reached the Florida Supreme Court, which refused to apply market share liability.<sup>61</sup> Citing *Sindell*, the court ruled that since the plaintiff was able to identify many manufacturers of the products to which he was exposed, the very first requirement of market share liability had not been satisfied.<sup>62</sup>

Considering the circumstances from which asbestos suits arise, it is fairly common for this problem to exist. Most asbestos plaintiffs were exposed to countless products and materials in the course of their employments and will invariably be able to name at least one company whose products they used. This becomes a double-edged sword. A plaintiff's ability to name a defendant undermines the first element of the market share liability test, which requires that plaintiff be unable to identify the specific defendant responsible for the harm. Yet, the plaintiff lacks the ability to recover from the named defendant directly since she cannot prove causation against one company when she was exposed to countless other products. A system must be adopted by which victims of asbestos will not lose their ability to recover simply because they can recall the maker of one or more of the many asbestos products with which they had contact. If a plaintiff can prove

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<sup>57</sup> See *Sindell*, 607 P.2d at 936.

<sup>58</sup> See *supra* note 6 for an explanation of this disease.

<sup>59</sup> *Celotex Corp. v. Copeland*, 471 So. 2d 533, 534-35 (Fla. 1985).

<sup>60</sup> *Id.* at 535.

<sup>61</sup> *Id.* at 534-35.

<sup>62</sup> *Id.* at 537 ("We find that the market share theory is an inappropriate vehicle with which to apportion liability for the asbestos-related injury in this cause. Our holding is based principally upon the fact that Copeland was able to identify many of the manufacturers of the products to which he was exposed."). See also *Sholtis v. Am. Cyanamid Corp.*, 568 A.2d 1196, 1204 (N.J. Super. Ct. App. Div. 1989) ("Plaintiffs here (as in most asbestos cases) present a different situation, which as defendants properly point out is not a true 'non-identification' case.").

that he had considerable exposure<sup>63</sup> to a product that a specific defendant manufactures, courts should compel that defendant to cover plaintiff's medical expenses. The absence of a definitive causal link should not relieve the defendant of all responsibility. Despite the fact that causation may be unclear, the named defendant's negligence is beyond question.<sup>64</sup> Since plaintiff suffered serious harm and defendant engaged in the type of conduct that caused the harm, proof of considerable exposure to the dangerous product should suffice to invite a basic recovery of medical expenses. At the same time, plaintiffs should not be entitled to the generous award that they would receive had causation been fully proved.<sup>65</sup>

While the first *Sindell* requirement has proved problematic, the others have been no less friendly to the asbestos litigant. Many courts note that determining what constitutes a "substantial percentage of the market" is rarely feasible in asbestos cases.<sup>66</sup> Considering the wide range of both the quality and quantity of asbestos materials and the equally varying levels of risk that accompany them, the identification of an "asbestos market" is often an impossible task.<sup>67</sup> For example, a defendant who owned 50% of the market for boilers but whose boilers contained only 5% of tightly packed asbestos, cannot be said to have the same share of the "asbestos boiler" market as the competing company that owned the remaining

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<sup>63</sup> The levels of exposure that would amount to "considerable exposure" will have to be decided on a case-by-case basis. The principal factors to be considered are the dangers posed by the product based on the type and amount of asbestos and the manner in which it was produced (loosely wrapped asbestos gives off considerably more dangerous dust than tightly packed asbestos) as well as the amount of time that plaintiff was exposed. The adoption of a general time frame would not be prudent considering the various impacts of all of the variables.

<sup>64</sup> As discussed *infra* Part III, the plaintiff will still have to prove that the named defendant acted negligently in its production and marketing of the alleged asbestos product.

<sup>65</sup> The fact remains that some amount of causation could be said to have been proven. Plaintiff does suffer from an injury caused by a prolonged exposure to a kind of product which defendant produced. Nonetheless, only medical expenses and attorney's fees, the most basic and necessary compensation, should be awarded considering the weakened causal link that has been established.

