The Judge & State Law: MTBE Multi-District Litigation

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Imagine a product that, when used properly, is safe, valuable and environmentally sound, but when used improperly is dangerous to the environment. Many such products exist. Drano is safe and useful—except when stored in the pantry salt shaker. Firearms save many lives—but not when used by criminals.[1] Automobiles get us where we need to go—but in the hands of bank robbers and drunks they can be lethal weapons. And the gasoline from our automobiles can either get us rolling, burn our house down, or leak through rusty gas tanks into the ground.

In every one of these cases the product itself is not deemed defective or unreasonably dangerous. The product is considered fine if it is correctly manufactured and accompanied by adequate instructions for proper use. If harm occurs, we assign legal blame for the *misuse* of the product, for its negligent storage or for the underlying crime.

Keep this in mind as we discuss the Methyl Tertiary Butyl Ether (MTBE) multi-district litigation. For MTBE, when used properly, is inoffensive to the environment. Indeed, MTBE *helps* the environment according to the Environmental Protection Agency, since it is an oxygenate that allows gasoline to burn more efficiently. And oxygenates are required by law (as will be discussed below).

I. *In re: Methyl Tertiary Butyl Ether ("MTBE") Prods. Liab. Litig*[2]

A. The Plaintiffs' Claims: The Procedural Posture

Plaintiffs—(four Boards of Education or School Districts; one Church; one Company; fifteen Utility Companies or Water Districts; twenty-Six Towns, Cities, Municipalities or Fire Districts; three Home Owners Associations (HOAs) or Villages; and two individuals from fifteen different states)—sought relief in multi-district litigation assigned to the Southern District of New York, for defendants' contamination or potential contamination of groundwater by MTBE. The defendants—five petroleum companies that supply some form of petroleum and own and operate various gas stations—invoked rule 12(b)(6) of the Federal Rules of Civil Procedure to demur to all of the complaints, which had originally been filed in fifteen states but removed to federal court for reasons of diversity of citizenship. In essence, the defendants' demurrers point out that MTBE is not intrinsically harmful, and that in any case plaintiffs cannot identify the origin of any product which in fact harmed any one of them, as the chemical is fungible. If the plaintiffs cannot identify a product's manufacturer, they must rely on some theory of collective liability, which defendants claim that all fifteen states reject.

Other courts have consistently ruled that the Reformulated Gasoline (RFG) requirements of the Clean Air Act do not free petroleum companies from liability for damages caused by their oxygenate as a matter of law, for the Act only requires the defendants to use *an* oxygenate, and they *chose* to use MTBE.[3] This is true. But the lack of immunity under the Clean Air Act does not mean, of course, that the defendants should not succeed on demurrer if there is no proof they produced a defective and unreasonably dangerous product that proximately caused harm to an identifiable individual.

B. The Science

In an effort to significantly reduce summertime smog pollution and year-round air toxic emissions, Congress required the use of RFG beginning in 1995 in the nation's most polluted cities. As part of these "clean gasoline" specifications, Congress required that every gallon of RFG contain cleaner-burning fuel additives called oxygenates.

The two most commonly used oxygenates were Methyl Tertiary-Butyl Ether (MTBE) (used in approximately 85 percent of RFG), and ethanol (used in approximately 10–15 percent of RFG). According to both the Congressional Research Service and the federal Department of Energy, ethanol is the more difficult and expensive way to meet the new RFG specifications than MTBE. This is true for two main reasons:

i. Pipeline Transportation: Ethanol's high affinity for water does not allow it to be blended with gasoline at the refinery, nor transported through the existing nation-wide gasoline pipeline infrastructure. Ethanol must be stored in segregated tanks, can only be transported by rail or truck to its final destination and must be blended into gasoline at the terminal or even the retail gas station. As a result, the cost of blending ethanol into gasoline is significantly higher than the cost of gasoline without ethanol.

ii. Blending Characteristics: RFG's clean fuel specifications call for limits on gasoline's ability to evaporate quickly in the summertime. Because ethanol blends evaporate more readily than MTBE blends, ethanol-using refiners are forced to spend additional resources and capital to produce a gasoline blendstock with ultra-low evaporative properties. This is a very expensive process that adds significantly to the cost of producing summertime gasoline ready for ethanol.

MTBE has none of these disadvantages. It is derived principally from natural gas, which is in abundant supply in the US. It can be safely and efficiently blended into gasoline *at the refinery* and efficiently shipped via the interstate gasoline pipeline system, already mixed with gasoline.

The differences in the efficiency and convenience between MTBE and ethanol are apparent, as witnessed by gasoline prices before more recent federal regulations mandated increased ethanol use. The primary ethanol/RFG market was the Chicago/Milwaukee area, where gas prices were *over 40 cents per gallon higher* than elsewhere; over 85 percent of the nation's gasoline providers used MTBE, their oxygenate of choice. In sum, defendants and many other companies chose to use MTBE for sound economic reasons. The cost efficiency

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of MTBE as opposed to ethanol is of course a good thing, unless one is an ethanol producer.

MTBE is highly soluble; once it enters a water source it is not readily biodegradable. When properly stored and used, MTBE *never* enters any water source. But beginning in late 1996, MTBE was discovered at low levels in groundwater sources in California, notably in Santa Monica and Lake Tahoe. Since then, MTBE has been detected at low concentrations in other parts of the country. Invariably, the presence of MTBE in groundwater was linked to underground storage tanks (USTs) that had been leaking gasoline for an extended period of time—several years, in many instances. These leaks are typically due to inadequate or non-existent UST inspection and/or maintenance practices. MTBE received an inordinate amount of attention from public officials because it is more water-soluble than other gasoline components and thus can be transported faster and farther in soil and water. As a result, MTBE is the canary in the proverbial coal mine: it is often discovered at the front edge of any gasoline plume traveling through the soil. An MTBE leak signifies that other, much more harmful, gasoline components, such as benzene, are in fact present as well. MTBE can persist for decades in water supplies and if foul-smelling a small quantity can make the water supply unfit for human consumption. Of course, this also applies to many other products, including non-oxygenated gasoline. To repeat, MTBE was never meant to get into water supplies in the first place and will *not* get into a water supply if stored in proper gasoline holding tanks.

