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Causation and Apportionment Issues in Opioid Litigation

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RICHARD C. AUSNESS*

I. INTRODUCTION

In November 2019, an Oklahoma trial court judge, sitting without a jury, ruled that Johnson & Johnson and its subsidiary Janssen Pharmaceuticals were guilty of creating a public nuisance because their production and marketing of prescription opioid painkillers significantly contributed to the current opioid epidemic in the State of Oklahoma. The judge also held that Johnson & Johnson must contribute $465 million to pay for the State's program to abate this nuisance.[1] Although the case has been appealed, it is significant because it was the first government sponsored opioid case to actually go to trial. Although there are many issues raised by the *Johnson & Johnson* case,[2] and by other opioid cases yet to be tried, this Article will focus on only one: namely, whether it is appropriate to hold one defendant liable for the cost of correcting a social problem caused by the wrongful conduct of many other actors. The Article concludes that some form of market share liability is a better approach than traditional joint and several liability for resolving certain kinds of mass tort cases.

Part II examines the origins of the current opioid epidemic and the litigation that has resulted from it. Part II identifies the various approaches

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[1] The State originally sought $17 billion over 30 years to pay for cost of a 30-year abatement program. Colin Dwyer & Jackie Fortier, *Oklahoma Judge Shaves $107 Million Off Opioid Decision Against Johnson & Johnson*, NPR (Nov. 21, 2019, 4:00 PM) https://www.kcur.org/2019-11-21/oklahoma-judge-shaves-107-million-off-opioid-decision-against-johnson-johnson [https://perma.cc/WK2N-2EMZ]. The $465 million award only covers the first year of the abatement program. *Id.* Therefore, Johnson & Johnson's ultimate liability may be much greater if it has to pay for the entire multi-year abatement program. *Id.*

[2] The case was officially styled *State* ex rel. *Hunter v. Purdue Pharma L.P. See generally* No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486 (Okla. Dis. Ct. Aug. 26, 2019). However, Johnson & Johnson and its subsidiary, Janssen Pharmaceuticals, were the only defendants left by the time the case went to trial. Accordingly, it will be referred to as the *Johnson & Johnson* case. *See infra* Part II.

to the issue of cause-in-fact, including the traditional "but for" test, the Second Restatement's substantial factor test and the Third Restatement's necessary element of a sufficient set (NESS) test. It concludes that the court could have found Johnson & Johnson to be a cause in fact of the public nuisance under the second and third tests, but not the first test. Part III is concerned with specific causation or product identification. Although this is not likely to be an issue in opioid litigation, it will be considered because one approach to the specific causation, market share liability, will play an important role in the proposal relating to apportionment of damages.

Proximate cause is briefly discussed in Part IV. The article observes that while an opioid epidemic was certainly foreseeable by the year 2000, opioid producers continued to promote opioids and distribute excess amounts of opioid painkiller medicine for another two decades,[3] a survey of handgun and other cases suggests that opioid producers might be able to claim that the actions of other actors,[4] such as prescribing physicians, illegal drug dealers and patient abuse might break the chain of causation. Part V examines joint and several liability and apportionment of damages. It finds that defendants whose concurrent independent acts result in injury to a plaintiff are often held jointly and severally liable. Finally, Part VI concludes that joint and several liability is inappropriate in mass tort cases and argues that courts should apply some form of market share liability instead.

II. *JOHNSON & JOHNSON*

The current opioid epidemic is undoubtedly one of the greatest public health disasters of the twenty-first century.[5] Although illegal street drugs, like heroin and fentanyl, contributed to the problem, prescription opioids were the principal source of widespread addiction in the country during the first two decades of the twenty-first century.[6]

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[3] *See infra* Part IV; Paul D. Frederickson, *Criminal Marketing: Corporate and Managerial Liability in the Prescription Drug Industry*, 22 MIDWEST L.J. 115, 132–133 (2008). The term "opioid producers" and "opioid sellers" includes manufacturers, distributors and retail pharmacies.

[4] *See, e.g.*, Ashley Cty. v. Pfizer, Inc., 552 F.3d 659 (8th Cir. 2009); People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192 (App. Div. 2003).

[5] *See* Ameet Sarpatwari et al., *The Opioid Epidemic: Fixing a Broken Pharmaceutical Market*, 11 HARV. L. & POL'Y REV. 463, 464 (2017).

[6] It should also be mentioned that prescription opioids are often a gateway to the use of other narcotic substances. Ty McCoy, Note, *The Need for Higher Punishment: Lock Up the Real Drug Dealers*, 54 GONZ. L. REV. 47, 56 (2018).

It all began with OxyContin. OxyContin, a prescription pain reliever whose active ingredient is oxycodone hydrochloride,[7] was developed by Purdue Pharma and first marketed in 1996.[8] It was touted by Purdue as being superior to other opioids because it contained a time-release mechanism which allowed a dose to be released over a twelve-hour period of time instead of the more common four to six hour period.[9]

Prior to OxyContin's entry into the market, the accepted practice among the medical profession was to avoid using opioids to treat chronic pain and instead limit its use to the treatment of short-term acute pain.[10] However, in the 1980s, a growing number of pain specialists claimed that chronic pain was being undertreated.[11] Relying on this newfound interest in pain treatment, Purdue urged doctors to prescribe OxyContin to treat non-malignant chronic pain.[12] In order to change existing prescribing practices, Purdue embarked on a well-funded and sophisticated marketing campaign to persuade doctors that opioids were effective for treating moderate chronic pain and that the risk of addiction was not significant.[13]

Purdue communicated this message to health care providers by direct advertising and during office visits by their sales representatives.[14] The company also funded seemingly independent key opinion leaders and organizations who echoed these assurances in medical and scientific journals and at continuing medical education programs.[15] The company also encouraged physicians to prescribe OxyContin by treating them to

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[7] Frederickson, *supra* note 3, at 132.

[8] SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC 124 (2015).

[9] Joseph B. Prater, *West Virginia's Painful Settlement: How the OxyContin Phenomenon and Unconventional Theories of Tort Liability May Make Pharmaceutical Companies Liable for Black Markets*, 100 NW. U.L. REV. 1409, 1413 (2006).

[10] QUINONES, *supra* note 8, at 80.

[11] Sarpatwari et al., *supra* note 5, at 465–66.

[12] QUINONES, *supra* note 8, at 124–27.

[13] Lars Noah, *Federal Regulatory Responses to the Prescription Opioid Crisis: Too Little, Too Late?*, 2019 UTAH L. REV. 757, 766 (2019).

[14] Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 U. KAN. L. REV. 1061, 1065 (2019).

[15] Nino C. Monea, *Cities v. Big Pharma: Municipal Affirmative Litigation and the Opioid Crisis*, 50 URB. LAW. 87, 103–04 (2019); Taylor Giancarlo, *Pharmaceutical Advertising Disclosures: Is Less Really More?*, 22 QUINNIPIAC HEALTH L.J. 449, 467–68 (2019).

all-expense-paid conferences at exotic resorts and sponsoring free pain-related educational programs.[16]

This marketing campaign was very successful.[17] Within a few years of its introduction into the market, OxyContin became the nation's most highly prescribed Schedule II prescription drug.[18] Other opioid manufacturers quickly copied Purdue's marketing practices. However, as the addiction problem increased, victims began to bring personal injury actions against Purdue and other opioid producers. At first, these lawsuits were unsuccessful, although the cost of defending against them was significant.[19] However, the tide began to change in 2014 when hundreds of cities, counties and states filed lawsuits based on public nuisance and other liability theories.[20] At the present time, opioid litigation is proceeding along three different, but related tracks. The first consists of lawsuits brought by the states in state courts; the second includes the thousands of civil actions brought by local governments which have been transferred to a single district court under the Multidistrict Litigation (MDL) statute; while the third track involves a case brought by Purdue Pharma in a federal bankruptcy court.[21]

The *Johnson & Johnson* case was the first state case to actually go to trial.[22] In that case, Thad Balkman, a state court trial judge sitting without a jury, initially awarded the state $572 million, which was later reduced to $465 million, against Johnson & Johnson and its subsidiary, Janssen.[23] The State alleged that the fraudulent marketing practices of the defendant opioid producers created a public nuisance in Oklahoma. Originally, the State also

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[16] Ashley Duckworth, Note, *Fighting America's Best-Selling Product: An Analysis of and Solution to the Opioid Crisis*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 237, 257 (2019).

[17] Sarpatwari et al., *supra* note 5, at 467.

[18] Dianne E. Hoffmann, *Treating Pain v. Reducing Drug Diversion and Abuse: Recalibrating the Balance in Our Drug Control Laws and Policies*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 231, 273 (2008).

[19] *See generally* Richard C. Ausness, *The Role of Litigation in the Fight Against Prescription Drug Abuse*, 116 W. VA. L. REV. 1117, 1122–37 (2014); Frederickson, *supra* note 3, at 134 (noting that by the end of 2004, Purdue had spent $250 million defending against lawsuits by injured consumers).

[20] Richard C. Ausness, *The Current State of Opioid Litigation*, 70 S.C.L. REV. 565, 566–67 (2019).

[21] Richard Ausness, *The Future of Opioid Litigation*, KY. BENCH & BAR, Mar./Apr. 2020, at 20, 22.

[22] WEN S. SHEN, CONG. RESEARCH SERV., LSB10365, OVERVIEW OF THE OPIOID LITIGATION AND RELATED SETTLEMENTS AND SETTLEMENT PROPOSALS 4 (2019).

[23] Duckworth, *supra* note 16, at 261–62.

sued Purdue,[24] and Teva,[25] but they settled prior to trial, leaving Johnson & Johnson to face the music alone.