<sup>66</sup> See *Goldman v. Johns-Manville Corp.*, 514 N.E.2d 691 (Ohio 1987) (quoting *In re Asbestos Cases*, 453 F. Supp. 1152 (N.D. Cal. 1982)) (rejecting application of market share liability in asbestos litigation because, *inter alia*, "defining the relevant product and geographic markets would be an extremely complex task due to the numerous uses to which asbestos is put."); *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538-39 (Fla. 1995) (stating that the varying levels of toxicity among asbestos products makes the determination of what constitutes a "substantial share of the market" most difficult).

<sup>67</sup> As explained *supra* note 40.

50% of the market but whose boilers contained 30% of loosely packed asbestos. To view the market simply as that of "asbestos boilers" would in no way represent the true nature of the risks created by the competing products. The inability to define the parameters of a specific market precludes any attempt to determine what constitutes a substantial share of that market. It is for those reasons that determining the appropriate market of an asbestos product is a virtual impossibility.

The market share requirement that has posed the greatest difficulty to asbestos plaintiffs is that the named defendant's products be identical or fungible.<sup>68</sup> In *Sindell*, the court put great emphasis on the fact that all DES doses were manufactured from an identical formula and therefore posed the exact same level of risk.<sup>69</sup> While this may have been the case with DES, it is emphatically not so in the asbestos products arena. As an initial matter, the level of danger posed by asbestos varies greatly among the different fibers that exist.<sup>70</sup> However, aside from the specific fibers used, many other variables affect the dangers created by an asbestos product. In explaining this fact, the *Celotex* court stated:

This divergence is caused by a combination of factors, including: the specific type of asbestos fiber incorporated into the product; the physical properties of the product itself; and the percentage of asbestos used in the product. There are six different asbestos silicates used in industrial applications and each presents a distinct degree of toxicity in accordance with the shape and aerodynamics of the individual fibers. Further, it has been established that the geographical origin of the mineral can affect the substance's harmful effects. A product's toxicity is also related to whether the product is in the form of a solid block or a loosely packed insulating blanket and to the amount of dust a product generates. The product's form determines the ability of the asbestos fibers to become airborne and, hence, to be inhaled or ingested. The greater the product's susceptibility to produce airborne fibers, the greater the product's potential to produce disease. Finally, those products with high

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<sup>68</sup> *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980).

<sup>69</sup> *Id.* (stating that use of market share liability was warranted because "all defendants produced a drug from an identical formula") (emphasis added).

<sup>70</sup> See Lee S. Siegel, Note, *As the Asbestos Crumbles: A Look at the New Evidentiary Issues In Asbestos-Related Property Damage Litigations*, 20 HOFSTRA L. REV. 1139 (1992) (citing testimony regarding the great variance in the levels of toxicity and risk among different asbestos fibers).



concentrations of asbestos fibers have corresponding high potentials for inducing asbestos-related injuries.<sup>71</sup>

Based on these inherent properties, it is clear that the market share liability approach used in the DES case is wholly inappropriate for asbestos litigation. The rationale underlying market share liability is that the total percentage of harm caused by any specific company is correlated to its percentage of the market. This can only be the case where the products in question posed the exact same level of threat. However, if the products themselves vary in danger, the percentage of the market share is in no way indicative of the percentage of resulting harm.

The 1988 California Appellate Court case of *Mullen v. Armstrong World Industries*<sup>72</sup> provides one illustration of the difficulties that product fungibility causes asbestos plaintiffs. In *Mullen*, a group of plaintiffs, who sustained various injuries from the presence of asbestos in their homes, filed suit against more than forty companies that were engaged in the manufacture or distribution of asbestos-containing products during the time in which plaintiffs' homes were built (a period beginning in 1912 and ending in 1978).<sup>73</sup> Plaintiffs sought recovery under the theory of market share liability.<sup>74</sup> The court rejected plaintiffs' arguments and distinguished asbestos products from DES on the matter of product fungibility. The court stated that "[t]he briefest consideration demonstrates numerous inherent differences between DES and asbestos,"<sup>75</sup> including the great variance of dangers among asbestos products noted in *Celotex*.<sup>76</sup>

As a result of the inability to satisfy any of the *Sindell* requirements, the vast majority of courts have refused to apply the theory of market share liability in asbestos litigation.<sup>77</sup> The

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<sup>71</sup> *Celotex*, 471 So. 2d at 538.