As of March 2001, the California Department of Health Services reported that MTBE had been detected in 0.8 percent of all water sources sampled, with only 0.2 percent of those samples exceeding California's primary health standard for MTBE. In addition, a report by the engineering consulting firm, Exponent, Inc., concluded that, "Despite the negative publicity surrounding MTBE and potential aesthetic issues, MTBE in drinking water should not pose a significant public health hazard in California…" MTBE has become a political scapegoat, one very attractive to the ethanol-producing lobby, blamed for failure to enforce federal storage tank regulations. This has occurred despite the fact that it is far more cost-effective to ensure that UST systems are properly preventing leaks than it is to ban the use of MTBE. When UST systems work well, *all* leaks, not just MTBE leaks, are prevented. According to the EPA, compliance with the 1998 minimum UST installation/upgrade requirements and the 1993 UST leak detection requirements is a national priority. Data suggests that UST systems in compliance with applicable regulatory requirements are not experiencing problems with leaking gasoline or gasoline additives, including MTBE. The dramatic impact that UST upgrades have had on groundwater protection is evident in recent contamination data from the California Department of Health Services. This data indicates that as USTs are upgraded the concentration level and frequency of MTBE detections is leveling off and beginning to decline. However, as of 2000 more than 40 percent (304,000 USTs) of all USTs were still not in compliance with 1993 leak detection regulations. More than 15 percent (150,000 USTs) remain out-of-compliance with 1998 regulations for the upgrade of spill, overfill and corrosion protection requirements. By law, all non-compliant USTs must be closed; however, many remain operational. Clearly, those operating non-compliant USTs should fear the wrath of tort law.

Upon repeated oral exposure of very substantial amounts of MTBE, female rats demonstrated an increase in the combined tumor types, lymphoma and leukemia. Male rats developed an increase in testicular tumors. Results from each of the two long-term inhalation studies in laboratory rats and mice, respectively, showed an increased occurrence of kidney and testicular tumors in male rats and liver tumors in mice of both sexes. The relevance of these findings to humans, at concentrations of MTBE found in the environment, is questionable. Extremely high doses were administered to the animals, and it is not known how MTBE causes tumors in these animals. Nevertheless, several agencies have concluded that it is carcinogenic in animals. Plaintiffs claim that it may also be carcinogenic in humans, but no one has yet determined that.[4] The EPA reviewed available health effects information on MTBE in its 1997 Drinking Water Advisory guidance and decided that there was insufficient information available to allow the EPA to establish quantitative estimates for health risks—and as such would not set health advisory limits. The drinking water advisory document indicates that there is little likelihood that MTBE in drinking water will cause "adverse health effects" at concentrations between 20 and 40 ppb or below. Those "adverse health effects" are essentially unpleasant odor and taste, but the vast majority of MTBE detections have been at non-sensory concentrations, under five parts per billion (ppb)—well below the EPA Consumer Advisory level.

The plaintiffs claim that the defendants were aware of dangerous contamination qualities of MTBE, and that the defendants are therefore each jointly responsible for contaminating their water, no matter whose MTBE actually caused the damage. Note that this reasoning could apply equally well to Drano, to gasoline itself, to firearms, and to automobiles. Ford and GM "know" that some of its cars will be misused by drunkards and criminals—but only the latter remain liable for the misuse of cars.

C. Collective Liability Theories

There are four recognized theories of collective liability: concert of action, alternative liability, enterprise liability, and market share liability. Each theory is often altered to fit a particular state's preferences, but they all have a basic definition from which the states begin their analysis.

CONCERT OF ACTION is described by the Restatement (Second) of Torts § 876 (1979) as a vicarious liability, where one party is responsible for the acts of another if he (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result where his own conduct, separately considered, constitutes a breach of duty to the third person. For example, if you and I rob a bank

together, I am liable for the entire amount of booty stolen, and injuries to the teller whom you struck.

ALTERNATIVE LIABILITY, which was first adopted in the controversial *Summers v. Tice,* occurs "where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the plaintiff by only one of them, but there is uncertainty as to which one has caused it."[5] In these cases, "the burden is upon each such actor to prove that he has not caused the harm."[6] Both of us misbehaved, one of us harmed the plaintiff, and the other did not, but the plaintiff cannot make his case against either of us, so the court deliberately chooses to hold both of us liable. This derogation from the normal plaintiff's burden of care is not upheld in all states, and where it is upheld it is done only in extreme cases (e.g., where misbehavior was virtually concerted).

Under ENTERPRISE LIABILITY plaintiffs must demonstrate defendants' joint awareness of the risks at issue and their joint capacity to reduce or affect those risks. As it were, each company in an industry gives cover to the others as they misbehave, much as a rampaging mob gives anonymity to each rampaging citizen.[7] Enterprise liability is only applicable to industries composed of a small number of units, for "what would be fair and feasible with regard to an industry of five or ten producers might be manifestly unreasonable if applied to a decentralized industry composed of thousands of small producers," who could hardly concert.[8]

MARKET SHARE LIABILITY allows the plaintiffs to shift the burden of proof to the defendants when identification of the product manufacturer is problematic or impossible.[9] "The plaintiff must join as defendant manufacturers representing a substantial share of the particular market and each defendant is liable for the proportion of the judgment represented by its share of the market unless it demonstrates that it could not have made the product that caused the plaintiff's injury."[10] *Four* states accepted market share liability for DES (the generic, synthetic female hormone, still used for many purposes but once incorrectly used to prevent miscarriage, causing ovarian cancer to female offspring). Most states squarely reject market share liability.

To these four established federal approaches to the issue, Judge Scheindlin added a fifth, dangerous legal innovation.

D. Judge's Scheindlin's Addition

Judge Scheindlin's COMMINGLED PRODUCT SHARE MARKET LIABILITY theory is an expanded version of market share liability.[11] This theory was held by Judge Scheindlin to be applicable when "a plaintiff can prove that certain gaseous or liquid products (e.g., gasoline, liquid propane, alcohol) of many suppliers were present in a completely commingled or blended state at the time and place that the risk of harm occurred, [if] the commingled product caused a single indivisible injury, [so that] each of the products should be deemed to have caused the harm."[12] Under this theory damages should be apportioned by proof of the defendants' share of the market. Plaintiffs only need to identify those defendants they believe to have contributed to the 'commingled' product which caused their injury; they must conduct some form of an investigation so that they can make a good faith effort to identify the defendants whom they believe caused their injury.[13]

Again, note that unless the defendant manufacturers *knew* that their MTBE would be placed in a particular leaky tank, they are similarly situated to Ford, who "knows" statistically that some of its drivers will use their cars as a deadly weapon, but also that this is *not* the case for any particular driver. Unless such knowledge is proven, it is very hard to see how this new theory could plausibly apply without implying a revolution in products liability.