The trial took 33 days and the parties called 42 witnesses, presented 874 exhibits as well as an additional 225 court exhibits.[26] The lawyers for the State argued that Johnson & Johnson contributed to the opioid epidemic in Oklahoma in two ways. First, Johnson & Johnson and its subsidiary, Janssen Pharmaceuticals, manufactured and sold Duragesic, a transdermal fentanyl patch, as well as Nucynta and Nucynta ER, whose active ingredient was an opioid substance tapentadol.[27] Second, Johnson & Johnson, though its subsidiaries Tasmanian Alkaloids and Noramco, cultivated opium poppy plants, processed them to manufacture narcotic raw materials, and imported them into the United States where they were further processed into active pharmaceutical ingredients (APIs) and sold to other opioid manufacturers.[28] According to the State, Johnson & Johnson anticipated the popularity of OxyContin and other opioids and increased its production of APIs in order to meet the expected demand.[29] This conduct, though not illegal in itself, contributed to the public nuisance that resulted from the improper use of prescription opioids.[30]

The court also charged Johnson & Johnson with engaging in a wide array of fraudulent marketing practices. These included using key opinion leaders (KOLs) to influence other doctors, persuading doctors that failure to treat chronic pain was harming their patients, promoting the concept of

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[24] *See* Martha Bebinger, *Purdue Pharma Agrees To $270 Million Opioid Settlement With Oklahoma*, WBUR (Mar. 26, 2019), https://www.wbur.org/npr/706848006/purdue-pharma-agrees-to-270-million-opioid-settlement-with-oklahoma [https://perma.cc/S6T8-EBY3]. Purdue and its owners, the Sackler family, agreed to pay $270 million to fund addiction research and treatment in Oklahoma and pay legal fees. *Id.* Additionally, $177.5 million was to fund a new National Center for Addiction Studies and Treatment at Oklahoma State University, $20 million for medicines for the treatment of patients at the facility, $12.5 million for Oklahoma counties and cities, as well as $60 million for legal fees. *Id.*

[25] Teva agreed to an $85 million settlement with the State of Oklahoma on June 24, 2019. Wayne Drash, *Oklahoma Judge Approves $85 Million Settlement with Opioid Drugmaker Teva*, CNN (June 24, 2019, 5:17 PM), https://www.cnn.com/2019/06/24/health/teva-settlement-oklahoma/index.html [https://perma.cc/9M42-H4GU].

[26] State *ex rel.* Hunter v. Purdue Pharma, L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *2 (Okla. Dist. Ct. Aug. 26, 2019).

[27] *Id.* at *5–6.

[28] *Id.* at *6–7.

[29] *Id.* at *10–11.

[30] *Id.* at *38.

pseudoaddiction and directing its sales representatives to claim that opioids were effective and nonaddictive.[31] However, while Johnson & Johnson did aggressively promote Duragesic and Nucynta, the practices described above seem to be largely associated with Purdue and others than with Johnson & Johnson.

After finding Johnson & Johnson guilty of creating a public nuisance, the court ordered the company to pay the full cost of abating the nuisance.[32] Judge Balkman also ruled that Johnson & Johnson was not entitled to any credit for the money Purdue and Teva had paid to the State in their pretrial settlement because it had not alleged that they were joint tortfeasors.[33] In addition, the court adopted the State's "Abatement Plan" (the Plan).[34] The Plan contained a variety of provisions to prevent opioid addiction and to provide treatment and recovery services for opioid addicts.[35] Although the Plan was multi-year in nature, the court concluded that the State did not provide sufficient evidence of the time or costs that would be required to under the Plan to abate the nuisance and, therefore, limited its ward to the costs of implementing the Plan for one year.[36]

The trial court's decision in *Johnson & Johnson* raised a number of questions, some of which may be addressed by a higher court on appeal. First, did Johnson & Johnson's conduct create a public nuisance? Second, did the illegal actions of distributors, doctors, pharmacies, drug dealers and individual abusers operate to break the chain of causation and thereby constitute superseding causes? Third, does imposing liability on drug companies for expressions of opinion about the safety and efficacy of their products interfere with their right of free speech? Fourth, is there any difference between a damage award and an abatement order? Finally, can the trial judge direct that the award be earmarked for specific abatement programs, or must the money be paid into the state treasury?

These are all interesting questions that will undoubtedly arise in other cases as well. In addition, there are even more issues that were not raised in the *Johnson & Johnson* case that are likely to surface in the MDL proceeding or in other forms of opioid litigation. These include fraud, Racketeer Influenced and Corrupt Organizations Act (RICO) violations, conspiracy, unjust enrichment, negligent marketing, as well as defenses such as lack of

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[31] *Id.* at *12–15.

[32] *Id.* at *44.

[33] *Id.* at *61–62.

[34] *See id.* at *44, *61–63.

[35] *See id.* at *47–61.

[36] *Id.* at *61.

duty, remoteness, federal preemption, running of the statute of limitations, the economic loss doctrine and the municipal cost recovery rule.[37]

In any event, this Article is concerned with another issue: namely, should one pharmaceutical company be held liable for the entire damage to a government entity when it controlled only a relatively small portion of the prescription drug market? This will require us to discuss the various tests for cause-in-fact, defendant identification, joint and several liability and apportionment of damages.

III. CAUSE-IN-FACT.

The purpose of the cause-in-fact requirement is to ensure that a person is not subjected to liability for harm to another unless there is some reasonably significant connection between the defendant's wrongful conduct and the plaintiff's harm.[38] As one commentator declared, "[t]here is no moral or social policy justifying the imposition of liability where wrongful conduct did not cause the harm or injury."[39] Perhaps for this reason, the plaintiff in most cases has the burden of proving this causal link by a preponderance of the evidence.[40] Cause-in-fact should be distinguished from proximate or legal cause, although the two concepts are often conflated. Cause-in-fact is concerned with the physical relationship between the defendant's conduct and the plaintiff's harm, while legal cause presupposes the existence of cause-in-fact and instead focuses on whether considerations of fairness, pragmatic judgment or social policy support the imposition of liability on the defendant.[41]

This portion of the Article will examine various tests for cause-in-fact, including the but for test, the substantial factor test and the Third Restatement's NESS test. We will conclude that the majority but for test works relatively well in one-cause cases, but it may be too narrow in multiple cause situations. The other tests work better in these latter scenarios, but they are far from perfect.

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[37] *See generally* Ausness, *supra* note 20.

[38] David G. Owen, *The Five Elements of Negligence*, 35 HOFSTRA L. REV. 1671, 1680 (2007).

[39] Tory A. Weigand, *Tort Law—The Wrongful Demise of But For Causation*, 41 W. NEW ENG. L. REV. 75, 80 (2019).

[40] David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1773–74 (1997). *But see* Haft v. Lone Palm Hotel, 478 P.2d 465, 467 (Cal. 1970) (shifting the burden of proof as to causation when the plaintiff showed that the defendant violated a safety statute).

[41] Weigand, *supra* note 39, at 77–78.

A. The But For Test.

The but for or *sine qua non* test is followed in the majority of states, particularly when only one cause is involved.[42] Under this approach, the plaintiff must show that his or her injury would not have occurred had it not been for some action by the defendant.[43] Scholars have pointed out that the test is counterfactual because it determines whether the defendant's conduct caused the plaintiff's harm by asking whether the plaintiff's harm would have occurred absent the defendant's alleged conduct.[44] It should be noted that the but for rule, is primarily a rule of exclusion—that is, it is invoked to prove the absence of a causal connection between the defendant's conduct and the plaintiff's harm.[45]

Prosser's venerable hornbook on the law of torts illustrates a number of cases involving the but for rule in action.[46] Thus, one court held that a defendant is not liable for failing to have a lifeboat available when a crewmember sinks without a trace immediately after falling overboard.[47] Likewise, a hotel will not be liable for failing to install a fire escape if the plaintiff dies in his bed from smoke inhalation before the fire reaches him.[48] Another court concluded that the defendant's failure to install crossing signals a railroad crossing did not cause the plaintiff's death when his automobile struck the train's sixty-eighth car.[49] Finally, a court refused to find that the presence of a railroad embankment caused the plaintiff's land to be flooded when the cloudburst that occurred would have flooded it anyway.[50]

Government plaintiffs would almost certainly be unable to prove individual drug companies were a cause-in-fact of the opioid epidemic if the but for test was used. Numerous parties contributed to the creation of the opioid problem, including manufacturers, distributors, retail sellers,

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[42] Owen, *supra* note 38, at 1681.

[43] Paul J. Zwier, "*Cause in Fact" in Tort Law—A Philosophical and Historical Examination*, 31 DEPAUL L. REV. 769, 777 (1982).

[44] DAN B. DOBBS, THE LAW OF TORTS 411 (2000); Kenneth S. Abraham, *Self-Proving Causation*, 99 VA. L. REV. 1811, 1814–15 (2013); Hillel J. Bavli, *Counterfactual Causation*, 51 ARIZ. ST. L.J. 879, 881 (2019).

[45] W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS 266 (5th ed. 1984).

[46] *Id.* at 265–67.

[47] Ford v. Trident Fisheries Co., 122 N.E. 389, 390 (Mass. 1919).

[48] Weeks v. McNulty, 48 S.W. 809, 809 (Tenn. 1898).

[49] Sullivan v. Boone, 286 N.W. 350, 350–52 (Minn. 1939).

[50] Balt. & Ohio R.R. Co. v. Sulphur Spring Indep. Sch. Dist., 96 Pa. 65, 65 (Pa. 1880).

overprescribing doctors and even purveyors of illegal street drugs. Consequently, the plaintiff will be unable to prove that the opioid epidemic would not have occurred if a particular defendant had acted more responsibly. It is interesting to observe that *Johnson & Johnson* raised the causation issue in a pretrial motion but failed to specifically rely on the but for test.[51] Instead, the company focused more on proximate cause rather than cause-in-fact.[52] Furthermore, in a written opinion at the conclusion of the trial, Judge Balkman failed to discuss the cause-in-fact at all other than to declare that he found "that the State has satisfied its burden of proof that the Defendants' actions were the cause-in-fact of its injuries."[53] Whatever test he had in mind, it was not the but for test.

B. The Substantial Factor Test.

Legal scholars agree that the but for test simply does not work in cases where there are multiple sufficient causes.[54] The celebrated *Twin Fires* case provides an excellent illustration of this problem.[55] In that case, the plaintiff's alleged that his property had been destroyed by a fire caused by a spark from the defendant's locomotive.[56] In response, the defendant maintained that its fire had merged with other fires in the area before reaching the plaintiff's property and, therefore, it was not responsible for the harm done to the plaintiff's property.[57]

The *Twin Fires* case exemplifies what is referred to as the "combined forces," "overdetermined" or "multiple sufficient causes" problem.[58] This occurs when two or more independent forces combine to cause an indivisible harm. If each factor would be sufficient by itself to cause the resulting harm, then neither would be regarded as a cause-in-fact under the but for test and

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[51] *See* Motion for Judgment of Defendants Johnson & Johnson and Janssen Pharmaceuticals Inc. and Brief in Support at 59–84, State *ex rel.* Hunter v. Purdue Pharma, L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486 (Okla. Dist. Ct. Aug. 26, 2019) [hereinafter Motion for Judgment of Defendants].

[52] *See id.*

[53] State *ex rel.* Hunter v. Purdue Pharma, L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *43 (Okla. Dist. Ct. Aug. 26, 2019).

[54] Bavli, *supra* note 44, at 882.

[55] *See* Anderson v. Minneapolis, St. P. & S. S. M. Ry. Co., 179 N.W. 45 (Minn. 1920) (modernly known as the *Twin Fires* case).