<sup>72</sup> 246 Cal. Rptr. 32 (Cal. Ct. App. 1988).

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 36.

<sup>76</sup> *Id.* (quoting *Celotex*, 471 So. 2d at 538).

<sup>77</sup> *Robertson v. Allied Signal, Inc.*, 914 F.2d 360 (3d Cir. 1990); *White v. Celotex Corp.*, 907 F.2d 104 (9th Cir. 1990); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480 (11th Cir. 1985); *In re Asbestos Litig.*, 509 A.2d 1116 (Del. Super. Ct. 1986); *Celotex*, 471 So. 2d 533; *Leng v. Celotex Corp.*, 554 N.E.2d 468 (Ill. 1990); *Sholtis v. Am. Cyanamid Co.*, 568 A.2d 1196 (N.J. Super. Ct. App. Div. 1989); *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691 (Ohio 1987); *Case v. Fibreboard Corp.*, 743 P.2d 1062 (Okla. 1987); *Gaulding v. Celotex Corp.*, 772 S.W.2d 66 (Tex. 1989).

fact that most plaintiffs are able to name at least one defendant, combined with the many factors that differentiate asbestos products and the difficulty in defining an appropriate market, has rendered the theory of market share liability inappropriate for use in asbestos litigation. Additionally, adopting market share liability would serve only to compound one already weakened theory of causation by adding another. As discussed above, traditional causation is rarely proven in asbestos litigation and only a relaxation of the standards invites recovery.<sup>78</sup> The theory of market share liability is a considerably greater modification of traditional causation principles and applying it to an already relaxed causation requirement would seem beyond the bounds of judicial generosity. Therefore, a system should be enacted in which the potential damages are limited so that they are awarded only in proportion to the proof of causation.

An analysis of the relevant factors demonstrates conclusively that application of market share liability in asbestos litigation would be both morally unfair and legally unjust. The level playing field that was essential to the *Sindell* decision is entirely non-existent in the asbestos arena. Considering the wide range of dangers that even the most similar asbestos products pose, the courts' refusal to adopt the theory of market share liability is most well founded.

#### B. *The Rejection of Alternative Liability for the Asbestos Plaintiff*

The *Summers* court understood the great injustice that would result had a person who fell victim to one of two negligent actors been unable to recover despite naming both as defendants.<sup>79</sup> While shifting the burden of proof from plaintiff to defendant under the theory of alternative liability was a departure from established legal precedent, it was a welcome evolution of tort law.<sup>80</sup> In adopting alternative liability, the court in essence stated that plaintiff satisfied his burden of

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<sup>78</sup> See *supra* Part I subsection A.

<sup>79</sup> *Summers v. Tice*, 199 P.2d 1 (Cal. 1948).

<sup>80</sup> See, e.g., Patricia A. Meagher, Note, *Market Share Liability: A New Method of Recovery for D.E.S. Litigants*, 30 CATH. U. L. REV. 551 (1981); Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 HARV. L. REV. 668 (1981); but see Cynthia L. Chase, Note, *Market Share Liability: A Plea for Legislative Alternatives*, 1982 U. ILL. L. REV. 1003 (criticizing market share liability as difficult to administer and unfair to manufacturers of potentially hazardous materials).

proof and it was for the negligent defendants to finish the job.<sup>81</sup> Many asbestos litigants who were unable to name a specific defendant responsible for their injury believed that their situations were analogous to the *Summers* case and therefore advocated the application of alternative liability. However, plaintiffs were alone in that belief and the courts have refused to apply alternative liability to asbestos litigation.<sup>82</sup>

