

# **An Analysis of Litigation Claiming Joint and Several Liability**

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## **ABSTRACT**

The purpose of the research is to aid the tort reform decision-making process by generating and analyzing a broad scope of state and federal court cases involving the use of joint and several liability from 1963 through 1988. Results indicate that the overall number of joint and several liability cases is quite small (just .41 percent in 1988). Further, as a percentage of all cases contained in LEXIS, joint and several cases showed an exponential increase from 1963 to 1988 at the federal level but not at the state level. Patterns observed in a sample of joint and several liability cases include dominance of contract cases, relatively large representations of corporate plaintiffs and individual defendants, minimal involvement of municipalities as defendants, larger damage values for corporate plaintiffs than for individual plaintiffs, and an increase in size of claimed damages over time.

## **An Analysis of Litigation Claiming Joint and Several Liability**

Of 58 legislative and regulatory risk management issues recently considered by risk managers in an Alexander and Alexander (1989) survey, modification of the joint and several liability doctrine was rated as second in importance only to caps on non-economic and/or punitive damages. This finding is consistent with claims by insurers and commercial insureds throughout the 1980s that joint and several liability modification is one of the, if not the, most needed tort reform(s). Yet despite such strong opinions about the doctrine, little evidence beyond anecdotes has been collected and analyzed regarding the extent and manner in which joint and several liability is employed in litigation.

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The purpose of the research reported here is to initiate the assimilation and analysis of data on the use of joint and several liability in an effort to aid evaluation of the effects and desirability of proposals to reform its implementation. Two areas of analysis are conducted in this study. The first examines the growth over a 26 year period in number of cases reported by LEXIS in which joint and several liability is mentioned. The second area analyzes a sample of cases claiming joint and several liability.

The article will be presented in five sections. Following this introduction, a brief history and description of key issues regarding joint and several liability is given. Data collection and research methodology are discussed next. The results of the data analysis, including an interpretation of those results, are presented. A summary and conclusions complete the article.

### **Evolution of Joint and Several Liability**

#### *Joint Torts*

Under the doctrine of joint and several liability, two or more defendants are together held financially responsible for a plaintiff's injury and each defendant individually may be held financially responsible for the full value of the harm. The doctrine is hundreds of years old. It was developed in English courts to apportion responsibility where defendants acted in concert to cause a plaintiff's harm. Defendants who act in concert operate independently of each other but do so with the others' knowledge and toward some common goal. Fraud, collusion, and embezzlement were early examples of joint torts. Under these conditions, courts considered the unlawful act of one defendant to be the unlawful act of all defendants. As a result, the rationale developed that the burden of insolvency or some other barrier to recovery against one defendant ought to be borne by the other culpable parties rather than the innocent plaintiff (see Keeton, 1984).

Over time the doctrine of joint and several liability has been expanded beyond concert of action cases. According to the *Restatement of Torts*, Second, Section 875, "Each of two or more persons whose tortious conduct is a legal cause of a single and indivisible harm to the injured party is subject to liability to the injured party for the entire harm." Thus, the concerted effort of the defendants is not necessarily required for joint and several liability to be applied. Rather, the critical element in its applicability appears to be the non-divisibility of harm. At the extreme, the doctrine of joint and several liability could result in a slightly at-fault defendant being responsible to pay for the entire amount of the plaintiff's injuries.

Today most states permit joint and several liability in a number of situations. Actual application of the doctrine differs from state to state; yet, concert of action or indivisible harm situations remain the most common permitted uses.

### Contribution

As the application of joint and several liability has been expanded, so too has the availability of recourse by defendants against their joint tortfeasors. Historically, liable joint tortfeasors were unable to obtain indemnification or contribution from non-liable joint tortfeasors. This situation was considered acceptable in part because it was not too dissimilar from prohibiting, under the doctrine of contributory negligence, any recovery by a plaintiff who was even slightly negligent in causing his/her own harm. With the advent of comparative negligence, however, the rationale to prohibit contribution was weakened.