[56] *Id.* at 46.

[57] *Id.* at 47–49.

[58] Weigand, *supra* note 39, at 83.

the plaintiff would lose.[59] This result would be particularly unjust if both factors were the product of negligent conduct.[60]

In the *Twin Fires* case, the court held that the plaintiff could recover only if he was able to prove that the defendant's fire was a "material factor" in causing the harm to his property.[61] By that it meant that the defendant's fire alone would have been sufficient to damage the plaintiff's property even if it had not merged with the other fire or fires.[62] Thus, the *Twin Fires* court's material factors approach may be characterized as a modification of the traditional but for test rather than truly independent development. Nevertheless, it provided a doctrinal foundation for the First and Second Restatement's substantial factor test.

The term "substantial factor" made its first appearance in an article written by Professor Jeremiah Smith.[63] Although Professor Smith proposed the substantial factor criterion as an alternative to the foreseeability principle in connection with proximate cause, it was later adopted as an alternative to the but for test by the drafters of the First Restatement of Torts.[64] The substantial factor test was subsequently retained by the drafters of the Second Restatement of Torts as well.[65] The substantial factor test, as it appeared in the First and Second Restatements, was intended as a response to the but for test's failure to adequately deal with multiple sufficient cause situations as exemplified by the *Twin Fires* case.[66] In addition, it was also intended to exclude trivial causes from being the basis for liability.[67]

Section 431 of the Second Restatement provides that:

> The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm, and (b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.[68]

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[59] *Id.* at 83–84.

[60] *Id.* at 84.

[61] *Anderson*, 179 N.W. at 49.

[62] *Id.* at 46.

[63] Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 303, 309–11 (1912).

[64] Weigand, *supra* note 39, at 81–82.

[65] RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965).

[66] Weigand, *supra* note 39, at 84.

[67] *Id.*

[68] RESTATEMENT (SECOND) OF TORTS § 431 (AM. LAW INST. 1965).

To determine whether the defendant's action is a substantial factor, Section 433 states that a court should consider: (1) the number of other factors that contributed to produce the harm; (2) whether the actor's conduct continuously operated to cause the harm or merely created a harmless situation until acted upon by another party or force; and (3) how much time had lapsed between the defendant's action and the harm to the plaintiff.[69] Section 432(2) deals with the problem of concurrent causes.[70] It declares that "[i]f two forces are actively operating, one because of the actor's negligence, the other not because of any misconduct on his part, and each of itself is sufficient to bring about the harm, the actor's negligence may be found to be a substantial factor in bringing it about."[71]

Some courts have taken a more liberal view of what constitutes a substantial factor and not required a factor to be sufficient in order to be considered substantial. For example, in *People v. ConAgra Grocery Products Co.*,[72] the State of California brought a public nuisance action against two lead-based paint manufacturers and a retail seller of these products.[73] The trial court ordered the defendants to pay $1.15 billion into a fund to pay for the State's lead-based paint abatement program.[74] On appeal, the defendants argued that the State had failed to prove that their promotion of lead-based paint was a substantial factor in causing the alleged nuisance.[75] In response, the court observed that "[t]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical."[76]

The court then described how the defendants' promotional activities played a significant role in creating the nuisance in question.[77] First, all three defendants participated in the Lead Industries Association's (LIA) "Forest Products" campaign, which began in 1934.[78] This marketing scheme

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[69] RESTATEMENT (SECOND) OF TORTS § 433 (AM. LAW INST. 1965); *see also* Weigand, *supra* note 39, at 86.

[70] 2 DAVID G. OWEN & MARY J. DAVIS, OWEN & DAVIS ON PRODUCTS LIABILITY § 11:4 at 196 (4th ed. 2014); *see also* RESTATEMENT (SECOND) OF TORTS § 432(2) (AM. LAW INST. 1965).

[71] RESTATEMENT (SECOND) OF TORTS § 432(2) (AM. LAW INST. 1965).

[72] 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

[73] *Id.* at 514.

[74] *Id.*

[75] *Id.* at 543.

[76] *Id.* (quoting Bockrath v. Aldrich Chem. Co., 980 P.2d 398, 403 (Cal. 1999)).

[77] *Id.*

[78] *Id.*

successfully induced lumber companies to recommend the use of lead-based paint in residential housing.[79] In addition, paint manufacturers and retail sellers instructed consumers to use only lead-based paints on residential interiors.[80] The court concluded that "at least some of those who were the targets of these recommendations heeded them."[81] The court apparently believed that this was sufficient to satisfy the causation requirement and did not follow the *City of St. Louis v. Benjamin Moore & Co.* court's holding that the plaintiff identify defendants and products more specifically.[82]

Although the substantial factor test is arguably superior to the but for test, at least where multiple causes are involved, it is far from perfect. One recurring criticism is that its inherent ambiguity leads to inconsistent results.[83] Other commentators complain that phrases such as "substantial factor" are nothing more than "labels applied to an unexplained conclusion."[84] As Professor David Fischer has pointed out, the substantial factor "test offers no real guidance for determining when a factor is substantial or even a 'factor.'"[85] Nevertheless, some states have extended it to multiple-cause cases in general, while others have scrapped the but for test entirely and replaced it with the substantial factor test as an all-purpose test for causation.[86]

Viewed solely as a test for cause-in-fact, the Restatement's version of the substantial factor approach would provide little help to government plaintiffs in opioid cases because it would be virtually impossible to prove that any one defendant had sufficient market share for a jury to conclude that the current opioid epidemic would not have occurred if a particular defendant had engaged in fraudulent promotion tactics.[87] On the other hand, a plaintiff may be able to establish cause-in-fact if a court dispenses with the Restatement's Section 432(2) requirement in and instead adopts a more liberal definition of "substantial" by extending it to multiple causes which are not individually sufficient to cause the plaintiff's harm.

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[79] *Id.* at 544.

[80] *Id.* at 520.

[81] *Id.* at 544.

[82] *See generally* City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007).

[83] Joseph Sanders et al., *The Insubstantiality of the "Substantial Factor" Test for Causation*, 73 MO. L. REV. 399, 430 (2008).

[84] Richard W. Wright & Ingeborg Puppe, *Causation: Linguistic, Philosophical, Legal and Economic*, 91 CHI.-KENT L. REV. 461, 480 (2016).

[85] David A. Fischer, *Insufficient Causes*, 94 KY. L.J. 277, 280–81 (2005–06).

[86] 2 OWEN & DAVIS, *supra* note 70, § 11:2, at 185.

[87] RESTATEMENT (SECOND) OF TORTS § 432(2) (AM. LAW INST. 1965).

C. The Third Restatement's Necessary Element of a Sufficient Set (NESS) Test.

Dissatisfaction with the analytical weakness of the substantial factor test led to the development and adoption of the NESS test.[88] The NESS test was first formulated by H.L.A. Hart and Tony Honore,[89] and was subsequently popularized by Professor Richard Wright.[90] Later, the Third Restatement of Torts adopted Professor Wright's version of the NESS test, a causal set approach, which states in mathematical terms that a condition contributes to some consequence "if and only if it was necessary for the sufficiency of a set of existing antecedent conditions that was sufficient for the occurrence of the consequence."[91] Simply put, "an unnecessary and insufficient force or condition is a cause of injury if it joins with other forces or conditions to contribute to an injury."[92] This approach is potentially useful when there are multiple causes and none is sufficient by itself to cause the plaintiff's injury. Three famous cases illustrate how the NESS test might work. The first is *Corey v. Havener*,[93] the second is *Warren v. Parkhurst*,[94] and the third is *Northup v. Eakes*.[95]

In *Corey v. Havener*, two motorcyclists passed the plaintiff's horse-drawn wagon at a high rate of speed.[96] The noise frightened the plaintiff's horse and cause his wagon to overturn.[97] Although both defendants were negligent, they were not acting in concert.[98] Nevertheless, the Massachusetts Supreme Judicial Court held that since it was impossible to determine what proportion of the plaintiff's injury was caused by each defendant, each defendant should be liable for the entire injury since each

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[88] Fischer, *supra* note 85, at 277.

[89] *See* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 104–08, 116–19, 225–29 (2d ed. 1985).

[90] Richard W. Wright, *Causation in Tort Law*, 73 CALIF. L. REV. 1735, 1788–1801 (1985).

[91] 1 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. c (AM. LAW INST. 2010); Richard W. Wright, *Once More Into the Bramble Bush: Duty, Causal Contribution, and the Extent of Legal Responsibility*, 54 VAND. L. REV. 1071, 1102–03 (2001).

[92] Fischer, *supra* note 85, at 284.

[93] *See generally* Corey v. Havener, 65 N.E. 69 (Mass. 1902).

[94] *See generally* Warren v. Parkhurst, 92 N.Y.S. 725 (Sup. Ct. 1904).

[95] *See generally* Northup v. Eakes, 178 P. 266 (Okla. 1918).

[96] *Corey*, 65 N.E. at 69.

[97] *Id.*

[98] *Id.*

one contributed to it.[99] Under the Third Restatement's analysis, each defendant's conduct, even if they were not independently sufficient conditions, were still NESS conditions as far as the defendant's injury was concerned.[100]

The *Warren v. Parkhurst* (*Warren*) case involved a claim by a riparian owner that twenty-six upstream mill owners had discharged sewage and other waste into the stream, causing a terrible stench which affected the enjoyment of the plaintiff's property.[101] The parties agreed that the actions of each defendant were not sufficient to cause the damage.[102] The court refused to award damages because it concluded that joint and several liability was not appropriate and, therefore, each defendant was only liable for the damage that he or she caused.[103] However, the court did conclude that the lower court could grant an injunction against the defendants requiring them to reduce their discharges.[104]

According to Professor Fischer:

> [E]ach defendant's discharge [would be] a NESS condition. . . . Each defendant's discharge was necessary for the sufficiency of a set of existing antecedent conditions which includes N-1 of the other defendants' discharges, and the sufficiency of that set was not preempted, but rather was reinforced, by the 26-N other defendants' discharges that were not included in the description of the sufficient set.[105]

The Restatement analysis is similar to that of *Warren*. Each defendant's discharge was arguably necessary for the sufficiency of a set of antecedent conditions and the sufficiency of the set was not affected by the other discharges that were not included in the sufficient set. In other words, there were no other conditions involved that would have prevented the defendants' discharges from destroying the plaintiff's barn.

Northup v. Eakes was another water pollution case.[106] The plaintiff in that case sued a number of oil and gas producers who allowed crude oil to

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[99] *Id.*

[100] Fischer, *supra* note 85, at 284.

[101] Warren v. Parkhurst, 92 N.Y.S. 725, 725 (Sup. Ct. 1904).

[102] *Id.* at 726.