A 1987 Ohio Supreme Court case, *Goldman v. Johns-Manville Sales Corp.*,<sup>83</sup> clearly articulated the argument against application of alternative liability in asbestos litigation. In 1980, a former bakery employee, who was exposed to numerous asbestos products over a period of almost twenty years, died from mesothelioma.<sup>84</sup> A fire destroyed the bakery twenty years prior to decedent's death. As a result of both the fire and the passage of time, the plaintiff was unable to identify any of the companies responsible for the manufacture or sale of the asbestos products.<sup>85</sup> Mindful of the inability to file suit based on the traditional principles of tort law, the plaintiff proposed liability based, inter alia, on the theory of alternative liability.<sup>86</sup> However, the trial court refused to apply alternative liability because the plaintiff "[was] unable to show that any of the defendants remaining in this case supplied any asbestos products to [decedent's employer]."<sup>87</sup> In affirming the decision, the Ohio Supreme Court held that a plaintiff who wishes to shift the burden of proof to the defendant through use of alternative liability must first prove: (1) two or more defendants committed tortious acts; and (2) plaintiff's injury was the proximate result of one of the defendants' actions.<sup>88</sup> The court noted that plaintiff failed to meet either

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<sup>81</sup> *Summers*, 199 P.2d at 4.

<sup>82</sup> See *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983); *Marshall v. Celotex*, 651 F. Supp. 389 (E.D. Mich. 1987); *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (Cal. 1997); *Nutt v. AC & S Co.*, 517 A.2d 690 (Del. Super. Ct. 1986); *Black v. Abex Corp.*, 603 N.W.2d 182 (N.D. 1999); *Sholtis v. Am. Cyanamid Corp.*, 568 A.2d 1196 (N.J. Super. Ct. App. Div. 1989); *Gaulding v. Celotex*, 772 S.W.2d 66 (Tex. 1989).

<sup>83</sup> 514 N.E.2d 691 (Ohio 1987).

<sup>84</sup> *Id.* Plaintiff alleged the presence of asbestos in the pipe insulation, ceiling board, oven lining, oven covering, wallboard, sheeting and gloves.

<sup>85</sup> The plaintiff was the decedent's widow.

<sup>86</sup> Plaintiff also attempted use of market share liability, which failed for the reasons discussed *infra* Part II. subsection A.

<sup>87</sup> See *Goldman*, 514 N.E.2d at 691 (quoting the lower court's decision).

<sup>88</sup> *Id.* at 696 (quoting *Minnich v. Ashland Oil Co.*, 473 N.E.2d 1199 (Ohio 1984)).

requirement. The plaintiff offered no evidence indicating that any of the named companies actually furnished asbestos products to the bakery at any time.<sup>89</sup> A defendant who supplied no products to the plaintiff cannot be said to have acted tortiously.<sup>90</sup> It follows then that the plaintiff failed to meet the second requirement as well. Where “[t]here is no evidence that *any remaining defendant* furnished *any asbestos product*”<sup>91</sup> to the plaintiff, to find that plaintiff was injured as a proximate result of one of the defendants is quite obviously impossible. Furthermore, even if plaintiff had been able to identify one or more companies that supplied asbestos products to decedent’s employer, there is no certainty that any of those specific products resulted in the harm. In fact, the *Goldman* court stated that considering the great number of companies who have marketed asbestos products in the past, “the only way to make sure that the guilty defendant was before the court would be sue *all* asbestos companies.”<sup>92</sup> Finally, based on the text of the Restatement (Second) of Torts in which alternative liability was detailed, the court noted that considering the wide range of risks associated with asbestos products, alternative liability was not appropriate.<sup>93</sup>

The *Goldman* opinion is not one that is limited to the specific facts of that case and will indeed hold true in virtually all asbestos litigation. Only where a plaintiff is able to identify all of the companies that supplied asbestos products with which he had contact can either of the requirements can be met. Additionally, even in the rare instances where plaintiff can identify all possible defendants, unless the products present a similar level of risk, the theory would still be inapplicable. It is quite understandable why the courts have set these rigid requirements. If a court is going to take the unusual step of imposing the burden of proof on the defendants, it must be certain that the culpable party is in its midst. Since alternative liability creates an inference of guilt on the named parties, the requirement that each named party must have

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<sup>89</sup> *Goldman*, 514 N.E.2d at 698.

