

For Manufacturers

shown to be negligent in firing guns, were held jointly liable because it could not be determined which hunter had fired the shot which hit the plaintiff. The court concluded that the rule in *Summers* was not applicable here. In *Summers*, all the parties who could have been responsible for the harm to the plaintiff were joined as defendants. Here, only five out of 200 DES manufacturers were defendants in the suit.

The second exception is the "concert of action" theory, as embodied in §876 of *Restatement (Second) of Torts*:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability 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 so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

The plaintiff's complaint alleged that, by relying upon each other's testing and promotion methods, the defendants acted in pursuance of a common plan

or design to commit a tortious act. The court concluded that such reliance is common practice in the industry.

The problem with this theory is that applying the "concert of action" to this situation would render almost any manufacturer liable for the defective product of an entire industry. Furthermore—as the court recognized in rejecting this theory there was no allegation that each defendant knew the other defendant's conduct was tortious and that they encouraged one another to test and warn inadequately with regard to use of DES.

The third exception is the theory which the plaintiffs called enterprise liability. The court, however, more accurately referred to it throughout as "industry-wide liability." The former is really a policy argument to impose liability; the latter states the theory or cause of action itself. The theory was suggested in *Hall v. E. I. du Pont de Nemours & Co., Inc.*, 345 F.Supp 353 (ED NY 1972), in which substantially the entire blasting cap industry plus its trade association were joined in an action involving twelve separate blasting cap incidents which occurred in ten different states. In *Hall*, the court followed this line of reasoning: since there was evidence that the defendants had adhered to an industry-wide standard concerning the safety features, manufacture and design of the caps, if the plaintiffs could