[103] *Id.* at 728.

[104] *Id.*

[105] Fischer, *supra* note 85, at 283.

[106] Northup v. Eakes, 178 P. 266 (Okla. 1918).

flow into a nearby creek.[107] One day, the oil ignited and the resulting fire was carried by the wind and current onto the plaintiff's property where it burned down a barn and its contents.[108] After a certain amount of procedural skirmishing, the case went to trial and resulted in a judgment for the plaintiff.[109] This decision was affirmed on appeal.[110] The Oklahoma Supreme Court concluded that while each of the defendants acted independently, allowing their crude oil to flow into the stream combined to produce a single injury.[111] The court concluded that, under these circumstances, each defendant was responsible for the entire result even though his or her act alone might not have caused it.[112]

Applying the NESS test to the *Johnson & Johnson* case, it is possible that a court would find Johnson & Johnson's conduct to be a contributing cause to the opioid epidemic even though it was not a sufficient cause. As in *Warren* and *Northup*, Johnson & Johnson is one of many alleged wrongdoers. *Warren* and *Northup* make it clear that a particular defendant's conduct does not have to be a sufficient condition as long as it is part of a sufficient set. However, unlike, those cases, a great number of contributors were not defendants in the case even though they contributed to the harm. Do Johnson & Johnson's actions belong to a set that includes all opioid manufacturers, distributors and sellers? If so, can it be said that its conduct is necessary to the sufficiency of this set? Although Johnson & Johnson's contribution to the problem was not trivial, it may not have been significant enough to satisfy the NESS requirement either.

D. Causation Issues in Opioid Litigation.

Although Judge Balkman did not place much emphasis on cause-in-fact in *Johnson & Johnson*, it will almost certainly be an issue in other cases that eventually go to trial. How this issue is resolved will depend on which approach to cause-in-fact that a particular state takes. For example, because so many opioid manufacturers, distributors, retail sellers and prescribing physicians have contributed to the opioid addiction epidemic, it would be hard for a government plaintiff to prove causation under the traditional but for test since none of the defendants' conduct, standing alone, would qualify as a sufficient cause. In theory, proving causation should be easier for a

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[107] *Id.* at 267.

[108] *Id.*

[109] *Id.*

[110] *Id.* at 269.

[111] *Id.* at 268.

[112] *Id.*

plaintiff under the substantial factor test. However, the sufficient cause requirement embodied in the First and Second Restatement's version of the test would make it difficult for a government plaintiff to pin liability on any particular defendant. On the other hand, because Johnson & Johnson's contribution was not a sufficient cause of the opioid epidemic, a plaintiff would have an easier time proving causation if the state followed the more liberal version of the substantial factor test which does not require that the defendant's conduct be a sufficient cause of the plaintiff's injury. Although the NESS test is not widely followed, it offered the best test of causation from the plaintiff's point of view since the subset of manufacturers, distributors, retail sellers and prescribing physicians would satisfy the sufficient cause requirement. Under these circumstances, a defendant could only avoid being included would be to show that its contribution was "trivial."

IV. SPECIFIC CAUSATION.

The traditional but for test not only required the existence of a causal relationship between the plaintiff and the defendant, but it also required that the plaintiff identify the defendant and connect him or her with his injury.[113] The identification or specific causation requirement protected a potential defendant from having to defend a lawsuit in which the plaintiff was unable to prove that he or she caused the plaintiff's injury.[114] Thus, if there were other possible sources of the harm, the plaintiff would have to identify which one actually caused the injury.[115]

This issue arose in *City of St. Louis v. Benjamin Moore & Co.*,[116] a public nuisance claim against a number of paint manufacturers to recover for the costs of removing lead-based paint from private residences.[117] During discovery, the City identified the residences that had incurred costs in removing lead-based paint, but it was unable to identify any of the manufacturers whose paint had to be removed in any particular residence.[118] Consequently, the trial court ruled in favor of the defendants.[119] On appeal, the City urged the Missouri Supreme Court to adopt a theory whereby causation could be proved by showing that "the defendant substantially

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[113] Zwier, *supra* note 43, at 778.

[114] *Id.*

[115] Houston v. Republican Athletic Ass'n, 22 A.2d 715, 716 (Pa. 1941).

[116] 226 S.W.3d 110 (Mo. 2007).

[117] *Id.* at 113.

[118] *Id.*

[119] *Id.*

contributed to the public health hazard created by lead paint via evidence of 'community wide marketing and sales of lead paint.'"[120] However, the court held that specific causation could only be established by identifying the actual party who made or sold the product that caused harm to each particular plaintiff.[121]

However, some courts have taken a more relaxed view of the causation requirement. For example, in *City of Chicago v. Beretta U.S.A. Corp.*,[122] the court held that the City had shown that the defendant handgun dealers' marketing practices was a cause of the public nuisance set forth in the City's complaint.[123] The court observed that the complaint contained "detailed allegations regarding the dealer defendants' participation in bringing about the alleged nuisance, specifically their conduct leading up to and at the point of sale."[124] The court apparently felt that the City should not have the impossible burden of identifying which gun dealers' products caused which specific gun-related costs that the City incurred.

Over the years, the courts have recognized a number of exceptions to the traditional identity requirement, particularly when all of the potential defendants are at fault. These include concert of action, alternative liability rule, enterprise liability and market share liability. These concepts will only be considered briefly here since specific causation is not normally a significant problem in opioid litigation. However, the reasoning behind some of these doctrines may also be applied to joint liability and apportionment issues, which are important in opioid litigation, and they will be examined in that context below.

A. Acting in Concert.

Unlike the more modern theories, concert of action dates back to the early seventeenth century.[125] It imposes vicarious liability on defendants who participate in a common plan or design to commit a tortious act, actively take part in it or further it by cooperation or request, who lend aid or encouragement to the wrongdoers or who ratify or adopt the wrongdoers'

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[120] *Id.* at 115.

[121] *Id.* at 116.

[122] 821 N.E.2d 1099 (Ill. 2004).

[123] *Id.* at 1147.

[124] *Id.* at 1132.

[125] *See generally* Heydon's Case, 77 Eng. Rep. 1150 (K.B. 1613).

acts done for their benefit.[126] There does not have to be an express agreement among the defendants; a tacit understanding will suffice.[127] Moreover, since all of the defendants who act in concert are liable for the acts of other defendants, there is no specific causation requirement in such cases.

Concert of action does not seem to be relevant to opioid litigation. Although isolated instances of cooperation may have occurred among some defendants, there does not appear to be any evidence of an industry-wide conspiracy to defraud the government or the public such as occurred in the case of asbestos, lead-based paint and tobacco companies in the twentieth century.[128]

B. Alternative Liability.

The concept of alternative liability can be traced back to *Summers v. Tice*,[129] a 1948 landmark decision by the California Supreme Court.[130] In that case, two quail hunters simultaneously fired their shotguns in the direction of the plaintiff, another member of the hunting party.[131] Although a pellet from one of these shots wounded the plaintiff in the eye, it was impossible to determine which defendant fired the shot.[132] Under the prevailing special causation rules, the plaintiff would have not been able to recover against either defendant because he could not identify the one who negligently fired the injury-causing shot.[133] Nevertheless, the trial court, sitting without a jury, found in favor of the plaintiff.[134] On appeal, the California Supreme Court affirmed.[135] The court held that under the circumstances, the burden was on the defendants to provide exculpatory

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[126] David W. Robertson, *Causation in the* Restatement (Third) of Torts*: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1011 (2009) (quoting KEETON ET AL., *supra* note 45, § 46, at 323.).

[127] *See* Bierczynski v. Rogers, 239 A.2d 218, 221 (Del. 1968).

[128] *See generally* Ronald L. Motley & Anne McGuinnes Kearse, *Decades of Deception: Secrets of Lead, Asbestos, and Tobacco*, TRIAL MAG., Oct. 1999, at 46.

[129] 199 P.2d 1 (Cal. 1948).

[130] Paul Homer, Note, *Indivisible Injury Negligence and Nuisance Cases—Proving Causation Among Multiple-Source Polluters: A State-by-State Survey of the Law for New England, and a Proposal for a New Causation Framework*, 3 PIERCE L. REV. 75, 77 (2004).

[131] *Summers*, 199 P.2d at 2.

[132] *Id.*

[133] *Id.*

[134] *Id.*

[135] *Id.* at 5.

evidence.[136] Furthermore, in the absence of such evidence, the court ruled that the defendants would be held jointly and severally liable.[137] Although the *Summers* decision has not been widely followed, it was adopted by the Restatement of Torts.[138]

The *Summers* court did not provide much guidance about when the burden of proof with respect to identification should be shifted.[139] Moreover, because few courts have actually applied the alternative liability rule in subsequent cases,[140] its ultimate scope remains a mystery. However, as one student commentator has pointed out, there are circumstances in the case that suggest that its scope may be limited.[141] First, the defendants were guilty of similar negligent acts.[142] Second, each defendant owed the plaintiff a duty of care.[143] Third, the two causal factors—the shotgun pellets—were indistinguishable.[144] Fourth, and most important, all negligent parties were joined in the action, thereby eliminating the possibility that two innocent persons would be held liable for the actions of an unknown third party.[145] Finally, because there were only two negligent parties involved, the chance of either one of the defendants being the guilty party was 50/50, very close to the conventional "more probable than not" standard.[146]

It can be seen that some of the factual circumstances in *Summers* are not present in the opioid cases. Taking account of all potential defendants, such as opioid manufacturers, distributors and retail pharmacies as well as overprescribing doctors, their negligent conduct is not the same. Manufacturers engaged in fraudulent marketing practices while distributors and retail sellers fueled a black market in prescription drugs by failing to monitor and report suspicious orders. In addition, far more than two defendants are involved in the current opioid litigation.

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[136] *Id.* at 4.

[137] *Id.* at 5.

[138] *See* RESTATEMENT (SECOND) OF TORTS § 433B(3) (AM. LAW INST. 1965).

[139] Robertson, *supra* note 40, at 1782.

[140] Glen O. Robinson, *Multiple Causation in Tort Law: Reflections on the DES Cases*, 68 VA. L. REV. 713, 723 (1982).

[141] Andrew G. Celli, Jr., Note, *Toward a Risk Contribution Approach to Tortfeasor Identification and Multiple Causation Cases*, 65 N.Y.U.L. REV. 635, 641–42 (1990).

[142] *Id.* at 641.

[143] *Id.*

[144] *Id.*

[145] *Id.* at 641–42.

[146] *Id.* at 642.