II. Federal Judges Predicting State Law

When a case is in federal court due to diversity and the substantive law of a forum state is uncertain or ambiguous, the federal court may certify the question to the highest state court.[14] Even when certification is not available under state law, a federal court "not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn."[15] Of course, the federal court *may* also attempt to predict how the highest court of the forum state would rule.[16] To make these predictions the federal judge must look to the state constitutions, statutes, judicial decisions, the Restatements, as well as law from other states.[17]

A. Judge Scheindlin on How to Predict State Law

While many federal judges take a cautious and conservative view when making predictions about the evolution of a state's laws, Judge Scheindlin states that a more liberal view is in order. For while "a court may not adopt innovative theories without the support of state law, or distort existing state law, when a case is removed to federal court, the plaintiff is entitled to the same treatment it would receive in state court."[18] Judge Scheindlin's theory is that the fears about possibly distorting established law or wrongly speculating about trends in state law are only appropriate where the plaintiffs brought the action in federal court, for then their motive may be to "obtain a broader interpretation of state law."[19] In this case the plaintiffs have not brought the case to the federal court, rather the plaintiffs objected to its removal there by the defendants.[20] Judge Scheindlin argues that in this situation, a liberal construction of state law is in order, for it protects principles of dual sovereignty "by protecting a party who sought to obtain a resolution of state law claims from state courts."[21] If a more restrictive view was adopted, this would lead to forum shopping—a main concern of the Erie Doctrine.[22]

Under this reasoning, if a corporate defendant properly removes (for diversity reasons) a state law case to federal court, for fear that as an out-of-state corporation it would be discriminated against (i.e., would not have state law correctly applied to it) by the elected judge and local jury, the federal court is now free to hold the corporation liable anyway. This is a significant new illustration of "darned if you do, darned if you don't."

Judge Scheindlin takes a very broad view of predicting state laws; this view is evident in her ruling.

B. An Opposing View of Predicting State Law

Many take the opposing view of federal prediction from Judge Scheindlin and implement a certification process or simply adhere to a conservative view of the state law and thus refrain from making innovative predictions when the state law is not easily discernable.

Certification occurs when a federal court, sitting for diversity purposes, is faced with an unclear question of state law, and asks the forum state's highest court for resolution.[23] Proponents of certification argue that the process is beneficial and promotes comity and federalism and avoids prognostication by federal courts.[24] Certification may "save time, energy, and resources and helps build a cooperative judicial federalism."[25] The Supreme Court has held that for a "matter of state law [federal judges are] 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction."[26] In *Lehman Bros.*, the Court does not assert that certification is obligatory merely because state law is in doubt.[27] The Court does say, however, that certification would seem "particularly appropriate" because of the novelty of the question posed and because the state law to be applied (in the instance, that of Florida) is in considerable distance from the federal court (New York).[28]

IV. "Erie Guesses"

A. Indiana

Among fifteen states, Judge Scheindlin predicts that Indiana will apply her commingled theory of market share liability.[29] She cites two cases toward that end.

In *City of Gary v. Smith & Wesson Corp.*, the courts chose to reject market share liability theory, but stated that even if they chose to adopt it, it would not be applicable in their case, for guns are not fungible and there was a great remoteness problem between the defendants and the crimes that their products later caused.[30] The "[market share] approach to allocation of liability has not been adopted in Indiana… Whatever the merits of 'market share' in other contexts, we do not believe it is properly applied in this situation involving such a wide mix of lawful and unlawful conditions as well as many potentially intervening acts by non-parties."[31] Judge Scheindlin's theory is that this case is not determinative of what Indiana would do in the case of MTBE, for the two cases are too dissimilar, with the key being the fact that guns are not fungible, while MTBE is fungible.[32] But of course MTBE only affects water supplies when it escapes through leaky tanks that are not the responsibility of MTBE producers—and leaky tanks are not interchangeable with non-leaky tanks, are they?

Judge Scheindlin relies heavily on *E.Z. Gas, Inc. v. Hydrocarbon Transp., Inc.* to reach her conclusion of commingled market share liability.[33] In *E.Z. Gas,* a gas explosion caused injury to plaintiff when he lit the pilot of his gas heater, because of its lack of gaseous odor.[34] Various gas manufacturers' non-odor-added products had been commingled and thus the plaintiff could not identify whose product caused his injury.[35] Indiana allowed burden shifting because there was a product identification problem.[36] Judge Scheindlin also relied on Indiana's Comparative Fault Act,[37] which adopted Indiana's Products Liability Act,[38] and requires that parties' level of liability must be apportioned. Joint responsibility is rejected in Indiana. But this is enterprise liability, and maybe even concert of action, not some version of market share.

Strangely, in a footnote, Judge Scheindlin reserves the use of market share liability, musing that Indiana may one day adopt ordinary market share liability based on the Restatement (Third) factors of market share liability (§15).[39] However, there is no evidence that Indiana has adopted this section of the Restatement (Third). While Indiana courts have used the Restatement (Third) in products liability cases, they have yet to specifically refer to §15.[40] In addition they continue to rely on portions of the Restatement (Second) of Torts.[41] But mere musing is not sufficient to preserve the practice of dual federalism.

B. Kansas

The judge also claims that Kansas will leap to apply her theory of market share liability. *MTBE Prods. Liab. Litig*.[42] However, Kansas is silent on whether or when they would adopt *any* collective liability theory.[43] Even more important is that Kansas' legislature has made it clear that policy-based alterations to well established tort law doctrines should be left to the legislature. Thus it would be inappropriate for federal courts to venture into realms of Kansas public policy.[44]

Despite this, the judge comes to her conclusion by analyzing *McAlister v. Atlantic Richfield Co.*, where a plaintiff sued various oil companies for polluting his fresh water well.[45] She concludes from this case that collective liability is allowed where all defendants acted tortiously towards the plaintiff.[46] In *McAlister* it is "not a prerequisite to recovery that it be shown that the [defendants] were the sole cause of the pollution."[47] Rather, there simply must be enough facts from which the defendants could reasonably be inferred to be the source; once this is determined the issue may then go to the jury.[48] Again, this is concert of action or enterprise liability—it has nothing to do with Judge Scheindlin's case.

In addition, Judge Scheindlin relied on the Restatement (Second) of Torts § 433B(2) and Kansas' comparative fault statute in determining that Kansas will likely apportion the damages among the defendants.[49] But apportionment of comparative fault still requires causation and individualized damages, facts the judge seemed not to address. *McAlister* appears to be saying that plaintiffs may name any one defendant as long as they can prove that the defendant is wrongfully responsible for *their* injuries; they do not have to list every possible defendant.[50] Judge Scheindlin also relies on the "common law notion that oil companies should be liable for storing hazardous substances on their land and permitting those substances to damage the plaintiff's property" to argue that the defendants have breached a duty to the plaintiffs.[51] However, there is no proof *whose* oil damaged the plaintiffs' property, i.e., which tanks were leaky, and this fundamentally undermines the judge's analogy.