Under contribution, defendants who have been assessed court awards in excess of their percentage of fault may proceed against other potential defendants for reimbursement. For example assume two parties A and B jointly caused injuries to a third party C. If C decided to pursue and collect the full award from A (the plaintiff may choose among the jointly liable defendants for compensation), A could attempt to make at least a partial recovery from B under the doctrine of contribution. Anderson (1985) shows that 44 states and the District of Columbia recognize some right of contribution among joint tortfeasors. The primary roadblock to such recovery may be the solvency of joint defendants rather than legal rationales.

The current condition, then, is the general availability of joint and several liability when two or more tortfeasors act in concert or cause a non-divisible loss. The harshness of joint and several liability, however, may be tempered by the allowance of contribution claims against solvent defendants. In essence, the courts have shifted from the plaintiff to the defendant the burden of locating, prosecuting, and collecting from jointly liable parties.

This shift is consistent with the development of new rules allowing plaintiffs to sue a group of potentially responsible defendants without proof of individual culpability because such proof is infeasible or at least practically impossible. In such circumstances defendants must prove their innocence rather than merely defend against the plaintiff's claims of culpability. These rules include Market Share Liability, Industry-Wide Liability, and Alternative Liability. Each of the rules permits a plaintiff to collect damages from a group of defendants (sometimes jointly and severally), even though the one who actually caused the harm is not discerned (see Friedland, 1984 and *Final Report*, 1986 for a discussion). Increasingly, through use of these rules, the burden of proof in civil suits is placed on the defendant. While the intent of such liability expansion may be to provide broader "insurance" protection to injured parties, the actual result may be the converse. As argued by Priest (1987), added variation and uncertainty in possible outcomes reduces insurance availability and increases transactions costs. The impact of these market forces is felt most strongly by the poor and low-income members of society. Abraham (1988), Danzon (1984), Epstein (1985), and others further demonstrate that expanded liability in mass tort litigation may distort the incentive system intended to balance the costs of safety versus harm. Abraham

discusses, for example, the inability to set insurance premiums at optimal safety-inducing levels when a large element of the premium reflects uncertainty about the legal system. Certainly the use of joint and several liability can prove troublesome for underwriters who wish to assess an insured's expected losses. Those losses under joint and several liability become dependent on the actions of others, possibly others who are unknown to both the insured and insurer.

### *Rationale for Joint and Several Liability*

The basic issue associated with joint and several liability is often presented as a question of who should bear the risk of insolvent or unidentifiable defendants. As pointed out by McNichols (1979), in any negligence action two distinct but often conflicting goals exist: ensuring fair but adequate compensation to victims, and providing equitable allocation of responsibility among wrongdoers. In many situations, attainment of the first goal requires that joint and several liability be retained, allowing plaintiffs to be adequately compensated with financially able defendants making up for those who are insolvent, uninsured or judgment-proof. Conversely, achievement of the second goal necessitates the abolition of joint and several liability so that defendants will pay only for the percentage they are at fault, and not for other defendants who are unable to pay.

The second goal is that of deterrence. Optimal allocation of responsibility occurs when each party internalizes all costs associated with its respective behavior.<sup>1</sup> Joint and several liability can distort that allocation process by placing full monetary responsibility on a single party. Yet, as shown by Landes and Posner (1980), the critical element in achieving optimal deterrence is appropriate allocation of expected cost *ex ante* rather than allocation of actual costs *ex post*. They state "If, *ex ante*, each defendant bears a cost (an expected cost) of liability, each defendant is deterred, even if all but one pay nothing" (p. 520). Whether or not the allocation is economically efficient under negligence rules depends on whether or not the negligent behavior is concurrent or successive and whether or not indemnity and contribution rights exist. Landes and Posner (1980) conclude that "the common law is seen approximating some rather subtle and not entirely intuitive economic distinctions." (p. 550) Empirical support of an economic decision-making process in litigation is provided by Viscusi (1986) who found that settlement/trial decisions closely parallel behavior modelled under rational economic conditions.