C. Enterprise Liability.

The doctrine of enterprise liability also relieves the plaintiff of the duty to identify the specific cause of his or her harm. The source of the enterprise liability concept appears to be *Hall v. E.I. DuPont de Nemours & Co*.[147] In that case, the plaintiffs sought damages from six manufacturers and their trade association, the Institute of Makers of Explosives (I.M.E.) for injuries sustained by children in separate accidents from blasting caps.[148] The plaintiffs claimed that the products were defective because the manufacturers did not place warnings on individual blasting caps.[149]

The plaintiffs alleged that the defendants were aware that children were frequently injured by blasting caps because the I.M.E., kept statistics and other information about these accidents.[150] Furthermore, the defendants considered the possibility of labeling individual blasting caps and rejected it.[151] Moreover, they also lobbied against legislation that would have required such labeling.[152]

The defendants moved to dismiss the case because most of the plaintiffs could not identify the specific manufacturer whose product caused their injury.[153] However, the trial court denied the defendants' motion to dismiss where a plaintiff could not identify the manufacturer of a blasting cap.[154] Instead, the court ruled that the burden of showing specific causation should be shifted to the defendants.[155] Furthermore, the court declared that defendants should be held jointly liable because they jointly controlled the risk.[156] The court based its burden shifting and joint liability holdings on concerted action and alternative liability theories and identified three factors

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[147] 345 F. Supp. 353, 378 (E.D.N.Y. 1972).

[148] *Id.* at 359.

[149] *Id.*

[150] *Id.*

[151] *Id.*

[152] *Id.*

[153] *Id.* at 358.

[154] *Id.* at 386.

[155] *Id.* at 374.

[156] *Id.* at 370–71.

to support them: the defendants' joint control of the risk, enterprise liability, in the broad sense of that term,[157] and fairness to the plaintiffs.[158]

None of these considerations apply to opioid litigation. First, while the defendants may have contributed to the risk of opioid addiction, they did not control it the way the blasting cap manufacturers did in the *Hall* case. Nor did they delegate decisions about product safety to a trade association. Second, although one can argue that the pharmaceutical industry owes a duty to the public to protect it from drug-related harm, it is composed of a diverse group of actors, including manufacturers, distributors, retail sellers and possibly prescribing physicians. It can hardly be compared to six blasting cap manufacturers and their trade association as far as being classified as an "enterprise" is concerned. Finally, there is no fairness issue because plaintiffs can and have identified most of the wrongdoers.

D. Market Share Liability.

The principle of market share liability was a response by the California Supreme Court in *Sindell v. Abbott Laboratories*[159] to the plight of thousands of plaintiffs who were injured by Diethylstilbestrol (DES).[160] DES is a synthetic form of estrogen that was developed by British scientists in 1938.[161] DES was first marketed in 1947 to prevent miscarriages.[162] The number of women who took the drug ranged from 1.5 million to 3 million.[163] Because DES was never patented, it was sold as a generic drug. Over the years, at least 300 companies manufactured and sold the drug.[164] Pursuant to a request by the Food and Drug Administration (FDA), DES packaging,

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[157] *Id.* at 371. Enterprise liability in its original sense means that those who benefit from the activities of an enterprise should provide compensation to those who are injured. This is usually done by the enterprise itself which then charges higher prices for its goods and services. Richard C. Ausness, *Sailing Under False Colors: The Continuing Presence of Negligence Principles in "Strict" Products Liability Law*, 43 U. DAYTON L. REV. 265, 277 (2018).

[158] Robinson, *supra* note 140, at 723.

[159] 607 P.2d 924 (Cal. 1980).

[160] Celli, *supra* note 141, at 636–37.

[161] Robinson, *supra* note 140, at 718.

[162] *Sindell*, 607 P.2d at 925.

[163] *See* Naomi Sheiner, Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 FORDHAM L. REV. 963, 964–65 (1978).

[164] Celli, *supra* note 141, at 649.

labeling and dosages were made uniform.[165] Approximately twenty-five years after DES was first marketed, it was linked to vaginal and cervical cancer in the daughters of DES users.[166] As a result, in 1971 the FDA banned DES as a treatment to prevent miscarriages.[167]

When DES daughters sued drug companies, they often failed to recover for their injuries because they were unable to prove specific causation.[168] In *Sindell*, the plaintiff brought a class action on behalf of herself and other DES affected daughters against eleven DES manufacturers, alleging that her injuries were caused by the ingestion of DES by her mother during pregnancy.[169] The trial court dismissed the case when it became apparent that the plaintiff could not identify the manufacturer of the DES that caused the harm to her.[170] However, this decision was reversed on appeal.[171]

The California Supreme Court conceded that a plaintiff normally has the burden of proving specific causation.[172] It then examined and rejected various exceptions to the general rule, including alternative liability,[173] concert of action,[174] and enterprise liability.[175] Finally, the court formulated an approach, loosely based on alternative liability, known as market share liability.[176] Under the market share liability rule, the plaintiff must bring suit against the manufacturers of a "substantial share" of the DES market from which her mother may have purchased the DES that caused her daughter's injury.[177] Next, the plaintiff must show that each of the defendants produced the type of drug that caused her injuries and that it violated the applicable standard of care.[178] Once the plaintiff satisfies these requirements, the

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[165] Victor E. Schwartz & Liberty Mahshigian, *Failure to Identify the Defendant in Tort Law: Towards a Legislative Solution*, 73 CALIF. L. REV. 941, 944 (1985).

[166] Sheiner, *supra* note 163, at 965.

[167] *Id.* at 965–66.

[168] Celli, *supra* note 141, at 644–45.

[169] Sindell v. Abbott Labs., 607 P.2d 924, 925 (Cal. 1980).

[170] *Id.* at 926.

[171] *Id.* at 938.

[172] *Id.* at 928.

[173] *Id.* at 928–31.

[174] *Id.* at 931–33.

[175] *Id.* at 935.

[176] *Id.* at 937; *see also* Celli, *supra* note 141, at 646; Mark A. Geistfeld, *The Doctrinal Unity of Alternative Liability and Market-Share Liability*, 155 U. PA. L. REV 447, 447–49 (2006).

[177] *Sindell*, 607 P.2d at 937.

[178] *Id.*

burden would shift to each defendants to prove that it could not have made the DES that caused the plaintiff's harm.[179] Any defendant who failed to exculpate itself will be held liable for a portion of the plaintiff's damages that corresponded to its share of the market at the time the plaintiff's mother was exposed to DES.[180] Unlike alternative liability, there is no joint and several liability; rather, each defendant will only be liable to the harm that it is statistically likely to have caused.[181]

The market share liability approach has not been widely followed by the courts.[182] Nevertheless, it may be useful to transfer certain aspects of it from the special causation realm to apportionment of damages as it relates to opioid litigation. In particular, the notion that each defendant's liability should be proportional to its market share and that liability should be several and not joint are worthy of further consideration in the context of opioid cases and possibly other types of mass tort litigation as well.

E. Specific Causation Issues in Opioid Litigation.

Because of the recordkeeping requirements imposed on all opioid producers, distributors, retail sellers and prescribers by state and federal governments, it is unlikely that government plaintiffs will have much difficulty identifying potential defendants. However, as mentioned above, courts may import doctrines associated with specific causation, particularly market share liability, as a means of resolving joint liability and apportionment of damages issues.

V. PROXIMATE CAUSE.

Proximate cause, sometimes referred to as "legal cause,"[183] reflects a principle, grounded in public policy, that some limit must be placed on the imposition of liability for the consequences of an act, even a negligent one.[184] Determining whether the defendant's conduct is a proximate cause of the plaintiff's injury usually involves the question of foreseeability—that

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[179] *Id.*

[180] *Id.*

[181] Geistfeld, *supra* note 176, at 448–49.

[182] 2 OWEN & DAVIS, *supra* note 70, § 11:9, at 217.

[183] *See* Young v. Bryco Arms, 821 N.E.2d 1078, 1085 (Ill. 2004).

[184] *See* People v. ConAgra Grocery Prods. Co., 227 Cal. Rptr. 3d 499, 545 (Cal. Ct. App. 2017); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099, 1127 (Ill. 2004); People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 202 (App. Div. 2003).

is, "whether the injury is of a type that a reasonable person would see as a likely result of his conduct."[185]

Furthermore, proximate cause is often invoked to cut off liability when other causes have subsequently intervened between the defendant's conduct and the plaintiff's harm.[186] Acts or events of this nature are often referred to as superseding causes.[187] Intervening criminal acts are often treated as superseding causes.[188] The defendant in *Johnson & Johnson* claimed that the activities of distributors, retail sellers, prescribing doctors and sales of illegal street drugs constituted superseding causes that were sufficient to relieve it of liability for causing an opioid-related nuisance.[189] However, the trial court disagreed, concluding that the defendants' acts were a direct and proximate cause of the State's injuries.[190] Quoting from *Graham v. Keuchel*, the court declared that "[t]o rise to the magnitude of a supervening [sic] cause, which will insulate the original actor from liability, the new cause must be (1) independent of the original act, (2) adequate itself to bring about the result and (3) one whose occurrence was not reasonably foreseeable to the original actor."[191] Although the court did not identify which elements were missing, it presumably meant elements 2 and 3. The court apparently believed that the intervening acts of various third parties were not sufficient by themselves to cause the opioid epidemic and intervening acts by third parties were foreseeable by Johnson & Johnson.

In addition, some courts distinguish between a situation where the defendant's conduct merely furnishes a condition by which an injury is made possible, and a third person, acting independently, subsequently causes the injury.[192] In such cases, the creation of the condition by the defendant is not considered to be the proximate cause of the injury.[193] Several courts have relied on this condition-versus-cause analysis to conclude that the

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[185] *Young*, 821 N.E.2d at 1086; State v. Lead Indus. Ass'n, 951 A.2d 428, 451 (R.I. 2008).

[186] *See* KEETON ET AL., *supra* note 45, § 44, at 301.

[187] Terry Christlieb, *Why Superseding Cause Analysis Should Be Abandoned*, 72 TEX. L. REV. 161, 167 (1993).

[188] *See* KEETON ET AL., *supra* note 45, § 44, at 313.

[189] *See* Motion for Judgment of Defendants, *supra* note 51, at 80–81.

[190] *See* State *ex rel.* Hunter v. Purdue Pharma, L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *43 (Okla. Dist. Ct. Aug. 26, 2019).

[191] *Id.* (quoting Graham v. Keuchel, 847 P.2d 342, 348 (Okla. 1993)).

[192] First Springfield Bank & Tr. v. Galman, 720 N.E.2d 1068, 1071 (Ill. 1999).