Respecting federalism would require a conclusion that Kansas would insist that plaintiffs first prove that each defendant violated a duty against them or that each defendant was

reasonably responsible for their injuries before going forward with their case.[52] The fact that the plaintiffs cannot prove this, and that the Kansas courts have not addressed the theories of collective liability would lead one to conclude that the Kansas plaintiffs' causes of action may not survive the defendants' 12(b)(6) motion.[53]

C. Vermont, Virginia and West Virginia

Vermont, Virginia and West Virginia have not had a chance to rule on the viability of collective liability in a products liability case, and Judge Scheindlin stated that she was not able to discover a "basis for inferring whether [those states] would accept or reject collective liability in MTBE cases."[54] What this means, of course, is that potential plaintiffs (there were "DES daughters" in all 50 states) did not even dare sue in these states, knowing as they did that their suits would be dismissed on demurrer for failure to state a legally cognizable grounds for liability. However, despite this, Judge Scheindlin concluded that the states would adopt the theory of market share liability.[55]

Judge Scheindlin reached her conclusion by citing two cases where the states expanded on the common law "to meet the changing needs of their society" and allowed recovery where, in the past, tort victims were unable to recover.[56] This is, however, in utter contention with our system of federalism; it is the states' right to expand upon the common law, not the federal court system. In brief, because these states' common law has not remained an un-moveable concrete block, Judge Scheindlin is authorized to treat it as moist clay moldable to her liking.

D. New Jersey

Judge Scheindlin predicts that New Jersey will adopt a market share liability theory, despite the fact that New Jersey has explicitly rejected market share, enterprise, alternative and concert of action theories in the context of products liability actions.[57] Judge Scheindlin bases this prediction on the idea that *Shakil v. Lenderle Labs* left the door slightly ajar, for the use of a market share theory of liability in a different context.[58] But *Shakil* made clear that its ruling was confined solely to the context of vaccines.[59]

Judge Scheindlin theorized that this MTBE case would nonetheless fall under the 'rule' of *Shakil*, which was never the rule and addressed only vaccines.[60] She came to this conclusion by comparing *Shakil* and this MTBE case. First, the two cases have a mutual interest in public safety.[61] Second, vaccines are required to save lives,[62] and gasoline, while needed, is not required to protect lives.[63] Placing liability on the defendants will not harm the public.[64] Third, liability exposure would have hurt companies willing to make the vaccine—for only two existed—while with MTBE there are over fifty petroleum companies. This effort at legal reasoning turns on its head earlier New Jersey law. Now, the less likely it is that you caused individualized damage the more likely it is that you will be held liable.

There is solid reason to think that New Jersey will decline the wide-spread adoption of market share liability.[65]

E. Louisiana

Louisiana plaintiffs asserted seven causes of action: unreasonably dangerous design in violation of the Louisiana Products Liability Act (LPLA), inadequate warning in violation of the LPLA, negligence, public nuisance, private nuisance, trespass and civil conspiracy.[66] Judge Scheindlin dismissed the Louisiana plaintiffs' five non-LPLA claims, for they were precluded by the statute.[67] Her analysis was thus based on whether the two LPLA claims may survive on a theory of collective liability.

Judge Scheindlin claims that Louisiana has been silent on the adoption of collective liability. Again, what this reveals is that "market share" plaintiffs ("DES daughters") did not even dare sue in Louisiana. Indeed, the defendants claimed that other federal courts, when called on to apply Louisiana law, had consistently refused to recognize any theory of collective liability.[68] However, according to Judge Scheindlin, such decisions are irrelevant. She concludes the Louisiana courts will adopt the market share theory of liability.[69]

Judge Scheindlin relies heavily on *Gould v. Hous. Auth. of New Orleans* to reach her conclusion.[70] She argued that in this case the courts allowed the plaintiffs to move forward with their claim, despite the fact that they could not identify the exact manufacturers of the lead based paint, which caused the tenants' lead poisoning.[71] *Gould* relied on Louisiana's statute, which allows for pleading in the alternative.[72] The statute specifically states that "a petition may set forth two or more causes of action in the alternative, even though the legal or factual bases thereof may be inconsistent or mutually exclusive."[73] *Gould* refrained from making any decisions on market share or collective liability, for the appeal was from the dismissal of the claims and based on Louisiana Civil Procedure; the issue of market share or collective liability did not need to be decided upon at that point in the proceedings.[74]

Judge Scheindlin is correct that the plaintiffs may move forward with their causes of action at this time due to Louisiana's alternative pleading rules. However, one questions why Judge Scheindlin would then take the extra step of invading the Pelican State's sovereignty to decide such a controversial issue as the adoption of collective liability: precisely what was reserved in *Gould*. What is more puzzling is that she stakes this claim on the idea that Louisiana has or would adopt the Restatement (Third) of Torts §15.[75] There is no evidence that the judge cites that Louisiana would adopt the Restatement (Third) or Torts. Rather, the Restatement (Third) of Torts § 15 cmt. c specifically discusses how Louisiana has rejected market share liability. Section 15 cmt c, cites the Louisiana case *Jefferson v. Lead Indus.*, which rejects market share liability.[76]

There are numerous Louisiana cases which reject the theory of market share liability.[77] Judge Scheindlin, while correct in her ruling that the plaintiffs' cause of action may move forward at this time, had no need to make a prediction about Louisiana's adoption of the market share liability theory.

F. Connecticut

Connecticut has not considered the theories of collective liability—but again, Judge Scheindlin concludes that they will adopt her novel theory.[78]

She relies on two cases: *Sharp v. Wyatt*[79] and *Champagne v. Raybestos-Manhattan Inc.*[80] In *Champagne—Sharp* relied on

Champagne—the court held that a "defendant may be liable when its defective product contributes to a condition giving rise to an injury or death. That other sellers supplied similar products that also may have contributed to the" plaintiff's injury does not matter.[81] I poison your air, and so does Joe. You die from poisoned air—Connecticut says you may sue either one of the wrongdoers. This is classic common law. Somehow Judge Scheindlin concludes that this relaxation of listing all the possible tortfeasors would lead Connecticut to adopt her commingled theory of market share liability, which of course involves liability to a plaintiff by a defendant who placed no poison in the air the plaintiff breathed.[82]

Judge Scheindlin also cited 52-572h(c) of the Connecticut General Statutes, (Conn. Gen. Stat. §52-572h(c) (1999)), which requires that the damages be apportioned among defendants—abolishing joint and several liability—to reach her conclusion.[83] But this statute did not abolish the causation requirement in Connecticut.