There is, in addition to compensation and deterrence, a third consideration, which is the cost of administering the system. By imposing joint and several liability on defendants, the court shifts to them the burden of proving proportionate shares of liability and of identifying all joint tortfeasors. In the

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<sup>1</sup> See Cooter and Rubinfeld (1989) for a review of the literature concerning economic models of legal disputes and their resolution by courts.

increasingly prevalent area of toxic torts, such litigation costs can be quite significant.<sup>2</sup>

The three conflicting goals of joint and several liability may be most strained when the plaintiff is contributorily negligent, especially when the plaintiff's relative fault exceeds that of individual defendants. The rationale to retain the doctrine of joint and several liability in this circumstance is that the plaintiff's negligence has caused harm to the plaintiff alone, while the defendant's negligence has caused harm to another person. Therefore, the plaintiff should be able to recover the full amount of his or her damage less any percentage which he or she was negligent. Proponents also argue that the defendant will be better able to absorb the loss and spread the cost among society than would be the injured plaintiff. These arguments are heightened when the defendant has insurance.

In contrast, those who favor abolition of joint and several liability under all circumstances believe that plaintiffs take their defendants as they find them. A plaintiff who happens to be injured by an insolvent defendant merely experiences the vagaries of the legal system. Such an argument is consistent with the law holding defendants liable for differing amounts depending on the age and income status of the plaintiff. Opponents of joint and several liability also point to the example that when there is only one defendant involved in a case, and that defendant is insolvent, the plaintiff has no recourse and cannot recover.

### *Impetus for Seeking Reform*

Tort reform is a term which generally describes the movement towards modification of the tort liability system. One of the specific proposals which has received considerable attention is modification of the joint and several liability doctrine. From January 1, 1986 to September 1, 1988, 29 states enacted legislation impacting the joint and several liability rule. Reform measures range from total elimination, to restrictions applying to non-economic or general damages, to prohibitions aimed at specific areas like auto, pollution or medical malpractice (*Insurance Facts*, 1988).

The attention given to joint and several liability by defendants and their insurance companies is directly related to situations like *Walt Disney World Co. v. Wood*.<sup>3</sup> Walt Disney operated a go-cart race track in Florida. A woman was injured at the track when her car was struck by the car driven by her fiancé. The jury found that the plaintiff was 14 percent negligent, her fiancé was 85 percent negligent, and Walt Disney World was 1 percent negligent. The court, under the doctrine of joint and several liability, held that Walt Disney World was required to pay 86 percent of the plaintiff's claimed damages. Of

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<sup>2</sup>Kakalik and Nicholas (1986) estimated that total expenditure nationwide in 1985 for tort litigation terminated in state and federal courts was between \$25 and \$36 billion. Of this, between \$16 and \$19 billion represented transactions costs of the system.

<sup>3</sup>489 So. 2d61 (Fla. 4th Dist. Ct. App. 1986) upheld by the Florida Supreme Court (515 So. 2d 198 1987).

course, Walt Disney World has the option of seeking contribution from the fiancé, but will bear the entire burden of the judgment if the fiancé is insolvent or otherwise judgment-proof.

*Walt Disney* type cases provide opponents of the joint and several liability doctrine some of their strongest arguments. The system can appear particularly unfair when a tortfeasor with minimal fault is required to pay all or most of a judgment because of its greater ability to pay (i.e., "deep pockets"). Municipal and other governmental units have complained of their involvement as defendants in such situations because of their deep pockets taxing authority.