[193] *Id.*

defendant's conduct was not a cause of the plaintiff's injury.[194] For example, in *Ashley County v. Pfizer, Inc.*,[195] where twenty counties in Arkansas accused several drug companies of distributing over-the-counter cold medicines containing ephedrine and pseudoephedrine knowing that these products would be used by criminals to produce methamphetamine.[196] On appeal from the lower court's dismissal of the plaintiffs' public nuisance and unjust enrichment claims, a federal appeals court upheld the lower court's ruling.[197] The court agreed that the defendants' sale of cold medicine did not proximately cause the counties to incur increased costs for government services.[198]

A New York intermediate appellate court reached a similar conclusion in *People ex rel. Spitzer v. Sturm, Ruger & Co*.[199] That case involved a public nuisance action by the State of New York against various handgun manufacturers, distributors and retail sellers.[200] The lower court dismissed the public nuisance claim and the State appealed.[201] However, the appeals court affirmed the lower court's ruling, declaring that the connection between the defendants, criminal wrongdoers and the plaintiff was too attenuated to satisfy the proximate cause requirement.[202] Courts have also ruled against health care providers and unions on proximate cause grounds when they have sought to recover against product sellers for costs associated with the treatment of product-related injuries or diseases.[203]

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[194] *See* Young v. Bryco Arms, 821 N.E.2d 1078, 1087 (Ill. 2004); *see also* State v. Lead Indus. Ass'n, 951 A.2d 428, 451 (R.I. 2008).

[195] 552 F.3d 659 (8th Cir. 2009).

[196] *Id.* at 662–63.

[197] *Id.* at 673.

[198] *Id.* at 670; *see* Indep. Cty. v. Pfizer, Inc., 534 F. Supp. 2d 882, 889 (E.D. Ark. 2008).

[199] 761 N.Y.S.2d 192 (App. Div. 2003).

[200] *Id.* at 194.

[201] *Id.*

[202] *Id.* at 202.

[203] *See, e.g.*, Allegheny Gen. Hosp. v. Philip Morris, Inc., 228 F.3d 429, 433 (3d Cir. 2000) (public nuisance and civil conspiracy); Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc., 191 F.3d 229, 241 (2d Cir. 1999) (RICO); Oregon Laborers-Emp'rs Health & Welfare Tr. Fund v. Philip Morris, Inc., 185 F.3d 957, 965 (9th Cir. 1999) (RICO and antitrust); Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc., 171 F.3d 912, 934 (3d Cir. 1999) (antitrust and RICO); Ark. Carpenters' Health & Welfare Fund v. Philip Morris, Inc., 75 F. Supp. 2d 936, 943–44 (E.D. Ark. 1999) (antitrust and RICO).

However, in *People v. ConAgra Grocery Products Co.*,[204] another intermediate appellate court recently concluded that the plaintiff had shown that the defendants' marketing practices proximately caused a public nuisance.[205] In that case, the State of California sued manufacturers and sellers of lead-based paint for allegedly creating a public nuisance in the State.[206] On appeal, the defendants maintained that their promotion and marketing efforts were too removed from the current public nuisance to be a proximate cause.[207] Instead, they argued that due to the passage of time, the damage to the state from lead-based paint was "more closely attributable to owner neglect, renovations, painters, architects, and repainting."[208]

However, the appeals court affirmed the trial court's ruling that the plaintiff had met the proximate cause requirement.[209] The court declared that:

> The connection between the long-ago promotions and the current presence of lead paint was not particularly attenuated. Those who were influenced by the promotions to use lead paint on residential interiors in the 10 jurisdictions were the single conduit between defendants' actions and the current hazard. Under these circumstances, the trial court could have reasonably concluded that the defendants' promotions, which were a substantial factor in creating the current hazard, were not too remote to be considered a legal cause of the current hazard even if the actions of others in response to those promotions and the passive neglect of owners also played a causal role.[210]

It remains to be seen whether the *ConAgra* court's view of proximate cause is an outlier, or whether it represents the beginning of a more expansive treatment of this issue by courts in the future.

Although Judge Balkman in the *Johnson & Johnson* case rejected the defendant's proximate cause argument, it will almost certainly arise again in other cases. At least in theory, proximate cause seeks to protect a defendant against liability from the unforeseeable consequences of his or her actions.

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[204] 227 Cal. Rptr. 3d 499 (Ct. App. 2017).

[205] *Id.* at 545.

[206] *Id.* at 514.

[207] *Id.* at 545.

[208] *Id.*

[209] *Id.*

[210] *Id.* at 546.

However, it is important to distinguish between proximate in this general sense and proximate cause as it relates to unforeseen intervening causes. The defendants will have a difficult time convincing a court or jury that they could not foresee that greatly increasing the production of prescription opioids could lead to widespread drug abuse. Even if the defendants could not foresee addiction as a problem when they first developed opioid painkillers, they certainly knew about it by the year 2000 and yet continued to promote these products aggressively for another twenty years.

The intervening cause issue is more complicated. In the case of opioids, the chain of causation is attenuated. Each party can point to someone else down the causal chain who contributed to the opioid addiction problem. Manufacturers can blame a host of downstream actors as can distributors. Retail sellers can blame overprescribing doctors and doctors can blame opioid abusers and thus claim that the intervening conduct of others was a superseding cause sufficient to break the chain of causation and relieve the defendant of liability. Other product sellers successfully relied on this argument in cases involving ephedrine and pseudoephedrine,[211] as well as cases involving handguns.[212] The facts in those cases are sufficiently similar to the facts in the opioid cases to make things interesting.

VI. JOINT AND SEVERAL LIABILITY.

Ordinarily, if two or more defendants cause a single indivisible injury, they are treated as joint tortfeasors. Thus, in *Johnson & Johnson*, if other drug companies had been found guilty of creating a public nuisance, each of them would have been liable for the entire cost of abating the nuisance. However, because the other defendants settled prior to the trial, the court in that case required Johnson & Johnson to bear the entire cost of the Oklahoma's proposed abatement program. Since most of these opioid cases involve multiple defendants, it will be necessary to examine the concept of joint and several liability in some detail.

A. Apportionment of Damages.

If two or more tortfeasors independently inflict separate and distinct injuries upon a plaintiff, each one will be only liable for the damage that he or she caused to the plaintiff.[213] For example, in the absence of concerted action, the owners of trespassing cattle or dogs who kill sheep are only liable

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[211] Ashley Cty. v. Pfizer, Inc., 552 F.3d 659, 668 (8th Cir. 2009).

[212] People *ex rel.* Spitzer v. Sturm, Ruger & Co., 761 N.Y.S.2d 192, 201 (App. Div. 2003).

[213] KEETON ET AL., *supra* note 45, § 52, at 348–49.

for the damage their animals have caused.[214] In addition, courts often apportion damages in private nuisance cases because the interference with the use of the plaintiff's land tends to be severable in terms of quantity, percentage or degree.[215] Thus damages have sometimes been apportioned in flooding and water pollution cases.[216]

Damages can be apportioned relatively easily when the injuries are clearly separate, such as when one defendant shoots the plaintiff in the leg and the other stabs him in the arm. However, apportionment is more complicated when several defendants commit the same acts and inflict the same injuries upon the plaintiff. In such cases, courts and juries are forced to rely on rough estimates in apportioning damages. For example, if five dogs kill the plaintiff's sheep and one defendant owns one dog and the other defendant owns four, it seems appropriate to require the first defendant to pay twenty percent (20%) of the damage and require the second defendant to pay eighty percent (80%).[217] Likewise, when two or more defendants pollute a stream, damages can be apportioned according to how much pollutant each one placed in the stream.[218]

B. Joint Tortfeasors

Joint tortfeasors are jointly and severally liable to the injured plaintiff.[219] Defendants can be treated as joint tortfeasors under the concept of acting in concert, alternative liability and enterprise liability. Most importantly, however, they may be held jointly liable if the act concurrently to produce a single indivisible injury.[220]

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[214] *See, e.g.*, Wood v. Snider, 79 N.E. 858, 861 (N.Y. 1907) (cattle); Stine v. McShane, 214 N.W. 906, 907 (N.D. 1927) (dogs).

[215] KEETON ET AL., *supra* note 45, § 52, at 348–49.

[216] *E.g.*, Johnson v. City of Fairmont, 247 N.W. 572, 573 (Minn. 1933); Somerset Villa, Inc. v. City of Lee's Summit, 436 S.W.2d 658, 665–66 (Mo. 1969).

[217] William L. Crowe, Sr., *The Anatomy of a Tort—Part V—Apportionment, Contribution, and Indemnity Among multiple Parties in the Area of Damages—A Second Reader*, 35 LOY. L. REV. 351, 357–58 (1989).

[218] *Johnson*, 247 N.W. at 573; Snavely v. City of Goldendale, 117 P.2d 221, 224–25 (Wash. 1941).

[219] KEETON ET AL., *supra* note 45, § 52, at 347.

[220] McGraw v. Weeks, 930 S.W.2d 365, 367–68 (Ark. 1996); Northup v. Eakes, 178 P. 266, 268 (Okla. 1918).

1. Rights of Plaintiffs Against Joint Tortfeasors.

Under the traditional rules of joint and several liability, a plaintiff has the right to sue one joint tortfeasor, or some of them or all of them in a single action.[221] This means that a plaintiff can focus on a defendant with "deep pockets" and ignore those who may be judgment proof or might have only minimal assets even if they are more culpable than the parties being sued.[222] A plaintiff can also sue each joint tortfeasor separately, obtaining a separate judgment against each tortfeasor.[223] At the same time, the plaintiff cannot collect more than once. Once the plaintiff obtains a judgment against one joint tortfeasor and it is fully satisfied, the plaintiff cannot collect additional damages from any of the other tortfeasors.[224]

While satisfaction of a judgment means that the amount of the damage award is fully paid and, therefore, the right to further compensation is extinguished, a release is quite different. A release is a surrender of the cause of action and may be for less than the claim is worth or even gratuitous. Nevertheless, at one time courts held that a release to one joint tortfeasor amounted to a complete surrender of any cause of action against another joint tortfeasor.[225] Nowadays, courts are more likely to distinguish between a release and a covenant not to sue, which does not necessarily release other tortfeasors.[226] However, if one tortfeasor executes a partial settlement with the plaintiff, the plaintiff may sue the other tortfeasors, but the other tortfeasors are entitled to have the damage award reduced by the amount of the settlement.[227]

2. Rights of Joint Tortfeasors Against Each Other.

Once the plaintiff has been fully compensated, contribution and indemnity are potentially available to joint tortfeasors to ensure that each

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[221] 3 OWEN & DAVIS, *supra* note 70, § 23:2, at 92 (pointing out that only about twenty states continue to follow the traditional rule and the rest have modified or abolished joint and several liability).