G. Pennsylvania

Judge Scheindlin writes that Pennsylvania plaintiffs may rely on either a market share or an alternative liability theory.[84] She reaches this conclusion by relying on Pennsylvania's case law, which discusses the two theories—but rejects them.

Scheindlin relies heavily on *Skipworth v. Lead Indus. Ass'n.*, which is a products liability case brought by the parents of a young child who was poisoned by the lead paint on the walls of their home in Philadelphia.[85] *Skipworth* rejected market share liability theory because the lead based paint products were not fungible and defendants, who did not constitute the sum total of possible defendants from a hundred year period, would have been forced to pay for others' actions.[86] They also rejected alternative liability for factual reasons—the paint manufacturers did not act simultaneously and the plaintiffs had not listed all of the possible tortfeasors.[87] However, the court did "realize that there may arise a situation which would compel [them] to depart from [their] time-tested general rule" of proximate causation.[88] Judge Scheindlin also cited to previous Pennsylvania cases which reached the same conclusion as *Skipworth*—rejecting market share liablity.[89]

In *Erlich v. Abbott Labs.*, the court approved the use of alternative liability, holding that there are four main elements, which justify the plaintiff not listing all of the possible tortfeasors:[90] (1) when the plaintiffs cannot identify exactly which defendant caused their injury, to no fault of their own; (2) they have joined substantially all possible tortfeasors who created substantially all the defective product; (3) all defendants are tortfeasors in that they all engaged in wrongful conduct—i.e., manufactured or marketed the defective product; and (4) the product is fungible.[91] Judge Scheindlin used this approval of alternative liability to conclude that Pennsylvania has adopted the theory of alternative liability.[92] However, she also used this case to conclude that Pennsylvania would adopt market share liability.[93] "That although [*Erlich*] purported to adopt a modified form of alternative liability, its analysis was more akin to that under market share."[94] In an attempt to further back up her theory of market share liability, Judge Scheindlin again cites the Restatement (Third) of Torts §15. Again, there is no clear evidence that Pennsylvania has adopted this section of the Restatement.

Judge Scheindlin's analysis is flawed. She is correct in that Pennsylvania has observed a theory of alternative liability and thus the defendants' motion to dismiss based on this theory should be denied. However, the courts have not openly adopted the theory of market share liability.[95] Rather, the courts have left open the possibility that when faced with a certain fact pattern they might consider adopting the theory.[96] When this fact pattern is present it should be left up to the Pennsylvania state courts. The role of the federal court in a diversity case is "to apply the current law of the appropriate jurisdiction, and leave it undisturbed."[97] "Federal courts may not engage in judicial activism."[98] Judge Scheindlin should not have made the decision to adopt market share liability for Pennsylvania.

H. Massachusetts

Judge Sheindlin relies heavily on two Massachusetts cases to conclude that the plaintiffs may move forward with their claims on a market share theory of liability.[99]

In *Payton v. Abbott Labs.,* the court received a certification request from the federal courts and held that they were not closing the door to the theory of market share liability and *may* "on an adequate record… recognize some relaxation of the traditional identification requirement," and hold the negligent defendant liable for their portion of the market.[100] The case was then sent back to the federal court, which held in *McCormack v. Abbott Labs*, that the plaintiffs may seek damages on a market share theory of liability as long as (a) the injuring product is present, (b) the product caused the damages, (c) defendant(s) produced or marketed the product, (d) the defendant(s) acted negligently in producing or marketing the product, and (e) that the defendants may exculpate themselves by proving that they did not produce or market the product which caused the injury.[101] It was also held that damages must be apportioned among the defendants.[102] The *McCormack* court held that these requirements quashed the *Payton* court's worries that defendants would be unable to prove their innocence and that damages would not be apportioned; and thus the theory was a viable form of recovery for plaintiffs.[103]

Judge Scheindlin has support for her argument, but there is also a strong alternative argument, which she dangerously ignores. The highest court of Massachusetts has never ruled on the issue of market share liability. The *Payton* court left open the door for the adoption of the theory, but the only courts which have adopted the theory are the Superior Court of Massachusetts and the United States District Court of Massachusetts. Other federal courts have refrained from allowing market share liability as a basis for plaintiff's recovery. In *Mills v. Allegiance Healthcare Corp.*, the court held that "although the Supreme Judicial Court of Massachusetts has never categorically rejected the theory, neither has it clearly sanctioned its validity."[104]

I. Iowa

In *Mulcahy v. Eli Lilly & Co.*, the Iowa Supreme Court addressed the issue of collective liability.[105] The court rejected the theory of market share liability on broad public policy reasons,[106] and rejected the use of enterprise liability

and alternative liability theories due to factual reasons.[107] Judge Scheindlin acknowledged that the facts of this case do not meet the standards of Iowa's enterprise liability[108] and alternative liability theories.[109] Plaintiffs have joined too many or too few defendants. Defendants did not delegate control or responsibility for safety functions to a trade association. And all possible tortfeasors are not before the court.[110] However, *Mulcahy* "reserved for later consideration the case which involves actual concert of action by the defendants."[111] Judge Scheindlin relied on this statement to reject the defendants' motion to dismiss.[112]

Iowa has indeed left the door ajar to the theory of concert of action. However, there is no evidence there was a concert of action to pour MTBE through leaky storage pipes into the ground water. *Mulcahy* worried that there would be injustice allowing manufacturers to pay for injuries they did not cause.[113] "If the MTBE defendants acted in concert… the court's concern would be inapplicable because they would be joint tortfeasors—*each* defendant would be responsible for the harm caused to the Iowa Plaintiffs."[114] There is no evidence which points to this scenario and thus it would be improper for a federal judge to apply this theory.

J. New Hampshire

New Hampshire has ruled only once on the issue of collective liability, rejecting it.[115] Judge Scheindlin nonetheless relies on New Hampshire's products liability law to conclude that the state would be receptive to all of the theories of collective liability, especially market share liability.[116]

Judge Scheindlin relied on New Hampshire's liability for defective design.[117] How this supports her is unclear. Similarly, *Bagley v. Controlled Envt. Corp.* held that liability for defective and unreasonably dangerous products did not require proof of negligence.[118] Many other cases are cited to this effect. None of them allow waiving causation requirements, nor the requirement that defendant (as opposed to someone else) produced a defective and unreasonably dangerous product that proximately caused harm to plaintiff.