<sup>90</sup> The term “acted tortiously” as used by the court is somewhat of a misnomer. While for the purposes of alternative liability the tortuous conduct must have been directed at plaintiff specifically (as was the case in *Summers*), this should not be construed to imply that the marketing of a dangerous product to the general public is not to be considered as having “acted tortiously.”

<sup>91</sup> *Id.* at 696-97 (emphasis added).

<sup>92</sup> *Id.* at 697.

<sup>93</sup> *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 433 cmt. h (1965)).

acted tortiously toward the plaintiff is understandable if not imperative. It is clear, therefore, why the vast majority of courts have rejected the application of alternative liability in asbestos cases.<sup>94</sup>

While there have been rare occasions in which alternative liability was employed in asbestos litigation, the fact patterns in those cases are distinguishable from the cases in which the theory was rejected. For example, in *Menne v. Celotex Corp.*<sup>95</sup> the plaintiff was able to identify all of the products to which he was exposed and was able to demonstrate that the named defendants had produced and supplied those products to his employer.<sup>96</sup> As a result, both requirements of alternative liability were satisfied. All named defendants had engaged in tortious behavior by supplying asbestos products to plaintiff's employer, and the injuries sustained by plaintiff were the result of at least one of the defendants if not all. Cases such as *Celotex* are not those for which this Note seeks a remedy. Indeed, similar fact patterns have led other courts to allow recovery using alternative liability.<sup>97</sup> However, those cases are the exception. Instances in which plaintiffs are unable to identify the manufacturers responsible for their injuries are far greater in number. In those cases, plaintiffs seem to be without any sound legal recourse. An alternative approach should be adopted to ensure that these plaintiffs are not deprived of their ability to secure a fair judgment. The approach should ensure that plaintiffs are adequately compensated while imposing liability on defendants that is proportionate to their fault.

### PART III

As discussed above, many plaintiffs are unable to secure judgments against asbestos companies because they lack the ability to identify the company or companies responsible for their injuries. Attempted applications of alternative theories of

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<sup>94</sup> See *Thompson v. Johns-Manville Sales Corp.*, 714 F.2d 581 (5th Cir. 1983); *Marshall v. Celotex Corp.*, 651 F. Supp. 389 (E.D. Mich. 1987); *Black v. Abex Corp.*, 603 N.W.2d 182 (N.D. 1999); *Rutherford v. Owens-Illinois, Inc.*, 941 P.2d 1203 (Cal. 1997); *Gaulding v. Celotex*, 772 S.W.2d 66 (Tex. 1989); *Sholtis v. Am. Cyanamid Corp.*, 568 A.2d 1196 (N.J. Sup. Ct. App. Div. 1989); *Nutt v. AC & S Co.*, 517 A.2d 690 (Del. Super. Ct. 1986).

<sup>95</sup> 641 F. Supp. 1429 (D. Kan. 1986).

<sup>96</sup> *Id.*

<sup>97</sup> See, e.g., *Gard v. Raymark Indus.*, 229 Cal. Rptr. 861 (Cal. Ct. App. 1986).

liability have been rebuffed by the courts and for sound judicial reasons. At the same time, however, as a matter of public policy, a system must be adopted in which such plaintiffs are not left entirely without recourse. These individuals suffered great harm at the hands of numerous negligent companies and should not be left to shoulder the accompanying financial burden alone.