Perhaps the area in which joint and several liability has received the loudest complaints is hazardous waste liability. Under the Comprehensive Environmental Response, Compensation Liability Act of 1980 (CERCLA, often referred to as Superfund) and amendments to it passed in 1986 (Superfund Amendments and Reauthorization Act, SARA), defendants are held strictly, retroactively, and jointly and severally liable for cleanup of hazardous waste sites. The potential exists, therefore, for a single defendant (such as a generator of hazardous waste) to have contributed only a small portion of waste to a site, yet be responsible to pay for a large portion (or all) of the cleanup. Estimated in the \$100 billions, the cost of hazardous waste liabilities under CERCLA is huge; hence, the potential liability can be extremely disconcerting to defendants and their insurers. Because of the relatively high probability of sharing liability with defendants who are insolvent, uninsured, or unidentifiable, joint and several liability has significant "bite" in Superfund cases. Abraham (1988) contends that because "insurers would have to make nearly impossible calculations based on both the potential behavior of the other parties whose activities might combine with the insured's to cause damage, and on the probability that these parties would prove to be judgment proof," (p. 960) the pollution liability insurance market has been severely constricted. In general, joint and several liability can provide underwriters with difficult decisions because the actions that may result in liability very well could be those of parties unrelated to the insured. Knowing this, insureds may have incentives to withhold information about activities that could result in joint and several liability.

### *Central Questions of Reform*

Given the arguments both pro and con, general questions considered in deciding to reform the joint and several liability system or not include: Is the doctrine so disruptive that it interferes with market developments and social objectives. Does the doctrine cause such difficulty in predicting losses that insurance systems are unable to operate? Does the doctrine stifle legitimate innovation in new products and services?

While contemplating questions such as those posed above, the authors were struck by the lack of the most elemental information on joint and several liability. Specifically, if the joint and several liability doctrine is a greater

burden today than it was previously, one would expect to see an increase in the number of cases claiming its applicability. But no data are known to exist on the number of or trend in joint and several liability cases. In addition, one would expect changes in the characteristics of the cases in which joint and several liability is claimed, such as finding for the plaintiff more frequently and claiming larger awards. But the authors know of no data on the changing characteristics of joint and several liability cases. Thus the authors decided to concentrate their research efforts in the present study on the collection and analysis of basic data on joint and several liability. The purpose is not to decide whether or not the doctrine is being applied as it *should* be used, but instead to evaluate some of the assertions made regarding such application. Knowledge of the current status of joint and several liability will help policy makers to assess the desirability of reforming the doctrine, given whatever objectives they choose.

### Data Collection and Research Methods

Two steps in the research were undertaken. In the first step LEXIS<sup>4</sup> was employed to identify the number of cases filed per year over the 26-year period, 1963 to 1988, in which joint and several liability was mentioned. The procedure was completed for both state and federal courts. Strict liability was first applied in 1963 by the California court hearing *Greenman v. Yuba Power Products, Inc.*<sup>5</sup> Because the permission of strict liability is often referenced as the catalyst for many other tort expansions, its commencement serves as the starting point of the analysis reported here.

A second counting procedure was undertaken in order to categorize the cases by type of liability.<sup>6</sup> Categories included are: automobile, contract, malpractice, product, and pollution. The intent is to disaggregate the data in order to observe possible variations in growth patterns by the type of liability.

To obtain a sense of the relative growth in joint and several liability cases, the search included a total number of cases examined by LEXIS in each year. Because of recent assertions that total numbers of legal proceedings are increasing exponentially, this last item of information is critical to evaluating the significance of joint and several liability in relation to the entire judicial system.

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<sup>4</sup>LEXIS is a computer-based legal library which includes a listing of cases reported in the National Reporter and other standard reports as well as certain unpublished opinions or reports. The design of LEXIS is such that cases can be identified by use of "key" words. The process used was to invoke the command:

joint! w/2 several! w/3 liab! and date is 19XX

This command identifies all cases in which "several" is found within two words of "joint" and in which "liability" (or some other term for which "liab" is the root; the ! ensures that all derivatives of the word are included) is found within three words of several for the year designated. LEXIS searches the entire opinion for the combination of words sought, thus some errors of admission are likely.

<sup>5</sup>59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).

<sup>6</sup>This was done by including in the command a fourth required word such as "automobile."