Judge Scheindlin predicted that New Hampshire would be inclined to apply the market share liability theory based on its product liability law, and on her assessment of the Restatement (Third) of Torts § 15. However, there is no evidence that they would adopt this section of the Restatement and none that they have adopted it. Indeed, the groundless basis of Judge Scheindlin's illogical product liability extension argument is based on the Restatement (Second) of Torts § 402A.[119]

K. Florida, New York and Illinois

Judge Scheindlin had previously ruled on the use of collective liability in Florida, New York and Illinois in an earlier MTBE case.[120]

i. Florida

Scheindlin concludes that the plaintiffs' negligence claims survive on the theory of market share liability and the rest of their claims on the theory of concert of action.[121]

In *Conley v. Boyle Drug Co.*, Florida approved the use of market share liability only for "actions sounding in negligence."[122] The district court, on certification, discarded the theory of concert of action due to the factual situation of the case,[123] and when the case was returned to the Supreme Court the court agreed and did not reject the theory as a whole.[124] If X negligently uses ten leaky storage tanks that pollute *your* well with MTBE, and negligently uses five leaky storage tanks that pollute *your* well with MTBE, then and only then does Florida allow for market share liability.

ii. New York

Judge Scheindlin predicts that New York plaintiffs' claims may survive on theories of market share liability and concert of action.[125] *Hymowitz* also acknowledged the use of concerted action "in some personal injury cases to permit recovery where the precise identification of a wrongdoer is impossible."[126] The opinion does not make clear how the defendants concerted to pour MTBE through leaky storage pipes into plaintiffs' wells, however.

iii. Illinois

Judge Scheindlin concludes that Illinois rejects the theories of market share, alternative and enterprise liabilities, but the plaintiffs may nonetheless rely on theories of concert of action and civil conspiracy.[127]

What is interesting is that in *MTBE I,* Judge Scheindlin had allowed plaintiffs to move forward on theories of concert of action and civil conspiracy, despite the fact that an Illinois case, *Smith v. Eli Lilly & Co.*, had held that concert of action had rarely been "utilized to help plaintiffs overcome the identification burden in product liability cases."[128] Judge Scheindlin failed to cite any Illinois cases which allowed plaintiffs to bypass this identification requirement. However, subsequent to her decision in *MTBE I*, Illinois, in *Lewis v. Lead Indus. Ass'n*, held that the identification burden may be relaxed if the plaintiffs prove that: (a) the distribution/manufacturing of the product causing the injury is tortious itself; (b) the defendants were sole suppliers/promoters of the product; and (c) that each was a party to the conspiratorial agreement.[129] Clearly the fundamental element, (a), has not been proven here. MTBE is safe and effective when used properly, as the introduction to this analysis has shown.

CONCLUSION

When a federal judge in a diversity action makes "innovative" rulings about what a state would do or what theories of law they would adopt the judge has intruded upon the Constitution's integrity. It is true that often the *lex loci* is unclear or in need of interpretation. But in such cases it is prudent for the judge to either certify the case to the highest court in the state or to make the most conservative prediction about how far the state would choose to modify existing jurisprudence. The lack of moderation in this case is almost breathtaking.

Endnotes

1 *See* Michael I. Krauss, Fire and Smoke: Government Lawsuits and the Rule of Law (2001).

2 379 F. Supp. 2d 348, 348-49 (S.D.N.Y. 2005).

3 *MTBE Prods. Liab. Litig.*, 175 F. Supp. 2d at 624; Oxygenated Fuels Ass'n Inc. v. Davis, 331 F.3d 665, 673 (9th Cir. 2003).

4 379 F. Supp. 2d 348, at 365.

5 199 P.2d 1 (Cal. 1948).

6 Restatement (Second) of Torts §433B(3) (1965).

7 Hall v. E.I Du Pont De Nemours & Co., Inc., 345 F. Supp. 353, 378 (E.D.N.Y. 1972).

8 *Id.*

9 63 Am. Jur. 2d Prod. Liab. §179.

10 Am. L. Prod. Liab. 3d § 89:21 (2006).

11 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 377.

12 *Id.* at 377-78.

13 *Id.* at 378.

14 Lehman Bros. v. Schein, 416 U.S. 386, 390-91 (1974).

15 *Id.* at 390.

16 *Id.* at 390-91.

17 Travelers Ins. Co. v. 633 Third Assocs., 14 F.3d 114, 119 (2d Cir. 1994).

18 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 364.

19 *Id.* at 363-64.

20 *Id.*

21 *Id.* at 364.

22 *Id.* "The principle that a federal court exercising diversity jurisdiction over a case that does not involve a federal question must apply the substantive law of the state where the court sits. Erie R.R. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817 (1938)." Black's Law Dictionary (8th ed. 2004).

23 Jessica Smith, *Avoiding Prognostication And Promoting Federalism: The Need For An Inter-Jurisdictional Certification Procedure In North Carolina,* 77 N.C. L. Rev. 2123, 2125 (1999); *See also* John B. Corr & Ira P. Robbins, *Interjurisdictional Certification And Choice Of Law,* 41 Vand. L. Rev. 411, 414-15 (1988) (certification is a byproduct of the Erie Doctrine).

24 Smith, *supra* note 23, at 2133; Corr, *supra* note 23, at 417-18.

25 *Lehman Bros.*, 416 U.S. at 390-91.

26 *Id.* at 391.

27 *Id.*

28 *Id.*

29 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 396.

30 801 N.E.2d 1222 (Ind. 2003).

31 *Id.* at 1245.

32 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 394-5.

33 471 N.E.2d 316 (Ind.Ct.App.1984).

34 *Id.* at 317-18.

35 *Id.* at 318.

36 *Id.* at 321.

37 Ind. Code Ann. §34-20-7-1 (West 1999).

38 Ind. Code Ann. §34-20-2-2 (West 1999).

39 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 397 n.233. Restatement (Third) of Torts: Products Liability § 15 (1998): In deciding when to adopt a rule of [market share] liability, courts have considered the following factors: (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 products caused the plaintiff harm, even after exhaustive discovery; (4) the clarity of the causal connection between the defective product and 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 a reasonable apportionment of liability.

40 Progressive Ins. Co. v. General Motors Corp., 749 N.E.2d 484, 489 (Ind. 2001).

41 Vaughn v. Daniels Co. (W.Va), Inc., 841 N.E.2d 1133, 1140-41 (Ind. 2006).

42 379 F. Supp. 2d at 405.