While the specific theories articulated by the *Sindell* and *Summers* courts are inapplicable to asbestos litigation, the philosophical approaches underlying those decisions can lead to a solution in the asbestos arena as well. In endorsing the application of market share liability, the *Sindell* court stated that “[t]he response of the 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.”<sup>98</sup> The *Sindell* court opted for the latter approach, and courts hearing asbestos litigation should be equally willing to fashion new remedies. Asbestos plaintiffs are often faced with fact patterns by which they would be unable to recover under the traditional principles of tort law. As was the case in *Summer* and *Sindell*, if the courts “adhere rigidly to prior doctrine” recovery would be barred and an injustice would result. Asbestos courts should follow the examples set by *Summers* and *Sindell* and adopt alternative approaches that would broaden the ability of such plaintiffs to recover without jeopardizing the fairness in its application to the defendants. The adoption of market share liability and alternative liability are indicative of the fact that such solutions can be crafted.

The difficulty in designing a new theory of liability is not to be understated. The competing fairness interests of plaintiffs and defendants would appear on the surface to be irreconcilable. On the one hand, there is a plaintiff who was injured as a result of industry-wide negligence and is left with enormous physical, emotional and financial suffering. Forcing such a plaintiff to shoulder that burden alone seems entirely unacceptable. On the other hand, the imposition of liability on random defendants, none of which were identified as having supplied any products, which caused plaintiff's harm, would seem equally unjust. The appropriate approach utilizes a balance of plaintiff's and defendant's interests resulting in a system that will advance the interest of justice without

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<sup>98</sup> *Sindell v. Abbott Labs.*, 607 P.2d 924, 936 (Cal. 1980).

compromising the interest of fairness. The appropriate test should be: (1) considerable exposure to an asbestos product; (2) naming a defendant who marketed the product; (3) likelihood that the plaintiff's employer used the product; and (4) that the defendant negligently produced and manufactured the asbestos product.

A system that is fair to both plaintiffs and defendants will consist of two components: (1) a modification of causation requirements and (2) a limitation of the potential for recovery. To satisfy proof of causation under this theory, a plaintiff would have to meet four requirements.

#### A. *Causation*

In order to establish a satisfactory causal link between the actions of the defendant and the harm to the plaintiff, four requirements must be met. First, the plaintiff must prove that he had considerable exposure to a specific kind of asbestos product or products.<sup>99</sup> While studies have demonstrated that even short-term exposure to asbestos can cause lung disease,<sup>100</sup> it is clear that the danger posed by asbestos is proportionate to the length of the exposure.<sup>101</sup> As a result, the longer the exposure, the greater the chance that it caused the plaintiff's injuries. By proving considerable exposure to the asbestos product, the plaintiff will have demonstrated a substantial likelihood that the asbestos product was the cause in fact of the harm. The satisfaction of this requirement will serve to ensure that a causal link between the asbestos product or products and plaintiff's injuries is likely to exist.

Second, plaintiff must prove that the named defendant marketed the specific kind of product or products alleged to have caused the harm during the time period in which the plaintiff was exposed to them. Satisfaction of this requirement will indicate that the defendant is responsible for injuries such

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<sup>99</sup> As explained *supra* note 63, there can be no bright line rule as to what would constitute considerable exposure because of the numerous factors to be considered. The determination would have to be made on a case-by-case basis.

<sup>100</sup> See GEORGE A. PETERS & BARBARA J. PETERS, 1 SOURCEBOOK ON ASBESTOS DISEASE: MEDICAL, LEGAL AND ENGINEERING ASPECTS B19 (1980).

<sup>101</sup> It is beyond question that the risk of asbestos-caused disease is proportionate to the exposure. See Susan L. Barna, *Abandoning Ship: Government Liability for Shipyard Asbestos Exposures*, 67 N.Y.U. L. REV. 1034, 1041 (1992) (noting that "[a]sbestosis is 'dose-related' in that the incidence of disease is directly related to the duration and intensity of exposure") (citations omitted).

as those from which the plaintiff suffers. If the defendant marketed the same products that caused the harm to the plaintiff, it can be reasonably inferred that the products resulted in injuries to others as well.

