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PRODUCTS LIABILITY

Market-Share Liability

By J. Russell Jackson

A BEDROCK PRINCIPLE of products liability law is that the plaintiff must prove that the defendant was an actual cause of his or her harm. Many cases have been dismissed on summary judgment for a lack of evidence identifying which defendant's product the plaintiff was exposed to.

Difficult facts, however, have led some courts to create exceptions to the rule that a plaintiff must prove causation for each defendant. One such exception is market-share liability. Although the elements of market-share liability vary significantly among the few courts that have adopted this exception, two characteristics are common to most formulations. First, the theory shifts the burden of proof to the manufacturer, forcing it to prove that it was not the cause of the plaintiff's harm.

Second, the theory makes each defendant severally liable for the plaintiff's damages based on the defendant's market share, rather than on its proportional share of the fault. As one commentator has explained, "courts embracing the concept have defined it in many ways, varying as to the size of the market (national versus local), who may be exculpated, what to do about unaccounted-for shares, etc." Paul D. Rheingold, Litigating Mass Tort Cases § 6.21.

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Courts first accepted the theory in DES litigation

Market-share theory was first applied in personal injury litigation over the prescription medicine diethylstilbestrol (DES), which was prescribed to expectant mothers in the middle of the 20th century to prevent miscarriage. The plaintiffs alleged that in utero exposure was the sole cause of the daughters' subsequent development of vaginal adenocarcinoma as adults. DES daughters' lawsuits had many proof problems. First, because DES was a generic medicine, there were scores of manufacturers making the identical formulation. Second, because often more than 20 years had passed between exposure and injury, few medical or other records existed to identify which manufacturer's DES a mother had taken. Despite market-share theory's nearly 30-year existence, "the vast majority of states has not yet been confronted with or decided this issue" in the context of DES litigation. Restatement (Third) of Torts: Products Liability § 28, comment O (Proposed Final Draft No. 1, 2005).

California led the way in adopting market-share theory in DES litigation, and a handful of other state supreme courts followed. But many courts that considered the question in DES litigation declined to adopt market-share theory, often suggesting that such a radical departure from traditional tort law was more properly within the power of the legislature. See, e.g., *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 75 (Iowa 1986).

Conventional wisdom is that even in states that have recognized market-share theory for DES cases, the theory is hardly ever applied outside of the DES context. See Restatement (Third) of Torts: Products Liability § 28, comment O (Proposed Final Draft No. 1, 2005). But despite "conventional wisdom," there have been a few recent decisions that recognize at least the possibility of applying market-share theory outside of the DES context—and even beyond the context of personal injury litigation.

For example, the federal court presiding over multidistrict litigation about a gasoline additive predicted—for the purposes of deciding a motion to dismiss—that 13 states' high courts would allow a market-share theory (even in states where the supreme court had rejected the theory for DES or other products), while only two states would not. See *In re Methyl Tertiary Butyl Ether (MTBE) Prods. Liab. Litig.*, 379 F. Supp. 2d 348 (S.D.N.Y. 2005). In *MTBE*, the plaintiffs were cities, municipalities and public and private water providers that alleged that their water supplies had been contaminated by MTBE, which was added to petroleum products with government permission in order to oxygenate gasoline and boost octane levels.

The court looked to the Restatement factors for deciding whether to adopt a market-share theory: "(1) the generic nature of the product; (2) the long latency period of the harm; (3) the inability of plaintiffs to discover which defendant's product caused plaintiff's harm, even after exhaustive discovery; (4) the clarity of the causal connection between the defective product and the harm suffered by

plaintiffs; (5) the absence of other medical or environmental factors that could have caused or materially contributed to the harm; and (6) the availability of sufficient 'market share' data to support reasonable apportionment of liability." Restatement (Third) of Torts: Products Liability § 15, comment c.

The court concluded that at least factors one, three and four weighed in favor of a market-share theory because MTBE was allegedly fungible, the products had been mixed together in pipelines and thus allegedly could not be separated, and the causal connection allegedly was clear because the "injury" was said to be the mere presence of MTBE in the water supply. Indeed, the court expressed its belief that the MTBE litigation over property damage "presents as compelling a circumstance for the application of market share theory as DES." Id. at 377.

