

CAUSATION IN JOINT PRODUCTS LIABILITY LITIGATION:
IMPLICATIONS FOR MARKETING MANAGEMENT

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In the past ten years several plaintiffs have attempted to prove industry-wide liability on the part of a number of groups of co-defendants (Davis v. Yearwood 1980; Beverly Hills 1979; Hall v. DuPont 1972). Though a variety of products have been involved, clearly the most publicized litigation has included the pharmaceutical industry (Abel v. Eli Lilly 1980; Payton v. Abbott Labs 1979; Sindell v. Abbott Labs 1980). These latter cases relate to the usage of DES, diethylstilbestrol, a synthetic hormone often prescribed between 1945 and 1971 for use by women to forestall accidents associated with pregnancy.

An important question in such litigation relates to causation. That is, whose fungible product actually caused the plaintiff's injuries? This seemingly simple question is a difficult one to answer if the product is destroyed when it harms the user, as is the case with unlabeled blasting caps, or if the product harms the user many years after it was ingested by her mother, as is the situation with DES.

Four approaches to industry-wide liability have been applied by courts and described by legal commentators: concerted action, alternative liability, enterprise liability, and market share liability. The first two approaches have been recognized by the courts for several years (Steffen 1965; Harper and James 1956) and have developed as the logical extension of theories of individual recovery in particular factual situations. The latter methods are policy arguments for the apportionment of damages and, as such, are a rationale or motivation for the doctrines that impose liability (Mallor 1981, p. 6; GLR 1981; Sheiner 1978, p. 995).

Regardless of which theory a plaintiff adopts for allegations in DES and other related litigation, causation typically emerges as the major issue. Under each of the four intra-industry liability theories, if certain facts can be established, the burden of proving causation shifts to the defendants from the plaintiffs. Each defendant must then prove that his/her behavior did not cause the plaintiff's injuries.

Several reasons account for the focus on causation. The lapse of time between use of the drug, DES, and discovery of the injury, from 10 to 20 years or longer, seriously impedes efforts to identify the specific pharmaceutical firm which made the product that caused the injury. The fact that the plaintiffs themselves did not consume the drug, but were exposed when their mothers took it during pregnancy, compounds the difficulties of tracing its source back to the suppliers. Plus, prescription purchasers do not make the choice of which product or brand to use; rather, a physician makes that decision. These circumstances combine to create a situation in which the plaintiff's mother might, at best, recall that she had taken a drug to prevent miscarriage but may never have known that it was DES.

With causation as the focal point in joint products liability litigation, the firm must be sure that its own marketing practices do not inadvertently associate it with the tortious conduct of its competitors. Manufacturing and engineering play obvious roles in minimizing injuries caused by faulty production and design, but marketing too must do its share to avoid joint liability. Specifically, marketing should be concerned with two areas of responsibility: (1) the unique identification of products through labels, brandnames, etc., and (2) the maintenance of records of product sales by channel, by territory, etc.

In the first situation, a company can dissociate its products from its competitors' similar offerings in a variety of ways. By changing the appearance of its products, a company can differentiate its products, but without changing the substance of the items. For example, by coloring its capsules in a unique fashion, a defendant may exculpate itself if the plaintiff remembers taking capsules of another color (Mallor 1981, p. 38).

The second area of responsibility, record-keeping, is important to the firm in defeating the causation question or, if found liable, in minimizing the share of the damages which must be paid. By being able to document when, where, and to whom its products were sold, a corporation can pass along the burden to less meticulous competitors. For example, if a firm can show it did not sell its products in the state where the plaintiff purchased the offending item during the time period in question, it will avoid liability.

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