Third, the plaintiff must prove that, considering the market in which defendant's products were sold, it is likely that those products were used by his employer.<sup>102</sup> Although this theory advocates a modified form of causation in which the plaintiff need not prove that the defendant actually caused the harm, this should not be construed to mean that the plaintiff need not prove any causation at all. This element will serve to ensure a strong possibility that the defendant was in fact responsible for the plaintiff's harm.

Finally, the plaintiff must prove that the defendant was negligent in its production and marketing of the alleged asbestos products. Despite the plaintiff's weakened burden of causation, this foundational element of any action in tort cannot be diluted. Regardless of how strong the causal link may be, if the defendant cannot be shown to have acted negligently then the plaintiff will be without an actionable claim.

A plaintiff who succeeds in satisfying the four elements of causation under this theory will have accomplished three feats. First, he will have succeeded in proving that his injuries were the result of exposure to asbestos. Second, he will have shown that by negligently marketing the kind of products that caused his injury, the defendant is responsible for causing the kinds of injuries from which he suffers. Finally, the plaintiff will have established a significant likelihood that the defendant was in fact responsible for his specific injuries. This will serve to demonstrate that the plaintiff was injured as the result of the negligent conduct of another party and that the defendant engaged in the type of negligent conduct that caused the harm.

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<sup>102</sup> The purpose of this requirement is to preclude inclusion of random manufacturers of such products. For example, a company that only sold the products in California would likely fall outside of this requirement for a New York based plaintiff since it is highly unlikely that those products were actually used by the New York employer.



## B. *Damages*

Considering that traditional causation requirements have been relaxed under this approach, the damages to be awarded must follow suit. As a matter of public policy as well as from a purely practical standpoint, the most crucial concern is that a plaintiff's medical expenses be removed from his list of worries. Where a financial burden is created as the result of the negligent actions of another, the victim should not be made to shoulder that burden alone. Under this approach, a plaintiff who satisfies the causation elements will be entitled to a recovery of all medical expenses associated with his asbestos-related illnesses. However, considering the failure to establish a definitive causal link between the plaintiff and the defendant, it would be unfair to allow recovery of punitive damages or pain and suffering. As a result, the financial burden of the victim is transferred to a guilty party<sup>103</sup> but that party will not be forced to pay any more than is absolutely necessary to remedy the harm suffered by the plaintiff. Under this scheme, the possibility of contributory negligence on the part of the plaintiff need not be considered. Even if the plaintiff engaged in risky behavior such as smoking or other potentially cancer-causing activities, the limited nature of the damages ensures that he will not be recovering funds to which he is not entitled. That is, if he were seeking to be fully compensated then fairness would dictate that the award be reduced to reflect his level of culpability. However, since the award has already been drastically reduced, it is safe to assume that any adjustment that would have been necessary to reflect his contributory negligence has already been made.

While the recovery of medical expenses alone may be ideal, from a purely practical standpoint, any system in which attorney's fees are not imposed on the defendant company is one that will fail the test of reality. Most asbestos cases are tried by attorneys on a contingency fee basis,<sup>104</sup> and considering

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<sup>103</sup> A fundamental rationale for this approach is the understanding that regardless of whether the named defendant actually caused the harm to *this* plaintiff, it still acted negligently and caused similar injuries. The defendant is not free of guilt in any sense of the term.

<sup>104</sup> In fact studies have shown that up to one half of asbestos settlements have gone towards the payment of attorney's fees. See Genine C. Swanzy, *Using Class Actions to Litigate Mass Torts: Is there Justice for the Individual?*, 11 GEO. J. LEGAL ETHICS 421, 429 (1998) ("Of every dollar spent in asbestos litigation, clients receive thirty-nine percent, while attorneys receive between one-third and one-half of the

the limited nature of the awards under this approach, it would not be profitable for a plaintiff's attorney to take such a case on a contingency basis. As a result, few plaintiffs would succeed in obtaining legal counsel, and the underlying motivation for this approach would not be realized since the plaintiffs in question would continue to go uncompensated. Including attorney's fees in the recovery provides a financial incentive for attorneys to represent these plaintiffs and at the same time would likely result in a quicker resolution of the case by the named companies.