Many of the Restatement factors did not fully match the facts of the environmental case before it, and thus the court took the opportunity to "fashion[] [a] new approach[] in order to permit plaintiffs to pursue a recovery," thereby making a "policy decision that in balancing the rights of all parties, it would be inappropriate to foreclose plaintiffs entirely from seeking relief merely because their actions did not fit the parameters of existing legal theories." Id. The court created what it called "the 'commingled product theory' of market share liability," which it described as "[w]hen a plaintiff can prove that certain gaseous or liquid products...of many suppliers were present in a completely commingled or blended state at the time and place that the risk of harm occurred, and the commingled product caused a single, indivisible injury, then each of the products should be deemed to have caused the harm." Id.

The *MTBE* court felt empowered to be so creative in predicting the applicable state law because the case had been removed to federal court from state court. The court clearly stated its view that the admonition " 'not to adopt innovative theories that may distort established state law' " does not apply when plaintiffs have been removed from the forum of their choice, and that limiting predictions of state law in such situations would be "systematically depriving state courts of the opportunity to address such novel issues" by implicitly encouraging removal. Id. at 363-64. See also *In re MTBE Prods Liab. Litig.*, 415 F. Supp. 2d 261 (S.D.N.Y. 2005).

Obviously, how a federal court predicts state law can be outcome-determinative. For example, in *Bortell v. Eli Lilly & Co.*, 406 F. Supp. 2d 1 (D.D.C. 2005), the court was faced with determining whether, under Pennsylvania law, market-share theory applied to a DES plaintiff's claim, which had been removed to federal court. The Pennsylvania Supreme Court previously had held that market-share liability did not apply to lead paint litigation, but left open the question of whether it had applied in DES cases.

There have been a few recent decisions that recognize at least the possibility of applying the theory outside of the DES context.

Analyzing the same cases that the *MTBE* court had analyzed in predicting that Pennsylvania would recognize market-share theory, the *Bortell* court reached the opposite conclusion, invoking the cautionary principle: "In the absence of any [later] decision by a Pennsylvania court permitting recovery under a market share theory of liability, it is not the place of a federal court sitting in diversity to do so." Id. at 6-7; see also *Barnes v. The Kerr Corp.*, 418 F.3d 583, 589 (6th Cir. 2005) (forgoing an expansive reading of Tennessee law on market-share theory in case that was removed); cf. *Kelley v. Eli Lilly & Co.*, No. 05-CV-1882, 2007 WL 1238789, at *4 (D.D.C. April 27, 2007) (Massachusetts law would not apply market-share theory to DES case).

Theory not accepted in lead paint and firearms cases

Another area of litigation that has spawned many opinions about market-share theory is lead paint litigation. In *City of St. Louis v. Benjamin Moore & Co.*, No. SC 88230, 2007 WL 1693582 (Mo. June 12, 2007), the city sought recovery from lead paint manufacturers under a market-share theory for remediating properties containing lead paint. In keeping with the general trend, the court refused to adopt market-share theory. Citing one of its prior decisions rejecting market-share theory in DES litigation, the court concluded that without actual product-identification evidence, "the city can do no more than show that the defendant's lead paint may have been present...[and that] risks exposing these defendants to liability greater than their responsibility and may allow the actual wrongdoer to escape liability entirely." Id. at *4. But see *Thomas v. Mallett*, 701 N.W.2d 523, 564-55 (Wis. 2005) (applying market-share theory Wisconsin adopted in DES litigation to claims against suppliers of lead carbonate).

Firearms litigation highlights another argument against the adoption of market-share theory. There, cities sought recovery for sums expended as a result of the criminal use of firearms. The Indiana Supreme Court pointed out that when the injuries could have a cause unrelated to the defendants' conduct—for example, intervening criminal acts—market-share theory may unfairly impose on the defendants responsibility for harm for which they are not responsible. See *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222, 1245 (Ind. 2003).

Market-share theory remains, as the Restatement reflects, a very narrow exception to the basic rule placing on plaintiffs the burden of proving causation. We can, however, continue to expect creative arguments from the bench and the bar for further expansion of this exception.