[222] Alfred W. Cortese, Jr. & Yosef J. Riemer, *Defining the Agenda for Serious Tort Reform*, 24 SAN DIEGO L. REV. 903, 909 (1987).

[223] 3 OWEN & DAVIS, *supra* note 70, § 23:2, at 92.

[224] Schoenly v. Nashville Speedways, Inc., 344 S.W.2d 349, 351–52 (Tenn. 1961).

[225] Price v. Baker, 352 P.2d 90, 93, 97 (Colo. 1959); Atl. Coast Line R.R. Co. v. Boone, 85 So. 2d 834, 842 (Fla. 1956); Lucio v. Curran, 139 N.E.2d 133, 135–36 (N.Y. 1956).

[226] Johnson v. Harnisch, 147 N.W.2d 11, 14 (Iowa 1966); Lyons v. Durocher, 169 N.E.2d 911, 912 (Mass. 1960).

[227] Peck v. Jacquemin, 491 A.2d 1043, 1048–49 (Conn. 1985).

party pays a fair share of the damage award.[228] Contribution is a process by which a joint tortfeasor may force another tortfeasor to pay a fair share of compensation to the injured party.[229] Most contribution cases involve a joint tortfeasor who has discharged the group's entire obligation to the plaintiff and who now seeks partial reimbursement from the other tortfeasors.[230] At one time, contribution usually required each tortfeasor to pay a *pro rata* share of the damage award.[231] Thus, if three joint tortfeasors harmed the plaintiff, each could be made to pay one-third of the damage award. However, some states, influenced by comparative fault systems applicable to plaintiffs and defendants, have imported this concept into contribution cases so that liability is based on the degree of fault involved rather than being imposed in equal shares.[232]

While a contribution action can be brought after one tortfeasor has paid the plaintiff, it is often cheaper and more efficient to determine contribution issues, along with defendants' liability to the plaintiff, in one proceeding. Therefore, under modern pleading rules, if the plaintiff sues only some of the potential joint tortfeasors, they may bring the remaining tortfeasors into the case as third party defendants. If the jury finds the original defendants to be liable, it can then determine how much the third-party defendants should pay as contribution.[233]

In contrast to contribution, indemnity shifts liability entirely from one tortfeasor to another once the plaintiff has been compensated. The right to indemnification may arise from a contract, it may be based on a relationship such as employer and employee and it may arise when party is substantially more culpable than another.[234] For example, an employer who is held vicariously liable to the plaintiff for the negligence of an employee could theoretically seek indemnification from the employee once it has paid the plaintiff's damage award. Likewise, a tortfeasor who is passively negligent could seek indemnification from a tortfeasor who was actively negligent.[235]

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[228] Of course, neither contribution nor indemnity are necessary if the plaintiff's damages have been apportioned among the various tortfeasors. *See* Crowe, *supra* note 217, at 354, 361, 377.

[229] *Id.* at 361.

[230] *Id.* at 364.

[231] KEETON ET AL., *supra* note 45, § 51, at 344.

[232] *Id.* § 67, at 475–77.

[233] *Id.* § 51, at 340–41.

[234] Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp., 518 S.E.2d 301, 305 (S.C. Ct. App. 1999).

[235] KEETON ET AL., *supra* note 45, § 51, at 343.

C. Joint and Several Liability Issues in Opioid Litigation.

Although some government plaintiffs have alleged that drug companies and others engaged in a conspiracy to defraud the FDA, prescribing doctors and the general public, it is questionable whether they can provide enough evidence to support a claim of joint and several liability based on concert of action. Instead, a claim of joint and several liability is more likely to be based on the theory that the various defendants acted independently to create a single indivisible harm, namely a public nuisance involving widespread opioid addiction. Presumably, the trial judge in the *Johnson & Johnson* case accepted this theory since he ruled that Johnson & Johnson must pay for the entire cost of the State's proposed abatement plan. Furthermore, if other cases go to trial, government plaintiffs will no doubt also seek to hold the defendants jointly and severally liable on this indivisible injury theory.

It is curious to note that the State of Oklahoma did not join many other manufacturers, distributors, or retail pharmacies as defendants in the *Johnson & Johnson* case, though a few additional companies were initially named as defendants.[236] Nor did Johnson & Johnson implead any other defendants. Presumably, neither side wanted to clutter up the litigation with numerous other parties.

It is possible to view *Johnson & Johnson* as a test case in which both sides wanted to focus on just a few issues. If that is the case, one can expect subsequent cases to be considerably more complicated as additional defendants and third-party defendants join in the fray. Indemnity is unlikely to be involved, but contribution problems will certainly arise in future cases. One likely issue will be how liability is apportioned among joint tortfeasors in a contribution action. Given the allegedly different degrees of culpability among the various defendants, apportionment on a *pro rata* basis hardly seems fair. On the other hand, in view of the fact that different classes of defendants—manufacturers, distributors, retail pharmacies, and prescribing physicians—evaluating culpability seems like comparing apples and oranges. It remains to be seen how courts will sort this out.

Another issue involves settlements. As mentioned earlier, a joint tortfeasor who settles with the plaintiff normally cannot be forced to contribute further. This could raise fairness problems if government plaintiffs settled with some defendants for modest amounts early in the litigation process either because they wanted to focus on deep pocket targets

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[236] *See* State *ex rel.* Hunter v. Purdue Pharma, L.P., No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *1 (Okla. Dist. Ct. Aug. 26, 2019). In addition to Purdue and Teva, the State named Cephalon, Allergan, Actavis and Watson Pharma as defendants. *Id.*

or because they needed money to finance existing litigation expenses. Another issue that was raised, but not resolved, in *Johnson & Johnson* is whether the remaining defendants should be entitled to a setoff for money paid to the plaintiff by settling defendants. While this is usually the case, the court in *Johnson & Johnson* seemed to think that settlement money earmarked for addiction treatment should not be deducted from money that was designated for abatement programs. It remains to be seen watch other courts will do in similar circumstance.

VII. A MARKET SHARE BASED PROPOSAL.

The *Johnson & Johnson* case raises concerns about the imposition of joint and several liability in mass tort cases in general and opioid litigation in particular. Arguably, some sort of market share approach may be a superior approach to the problem of apportioning responsibility fairly in such cases.

A. Problems with Joint and Several Liability.

The principle of joint and several liability is supported by a number of considerations. From a doctrinal perspective, joint and several liability is justified because the defendants have acted in concert to inflict harm on the plaintiff or they have breached a common duty to the plaintiff or their independent actions have led to a single indivisible harm to the plaintiff.[237] Another consideration is that a plaintiff should not be left without a remedy when the conduct of the defendants makes it difficult to apportion damages.[238] A final justification is that the risk that some of the defendants may be insolvent or unavailable for suit should fall on the rest of the tortfeasors and not on the plaintiff.[239]

However, joint and several liability is subject to criticism. One concern is that corporations and other well-off defendants are more likely to pay most of the damage award, while other tortfeasors, including those who are more culpable, may pay token settlements or even nothing at all. Although the defendants who pay may seek contribution from those who initially escape liability, contribution actions, like other lawsuits, may be time-consuming and expensive.

The arguments for and against joint and several liability discussed above are particularly applicable to routine negligence cases like automobile

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[237] Mike Steenson, *Recent Legislative Responses to the Rule of Joint and Several Liability*, 23 TORT & INS. L.J. 482, 482 (1987).

[238] *Id.*

[239] *Id.*

accidents where there is one individual plaintiff and two or three defendants, and their liability insurer. However, additional considerations may be involved in mass tort cases such as opioid litigation. First, when large numbers of defendants are involved, it is desirable for corrective justice and deterrence reasons that as many culpable parties as possible bear a share of the damage award and that no defendant escape liability. In addition, when a large number of plaintiffs are suing, it is better to avoid placing the entire burden on a few defendants. If this occurs, some of these defendants (as well as their employees and shareholders) may suffer severe economic harm.

B. Should Market Share Liability Be Applied to Opioid Litigation?

In *Sindell*, the California Supreme Court declared that each defendant who manufactured and sold DES in the state during the time the plaintiff's mother consumed the drug should pay a portion of the damage award that was equivalent to its share of the market during that time period.[240] Market share liability thus relieved the plaintiff from having to prove specific causation in such cases.[241] My proposal would apply the principle of market share liability to damage awards in opioid cases and possibly to other types of mass tort cases as well. Like the version adopted by the California Supreme Court in *Sindell*, my proposal would apportion liability among the defendants rather than holding them jointly liable.

To be sure, there are significant differences between *Sindell* and opioid cases such as *Johnson & Johnson*. First, market share liability in *Sindell* was concerned with the issue of specific causation.[242] In *Sindell*, through no fault of their own, DES daughters were generally unable to identify the manufacturers of the DES that caused their harm.[243] In contrast, specific causation should not be much of a problem in opioid litigation.

Second, market share liability in *Sindell* was intended to protect the interests of plaintiffs who would otherwise not be compensated because of their failure to prove specific causation.[244] In opioid litigation, market share liability is intended to protect the interests of the defendant drug companies and by extension, the interests of consumers of prescription painkillers and other drugs.[245] The question of whether these interests are worthy of protection will be addressed below.

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[240] Sindell v. Abbott Labs., 607 P.2d 924, 937–38 (Cal. 1980).

[241] *Id.* at 936

[242] *Id.* at 937.

[243] *Id.* at 936.

[244] *Id.*

[245] *See id.* at 940 (Richardson, J., dissenting).

Third, unlike *Sindell*, where market share liability was only applied to DES daughters who suffered personal injuries, the market share scheme described below would only protect the economic interests of government entities. Furthermore, market share liability, if adopted, would be limited to reimbursing state and local governments for the cost of abating public nuisances caused by opioid addiction.

C. The Proposal.

Market share liability means that the government plaintiff may obtain a judgment or decree in an abatement action from each defendant by requiring it to contribute an amount based on its share of the overall market or on some other objective basis. Liability would, therefore, be several and not joint. Market share could be based on gross sales of opioids or morphine milligram equivalents (MMEs) for all companies that manufactured or sold prescription opioids during the period covered by the applicable statute of limitations.[246] Moreover, market share liability would only be applied to government entities that had developed detailed abatement plans. This would prevent, or at least discourage, governments from devoting the proceeds of opioid litigation to other purposes as happened in the tobacco settlement.[247] In order for abatement to be available, the court would have to conclude that the marketing, distribution and sale of prescription opioids led to the creation of a public nuisance. However, since the requirements for public nuisance vary from state to state, there may not be any public nuisance to abate in some states.[248]

A simpler and more manageable approach, adopted by the *Sindell* court, would be to require the plaintiff to join a "substantial" percentage of the market and use their aggregate sales as the denominator in calculating the share of each of the defendants. Thus, market share would not include illegal sales of illegal street drugs such as heroin or nonprescription fentanyl.