One element conspicuously absent from this approach is an analysis of the market share owned by the named defendant. Under this theory, once the causation elements are satisfied, the judgment can be obtained in its entirety from the named defendant. The rationale behind this theory is that considering the limited nature of the awards, requiring plaintiff to conduct exhaustive research as to the components of the market at the time of the exposure would be imprudent. To compensate for this efficiency, the named defendant company may implead any other company whom it can prove satisfies the four criteria listed above. Once that is accomplished, the damages awarded will be apportioned based on the share of the market that the companies had in respect to each other.<sup>105</sup> Additionally, unlike market share liability, the ability of a plaintiff to name minor defendants will not preclude application of this theory. Even if a plaintiff can identify a company as having supplied asbestos products, if the exposure to that company's product was not sufficient to warrant a tort action, plaintiff can still proceed against other defendants under this approach.

On the surface, the theory proposed by this Note may seem vulnerable to the criticism that it will impose unacceptably high legal bills on the defendant corporations. That is, when numerous companies may have been the culprit but only one of them is named in the suit, the named defendant will be compelled to expend additional financial and legal resources to research and ultimately implead the other

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awards in attorney's fees.") (citations omitted).

<sup>105</sup> This is unlike market share liability in that the companies are judged in comparison to each other and not in comparison to the entire market. If company A sold twice as much of the named product as company B, liability will be apportioned on a ratio of 2:1 regardless of the total share of the market that was owned between both of them. The public policy considerations as well as the nature and size of the awards allow for this leeway in apportioning the damages.

negligent parties. In truth, however, the economic realities of the nature of the damages ensure that this scenario will never arise.

Considering the limited nature of the total damages available to the plaintiff, a defendant corporation would have no incentive to invest considerable capital in trying to mitigate the amount that they are forced to pay. Where the negligence of another corporation is easily proved, it would then be efficient to implead them. However, if the implication of other defendants would require the named defendant to invest considerable amounts in legal fees, a simple cost-benefit analysis would preclude their doing so.

## CONCLUSION

A system must be adopted in which plaintiffs who are unable to identify the asbestos manufacturer responsible for their injuries can still obtain a basic recovery. The appropriate approach employs a four-part causation test to establish a considerable causal link between the negligent acts of a particular defendant and the injuries suffered by the plaintiff. Once the elements are satisfied, plaintiff would be entitled to medical expenses and attorney's fees. The implementation of this approach would be fair to all parties involved. Plaintiffs' medical needs would be taken care of and their access to counsel would not be compromised. Negligent defendants would be forced to shoulder the financial burdens created as a result of their tortious conduct, without being subjected to the more costly awards often granted when causation is fully proven.<sup>106</sup> If followed, this theory will bolster the interest of justice by ensuring that the financial burden created by negligent conduct is shouldered by those responsible for it, rather than by its victims. At the same time, the interest of fairness would not be compromised, since the limited nature of

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<sup>106</sup> Jury awards to asbestos plaintiffs have run in the tens, if not hundreds of millions of dollars. See, e.g., *A Big Win in the Cradle of Asbestos Lawsuits*, NAT'L L. J. Feb. 4, 2002, at C4. (discussing a Texas jury award of \$130 million); Margaret Cronin Fisk, *A Fight Over Who Knew What, When, About Asbestos*, NAT'L L.J. Feb. 19, 2001, at C4. (\$52 million). A story that appeared in the *Washington Post* more than ten years ago, put the average jury award in New York asbestos cases at \$2 million. Sharon Walsh, *2,000 Asbestos Cases Settled in New York; Victims, Families to Get \$300 Million From Nearly 100 Firms*, WASH. POST, Mar. 17, 1992, at C1.

the awards ensures that they are proportionate to the case against the defendant.

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