Some problems exist, however, with counting cases in this fashion. For example, identification of cases is dependent upon the wording of the opinion written by the judge. In addition, although almost all federal cases are found on LEXIS, some state courts are not documented all the way back to 1963 because the system is relatively new. Furthermore, LEXIS includes only those cases in which a judicial opinion is written. Eliminated from the sample, as a result, are settled cases and most cases at the trial court level. Trial courts may have a preponderance towards personal injury suits. Moreover, if the case is appealed, yielding a second opinion, it could possibly be counted twice. A similar double-counting problem exists if the case includes claims for more than one type of liability. The purpose of LEXIS is to aid lawyers and legal scholars in locating specific cases for support of legal arguments. To use the system for case-counting, thus, involves limitations as presented. Despite such limitations, the dearth of statistical analysis regarding joint and several liability makes this method a desirable process. Improvements in data availability in the future may suggest other methods of analysis.

The second step in the research is to analyze a sample of cases identified in the first step. Characteristics of the cases to be analyzed include: (1) status of the plaintiff as an individual, business, or municipality;<sup>7</sup> (2) status of the defendant as an individual, business, or municipality; (3) type of liability claimed, e.g., auto, products; (4) jurisdiction and year in which the case is heard; (5) size of damages awarded; and (6) acceptance or rejection of joint and several liability by the court. The purpose of the second step is to measure any consistent patterns in the application of joint and several liability. For example, one might expect that if the deep pockets theory holds, joint and several liability would be applied more frequently and for greater amounts against organizations than against individuals. Furthermore, one might expect joint and several liability to be applied more frequently when the determination of the exact tortfeasor who caused harm is difficult, while identification of the entire population of potential tortfeasors is less burdensome.

## **Results and Discussion**

### *Number of Cases Claiming Joint and Several Liability*

Results of the LEXIS searches are shown in Table 1 and Table 2. As can be observed, state courts hear more cases than do federal courts. In addition, contract claims dominate the subgroup of joint and several liability cases. All types of cases appear to be increasing in a nonlinear fashion.

In fact, time-series analysis supports the hypothesis that the number of cases in which joint and several liability is claimed has been increasing

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<sup>7</sup>The status of plaintiff and defendant are considered according to the original case, even when that status changes on appeal. Thus, the plaintiff is the injured party and the defendant the party being sued for compensation of that injury.

**Table 1**  
 Number of Cases Where  
 Joint and Several Liability Is Mentioned in State Court Suits:  
 1963-1988

| (1)  | (2)  | (3)      | (4)         | (5)      | (6)       | (7)                            | (8)            |
|------|------|----------|-------------|----------|-----------|--------------------------------|----------------|
| Year | Auto | Contract | Malpractice | Products | Pollution | Total<br>Joint and<br>Several* | Total<br>State |
| 1963 | 14   | 31       | 0           | 2        | 2         | 53                             | 16640          |
| 1964 | 14   | 21       | 0           | 0        | 0         | 53                             | 16994          |
| 1965 | 22   | 31       | 3           | 0        | 2         | 60                             | 23560          |
| 1966 | 21   | 35       | 2           | 0        | 0         | 77                             | 25329          |
| 1967 | 26   | 40       | 1           | 0        | 2         | 76                             | 26180          |
| 1968 | 34   | 46       | 3           | 0        | 2         | 101                            | 27487          |
| 1969 | 28   | 47       | 1           | 2        | 0         | 88                             | 28354          |
| 1970 | 22   | 52       | 2           | 0        | 0         | 91                             | 30834          |
| 1971 | 41   | 48       | 5           | 3        | 3         | 104                            | 32602          |
| 1972 | 29   | 48       | 2           | 1        | 0         | 95                             | 34107          |
| 1973 | 30   | 52       | 7           | 2        | 1         | 101                            | 35640          |
| 1974 | 33   | 70       | 8           | 1        | 3         | 124                            | 37614          |
| 1975 | 36   | 78       | 8           | 2        | 1         | 138                            | 44273          |
| 1976 | 27   | 60       | 4           | 3        | 4         | 110                            | 49800          |
| 1977 | 37   | 84       | 8           | 8        | 1         | 150                            | 51597          |
| 1978 | 45   | 81       | 9           | 12       | 2         | 164                            | 53969          |
| 1979 | 39   | 62       | 9           | 14       | 4         | 154                            | 56871          |
| 1980 | 43   | 92       | 11          | 17       | 2         | 193                            | 59410          |
| 1981 | 45   | 94       | 7           | 11       | 2         | 185                            | 65228          |
| 1982 | 47   | 117      | 11          | 19       | 2         | 221                            | 68702          |
| 1983 | 66   | 118      | 11          | 20       | 3         | 237                            | 70815          |
| 1984 | 67   | 132      | 23          | 31       | 6         | 245                            | 71980          |
| 1985 | 75   | 145      | 21          | 38       | 9         | 293                            | 88002          |
| 1986 | 65   | 147      | 36          | 28       | 5         | 301                            | 92420          |
| 1987 | 68   | 173      | 28          | 22       | 8         | 321                            | 90078          |
| 1988 | 72   | 193      | 29          | 22       | 12        | 286                            | 88112          |