43 *Id.* at 403.

44 *In Re: Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, Defendant's Motion to Dismiss, Master File C.A. No. 1:00-1898 (SAS) MDL 1358, Kansas cases, 8, S.D.N.Y.

45 662 P.2d 1203 (Kan. 1983).

46 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 404.

47 *McAlister*, 662 P.2d at 1209.

48 *Id.*

49 Kan. Stat. Ann. § 60-258a (2005).

50 662 P.2d at 1209; *see also* Atkinson v. Herington Cattle Co., 436 P.2d 816, 820 (Kan. 1968) ("where two or more persons by their concurrent action pollute or contaminate a stream to the injury of another through whose land the stream flows, they are jointly and severally liable for the wrongdoing, and the injured party may, at his option, institute an action and recover against one or all of those contributing to his injury").

51 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 404.

52 *See* Lyons v. Garlock, 12 F. Supp. 2d 1226 (D. Kan. 1998) (must prove that the tortfeasor is a substantial cause of the injury).

53 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 362.

54 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 439.

55 *Id.* at 440.

56 *Id.* at 439; *see* Hay v. Med. Ctr. Hosp. of Vt., 496 A.2d 939, 945 (Vt. 1985) (holding that Vermont "often met changing times and new social demands by expanding outmoded common law concepts."); Surratt v. Thompson, 212 Va. 191, 183 S.E.2d 200, 202 (1971) (" 'There is not a rule of common law in force today that has not evolved from some earlier rule of common law … leaving the common law of today when compared with the common law of centuries ago as different as day is from night.' ") (quoting State v. Culver, 23 N.J. 495, 505, 129 A.2d 715 (1957)); McDavid v. United States, 213 W.Va. 592, 584 S.E.2d 226, 230 n. 4 (2003) (maintaining that their "courts retain the power to change the common law"); R. & E. Builders, Inc. v. Chandler, 144 Vt. 302, 304, 476 A.2d 540 (1984) (rejecting common law rule that wife's legal existence merged with that of her husband); Hilder v. St. Peter, 144 Vt. 150, 159-60, 478 A.2d 202 (1984) (finding an implied warranty of habitability for residential premises); Morris v. American Motors Corp., 142 Vt. 566, 575, 459 A.2d 968 (1982) (holding that assembler-manufacturer of cars can be vicariously liable for negligence of manufacturer of defective component part); Menard v. Newhall, 135 Vt. 53, 54-55, 373 A.2d 505 (1977) (creating rebuttable presumption of causation in failure to warn cases); Zaleskie v. Joyce, 133 Vt. 150, 155, 333 A.2d 110 (1975) (adopting strict products liability); Richard v. Richard, 131 Vt. 98, 106, 300 A.2d 637 (1973) (abrogating rule of interspousal tort immunity); O'Brien v. Comstock Foods, Inc., 125 Vt. 158, 161, 212 A.2d 69 (1965) (rejecting privity as a defense for injuries to consumer); Foster v. Roman Catholic Diocese, 116 Vt. 124, 133-34, 70 A.2d 230 (1950) (rejecting rule that charitable institutions are immune from tort liability); Smith v. Kauffman, 212 Va. 181, 186, 183 S.E.2d 190 (1971) (abolishing parental immunity in automobile accident cases); Weishaupt v. Commonwealth, 227 Va. 389, 405, 315 S.E.2d 847 (1984) (abolishing husband's immunity from prosecution for rape of wife that

occurred when husband and wife were separated but not yet divorced); Midkiff v. Midkiff, 201 Va. 829, 833, 113 S.E.2d 875 (1960) (abolishing immunity in automobile accident case between two unemancipated brothers); Worrell v. Worrell, 174 Va. 11, 12, 4 S.E.2d 343 (1939) (eliminating interspousal tort immunity in personal injury case because "[a] maxim of the common law (and of the ages for that matter) is when the reason for a rule ceases the rule itself ceases"); Teller v. McCoy, 162 W.Va. 367, 384, 253 S.E.2d 114 (1978) (affording residential tenant implied warranty of habitability); Lee v. Comer, 159 W.Va. 585, 593, 224 S.E.2d 721 (1976) (establishing right of unemancipated minor to maintain action against parents for personal injuries received in automobile accident); Adkins v. St. Francis Hosp. of Charleston, 149 W.Va. 705, 718, 143 S.E.2d 154 (1965) (abolishing doctrine of charitable immunity in tort cases against hospitals); Snyder v. Wheeling Elec. Co., 43 W.Va. 661, 661, 28 S.E. 733 (1897) (adopting res ipsa loquitur doctrine). These cases and citations were taken directly from Judge Scheindlin's opinion. *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 439 nn. 516-17.

57 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 420.

58 561 A.2d 511 (N.J. 1989).

59 *Id.* at 529.

60 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 421.

61 *Id.* at 422.

62 But do defective vaccines not *harm* life?

63 But does non-defective gasoline not allow the ambulance to get the patient to the hospital?

64 *Id.*

65 *See* James v. Bessemer Processing Co. 714 A.2d 898 (N.J. 1998) (held that, in a failure to warn of toxicity of chemicals at the workplace, New Jersey would rely on the asbestos rulings in *Sholtis*, which stated that the "'frequency, regularity and proximity' [of exposure] test appears to… be well-reasoned, properly focusing upon the cumulative effects of the exposure. It is a fair balance between the needs of plaintiffs (recognizing the difficulty of proving contact) and defendants (protecting against liability predicated on guesswork). [The] [i]ndustry should not be saddled with such open-ended exposure based upon "'a casual or minimum contact.'" 568 A.2d at 1207); *see also* Provini v. Asbestospray Corp. 822 A.2d 627, 629 (N.J. Super. Ct. 2003) (follows *Sholtis*).

66 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 405.

67 *Id.* at 408.

68 *Id* at 405.

69 *Id.* at 407-08.

70 595 So.2d 1238 (La.Ct.App. 1992).

71 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 407.

72 La. Code Civ. Proc. Ann. Art 892 (1960).

73 La. Code Civ. Proc. Ann. Art 892 (1960).

74 *Gould*, 595 So.2d at 1242.

75 *Id.*

76 106 F.3d 1245 (5th Cir. 1997).