To discourage government plaintiffs from "cherry picking" defendants, and to encourage the inclusion of all responsible parties, market share would

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[246] *See* OPIOIDS NEGOTIATION CLASS, CLASS COUNSEL MEMORANDUM: HOW THE ALLOCATION MODEL WORKS 5 (2019), https://www.opioidsnegotiationclass.info/Content/Documents/Negotiation%20Class%20Allocation%20Model%20Explanatory%20Memo.pdf [https://perma.cc/S3KS-P4UG]. DEA collects information about the amount of opioids shipped to a given location and reports them in a database known as ARCOS. This data might possibly be used to measure opioid damage by counting MMEs.

[247] Ryan D. Dreveskracht, *Forfeiting Federalism: The Faustian Pact with Big Tobacco*, 18 RICH. J.L. & PUB. INT. 291, 293–94 (2015).

[248] Ausness, *supra* note 20, at 567–74.

be calculated insofar as possible on the entire market. For example, if total prescription opioid sales amounted to $10 billion and Defendant A's share of this was $1 billion, that defendant's liability would be capped at ten percent (10%) of the total or $1 billion. If all of the defendants involved in the litigation only constituted eighty percent (80%) of the market, Defendant A's share would still not exceed $1 billion. In other words, the defendants who were sued would not have to make up the share of those who were not sued.

D. Justifications for Applying Market Share Liability to Opioids.

Why utilize the concept of market share liability in opioid litigation when it has not been widely accepted for its original purpose as a mechanism for enabling plaintiffs to avoid the necessity of proving specific causation? This is a fair question, and I would acknowledge that if market share liability is to be applied in this new context, it must be justified by persuasive policy arguments.

1. Corrective Justice.

First, market share liability in this context is consistent with corrective justice, as is joint and several liability. In its traditional form, corrective justice is concerned with the problem of unjust enrichment that occurs when a defendant improperly obtains something at the expense of another.[249] In such cases, corrective justice requires that property wrongfully acquired be returned to its rightful owner.[250] For some, this version of corrective justice can be expanded to justify compensating an injured party even when the defendant has not received a financial gain at the his or her expense.[251] It is even possible to invoke principles of corrective justice to impose a duty to compensate those who are injured by a defendant's lawful but risk-creating activities.[252] These nontraditional concepts of corrective justice might, therefore, justify requiring opioid producers and others who profited from the sale of prescription opioids to contribute to the cost of abating the resulting opioid epidemic. Otherwise, state and local governments, which did not contribute or profit from sale of opioids, will be forced to bear the

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[249] Alan L. Calnan, *Distributive and Corrective Justice Issues in Contemporary Tobacco Litigation*, 27 SW. U.L. REV. 577, 601–03 (1998).

[250] Emily L. Sherwin, *Constructive Trusts in Bankruptcy*, 1989 U. ILL. L. REV. 297, 330 (1989).

[251] Calnan, *supra* note 249, at 603–04.

[252] Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 425 (1982).

entire cost of responding to the opioid addiction problem. Arguably, market share liability, like joint and several liability, is consistent with the objectives of corrective justice.

2. Retributive Justice.

Given the wrongful conduct of many opioid sellers, principles of retributive justice would also seem to be relevant. Retributive justice dictates that actors be punished when they voluntarily and inexcusably commit a wrongful act.[253] However, principles of retributive justice also require that any punishment imposed on a wrongdoer be reasonably proportioned to the seriousness of the offense.[254] Although neither compensatory damages nor abatement costs are normally thought of as punishment, retributive justice considerations may be relevant in deciding whether to adopt market share liability instead of joint and several liability in opioid cases.

First, insofar as retributive justice requires that wrongdoers be punished, it would seem that a liability rule that affects most members of a group of tortfeasors is preferable to a liability rule that includes only a few members of the group and lets the rest of them off. This issue arose in the *Johnson & Johnson* case, where the trial court required a single defendant to pay for the entire cost of abatement while most of the other opioid sellers, including some highly culpable ones like Purdue, escaped largely unscathed.[255] Therefore, because market share liability is likely to ensnare more wrongdoers than joint and several liability, it would seem to be the better choice. Another advantage of market share liability is that it ensures that the share that each defendant pays is roughly proportional to its contribution to the opioid problem.

Market share liability is also more consistent with the proportionality norm embodied in the concept of retributive justice. If the principle of joint and several liability is applied, there is a real possibility that a few unlucky defendants may be forced to pay billions of dollars to abate the costs of opioid addiction. For some of these defendants, liability of this size may be tantamount to a corporate death penalty. In contrast, market share liability

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[253] Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 5 (1982).

[254] *Id*. at 6.

[255] Purdue, arguably the more culpable party, did not escape entirely unscathed, but ultimately settled with the State for an amount that was about half of the amount Johnson & Johnson may have to pay. Bebinger, *supra* note 24.

will spread the cost of abatement among a greater group of defendants and thus reduce the chances of a wipeout.

3. Deterrence and Overdeterrence.

An important objective of tort liability is to deter certain types of conduct.[256] An actor who is able to externalize certain costs to others, is unlikely to change his or her behavior unless these costs are shifted back in the form of tort liability. This sort of deterrence is relatively easy to achieve if there is only one defendant. However, the deterrent effect of tort liability will be weakened when multiple parties have contributed to the plaintiff's injury unless all of them have to pay a share of the damage award. In *Johnson & Johnson*, only one defendant had to pay (and was presumably deterred from engaging in future wrongful conduct), while the other opioid sellers who escaped liability would not have necessarily been deterred by what befell Johnson & Johnson. Thus, market share liability enhances the deterrent effect of tort liability by spreading it among all of the wrongdoers (or at least most of them) rather than having it potentially fall on only a few.

Not only is it important to achieve optimal deterrence, but it is also desirable to avoid excess deterrence or overdeterrence. Overdeterrence occurs when the fear of potential liability causes actors to refrain from engaging in socially useful but dangerous conduct.[257] For example, in the 1970s, drug companies refused to produce Swine Flu vaccine until the federal government agreed to immunize them from liability.[258] In addition, during the childhood vaccine crisis of the 1980s, fear of massive tort liability allegedly caused many diphtheria, tetanus and pertussis (DPT) vaccine manufacturers to quit making these products. Consequently, lack of competition and the high cost of liability insurance caused the price of childhood vaccines to rise from 11 cents per dose in 1982 to $11.40 per dose in 1986., a tenfold increase during this period.[259] Ultimately, Congress

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[256] RESTATEMENT (SECOND) OF TORTS § 901(c) (AM. LAW INST. 1965).

[257] Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 135 (1982).

[258] Richard C. Ausness, *Unavoidably Unsafe Products and Strict Products Liability: What Liability Rule Should Be Applied to the Sellers of Pharmaceutical Products?*, 78 KY. L.J. 705, 754 (1989).

[259] Tim Moore, Comment, *Comment K Immunity to Strict Liability: Should All Prescription Drugs Be Protected?*, 26 HOUS. L. REV. 707, 718 (1989). $8.00 per dose of this increase was used to provide an insurance reserve against future liability. *Id.*

enacted legislation to protect vaccine manufacturers against an expected avalanche of tort liability.[260]

This concern is also relevant to opioid producers. Prescription drugs, including opioid painkillers, are socially useful products when marketed responsibly. If one producer may be held potentially liable for the entire cost of opioid abatement, like Johnson & Johnson, it is possible that the entire industry will be excessively deterred. Unlike joint and several liability, market share eliminates this risk and, therefore, reduces the chances of overdeterrence while retaining the deterrent effect of tort liability for the entire industry.

E. Abatement Versus Damage Awards.

The proposed market share approach is limited to abatement cases. That is not to say that it might be useful in other situations such as damage awards or settlement cases. However, there are certain aspects of abatement as a remedy when a state or local government is called upon to deal with a nuisance situation.

First, there are important conceptual differences between damage awards and abatement. Damage awards are concerned with compensating a plaintiff for past injuries. Consequently, they are backward-looking. In contrast, abatement is concerned with mitigating future damages and is, therefore, forward-looking. Furthermore, there are certain advantages for government plaintiffs who choose abatement over damage claims. Most importantly, unlike settlements and damage awards, abatement decrees, which are equitable in nature, are earmarked for a particular purpose and are, therefore, harder for the state to divert these funds for other purposes. To be sure, abatement costs may be smaller than damage awards because they exclude certain components, such as law enforcement costs and quality of life that might be recoverable as part of a damage award. In addition, a government plaintiff would presumably not be able to seek punitive damages in an abatement case. This may or may not be a good thing.

Finally, damage awards are usually determined by a jury, often without much guidance from the court. In contrast, if the *Johnson & Johnson* case is any guide, a defendant will only be used to finance an abatement effort when the government plaintiff has developed a specific and detailed plan which is supported by credible cost estimates. This requirement, if followed in other cases, will prevent a state or local government from transforming

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[260] *See generally* National Childhood Vaccine Injury Act of 1986, 42 U.S.C. §§ 300aa-1 to -34 (2018); *see also* Okianer Christian Dark, *Is the National Childhood Vaccine Injury Act of 1986 the Solution For the DTP Controversy?*, 19 U. TOL. L. REV. 799, 839–50 (1988).

their abatement plan into a Christmas wish list of unnecessary or unrelated requests.

VIII. CONCLUSION.

In *Johnson & Johnson*, a liberal application of the substantial test of cause-in-fact, coupled with summary dismissal of proximate cause and the imposition of joint and several liability resulted in a trial court ruling that the defendant pay for the entire cost of abating an opioid addiction based public nuisance, at least for the first year.[261] This seems unfair considering that many other opioid producers also contributed to the opioid epidemic and got off scot free.[262] Assuming that there is no "global" settlement in the near future, other cases will go to trial, particularly at the state level, and at least some will reach the same result as the *Johnson & Johnson* case.

To avoid such an unfortunate result, in this Article I propose an alternative approach. Assuming that cause-in-fact and proximate cause requirements are satisfied, which they probably will be in most cases, the court should apportion responsibility for abating the public nuisance caused by opioid producers on some form of market share liability rather than imposing joint and several liability on a few of them. This approach is more consistent with normative values and deterrence objectives than joint and several liability.

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[261] *See State* ex rel. *Hunter v. Purdue Pharma L.P*. *See generally* No. CJ-2017-816, 2019 Okla. Dist. LEXIS 3486, at *38–43, *62–63 (Okla. Dis. Ct. Aug. 26, 2019).

[262] *See, e.g.*, Bebinger, *supra* note 24 (describing Purdue's settlement); Drash, *supra* note 25 (describing Teva's settlement).