77 *See* George v. Hous. Auth. of New Orleans, 906 So.2d 1282, 1287 (4th Cir. 2005) (held that, "while market share liability is recognized by some jurisdictions, [there is] no Louisiana case law adopting it."); *Jefferson* 106 F.3d 1245 (5th Cir.1997); Bateman v. Johns-Manville Sales Corp. 781 F.2d 1132,1133 (5th Cir. 1986) (held that they "are bound by the *Thompson* holding that it is for the state of Louisiana to decide for itself whether to make the major policy change of adopting the market share theory."); Thompson v. Johns-Manville Sales Corp. 714 F.2d 581 (5th Cir. 1983) (held that departing from the Louisiana courts is not for them to do.); Case v. Merck & Co., 2002 WL 31478219 (Nov. 5, 2002, E.D.LA) (held that Louisiana has never adopted market share.); Hannon v. Waterman S.S. Corp., 567 F. Supp. 90 (E.D.L.A.1983) (held that market share liability is not proper in asbestos cases).

78 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 379.

79 627 A.2d 1347 (Conn. App. Ct. 1993).

80 562 A.2d 1100 (Conn. 1989).

81 *Sharp*, 627 A.2d at 1357.

82 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 381-82.

83 *Id.* at 382.

84 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 437. Concert of action and enterprise theory of liability are recognized in Pennsylvania, however, the theories as stated in Pennsylvania do not "provide a basis for relaxing [the] plaintiffs' obligation to prove causation." *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 433-34.

85 690 A.2d 169 (Pa. 1997).

86 *Id.* at 173.

87 *Id.* at 174.

88 *Id.* at 172.

89 *See* Pennfield Corp. v. Meadow Valley Elec., 604 A.2d 1082 (Pa. Super. Ct. 1992) (rejected market share liability because not all defendants acted negligently and rejected alternative liability because defendants' actions were not all tortious.); Cummins v. Firestone Tire & Rubber Co., 495 A.2d 963 (Pa. Super. Ct. 1985) (did not adopt market share liability because the factual situation did not condone it.); Burnside v. Abbott Labs., 505 A.2d 973 (Pa. Super. Ct. 1985) (rejected market share liability because at that time the state had not yet adopted the theory and even if they had the facts did not fit the theory—the defendants in question had already proven themselves out of the equation.).

90 1981 WL 207361, 268 (Pa.Com.Pl. 1981).

91 *Id.* at 265-69.

92 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 437.

93 *Id.* at 436-37.

94 *Id.*

95 *Skipworth*, 690 A.2d at 172.

96 *Id.*

97 City of Phila. v. Lead Indus. Ass'n., 994 F.2d 112 (3d Cir. 1993).

98 *Id.*

99 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 411.

100 437 N.E.2d 171, 190 (Mass. 1982).

101 617 F.Supp.1521, 1526 (D. Mass. 1985).

102 *Id.* at 1527.

103 *Id. See also* Russo v. Material Handling Specialties, 1995 WL 1146853 (Mass. Supp. 1995) (adopted and followed *McCormack*'s theory of market share liability.); Mahar v. Hanover House Industries Inc., 1995 WL 1146188 (Mass. Supp. 1995) (adopted market share theory).

104 178 F.Supp.2d 1, 8 (D.Mass. 2001); *see also* Gurski v. Wyeth-Ayerst Div. of Am. Home Prods. Corp., 953 F. Supp. 412 (D.Mass. 1997) (held that Mass. not recognize market share liability.); Santiago v. Sherwin Williams Co., 3 F.3d 546 (1st. Cir. 1993) (holding that Massachusetts has never explicitly endorsed the theory of market share liability).

105 386 N.W.2d 67, 72 (Iowa 1986).

106 *Id.* at 75.

107 *Id* at 71, 73.

108 Enterprise liability requires that (1) the injury-causing product was manufactured by one of a small number of defendants in any industry; (2) the defendants had joint knowledge of the risks inherent in the product and possessed a joint capacity to reduce those risks; and (3) each of them failed to take steps to reduce the risk but, rather, delegated this responsibility to a trade association. *Mulcahy*, 386 N.W.2d at 71 (citing *Burnside*, 505 A.2d at 984).

109 Alternative liability requires that the plaintiffs bring forth all of the parties which may have caused the injury and that these parties acted tortiously and that the plaintiffs, through no fault of their own, cannot identify which party caused their injury. *Mulcahy*, 386 N.W.2d at 74.

110 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 399.

111 386 N.E.2d at 76.

112 *Id.* at 400.

113 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 400. This worry of injustice was the worry with the theories of enterprise, alternative and market share liability. *Mulcahy*, 386 N.W.2d at 71, 73, 76.

114 *Id.*

115 Univ. Sys. Of N.H. v. U.S. Gypsum Co., 756 F. Supp. 640 (D.N.H. 1991), was an asbestos case and the theories were rejected due to the non-fungibilty of the asbestos products.

116 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 413, 416.

117 *See* Buttrick v. Arthur Lessard & Sons, Inc., 260 A.2d 111 (N.H. 1969) (held that use of strict liability and burden shifting is allowed where defect details are beyond plaintiff's knowledge, so long as plaintiff proves there was a defect at the time of purchase and the defect caused the plaintiff's damage.).

118 503 A.2d 823 (N.H. 1986).

119 *See Buttrick*, 260 A.2d at 113.

120 *In re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 175 F.Supp.2d 593 (S.D.N.Y. 2001) (hereafter, MTBE I).

121 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 388-89.

122 570 So.2d 275, 286 (Fla. 1990).

123 Conley v. Boyle Drug Co., 477 So.2d 600 (Fla. Dist. Ct. App. 1985).

124 *Conley*, 570 So.2d at 280; *see* Symmes v. Prairie Pebble Phosphate Co., 63 So. 1 (Fla. 1913) (held that there must be a common design for the theory of concert of action to be viable); Standard Phosphate Co. v. Lunn, 63 So. 429 (Fla. 1913) (followed *Symmes* recognition of the theory of concert of action).

125 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 425. New York has adopted the theory of market share liability in DES cases. Hymowitz v. Eli Lilly & Co., 539 N.E.2d 1069 (N.Y. 1989); *see also* Hamilton v. Beretta U.S.A. Corp., 750 N.E.2d 1055 (N.Y.Ct.App. 2001) (held that market share liability did not apply because guns are not fungible products; their origin is identifiable).

126 539 N.E.2d at 1073.

127 *MTBE Prods. Liab. Litig.*, 379 F. Supp. 2d at 391. The theories of concert of action and civil conspiracy are treated as one in Illinois. Lewis v. Lead Indus. Ass'n., 793 N.E.2d 869, 878-79 (Ill. App. Ct. 2003).

128 527 N.E.2d 333, 350 (Ill. App. Ct. 1988).

129 793 N.E.2d 869, 879 (Ill. App. Ct. 2003).