\* Because some cases may involve more than one type of claim, the sum of columns (2) through (6) can exceed the value shown in column (7)

exponentially since 1963. The increase (significant at .005) occurs both at the federal and state level and across all types of liability claimed.<sup>8</sup>

<sup>8</sup> Exponential time trend models (several requiring lagged variables) were used to define the pattern of case frequency. Durbin-Watson statistics fall between 1.40 and 2.50 (acceptable ranges) for all equations.

**Table 2**  
 Number of Cases Where  
 Joint and Several Liability Is Mentioned in Federal Court Suits:  
 1963-1988

| (1)  | (2)  | (3)      | (4)         | (5)      | (6)       | (7)                            | (8)              |
|------|------|----------|-------------|----------|-----------|--------------------------------|------------------|
| Year | Auto | Contract | Malpractice | Products | Pollution | Total<br>Joint and<br>Several* | Total<br>Federal |
| 1963 | 4    | 11       | 0           | 0        | 0         | 24                             | 10558            |
| 1964 | 5    | 13       | 0           | 0        | 0         | 24                             | 10517            |
| 1965 | 6    | 10       | 1           | 0        | 0         | 23                             | 10463            |
| 1966 | 6    | 23       | 1           | 0        | 0         | 40                             | 11236            |
| 1967 | 10   | 21       | 0           | 1        | 0         | 40                             | 11823            |
| 1968 | 13   | 19       | 0           | 1        | 0         | 44                             | 12634            |
| 1969 | 9    | 32       | 0           | 1        | 1         | 44                             | 13924            |
| 1970 | 7    | 17       | 1           | 2        | 0         | 39                             | 15643            |
| 1971 | 10   | 36       | 1           | 1        | 2         | 61                             | 16612            |
| 1972 | 11   | 38       | 1           | 2        | 3         | 62                             | 17108            |
| 1973 | 14   | 31       | 0           | 4        | 2         | 68                             | 17593            |
| 1974 | 14   | 39       | 4           | 2        | 2         | 77                             | 16996            |
| 1975 | 9    | 41       | 0           | 2        | 2         | 70                             | 16505            |
| 1976 | 9    | 42       | 3           | 2        | 1         | 63                             | 16404            |
| 1977 | 11   | 49       | 2           | 3        | 2         | 90                             | 16558            |
| 1978 | 13   | 60       | 4           | 5        | 2         | 101                            | 18930            |
| 1979 | 14   | 68       | 4           | 5        | 0         | 98                             | 21942            |
| 1980 | 13   | 80       | 4           | 11       | 2         | 127                            | 27201            |
| 1981 | 21   | 103      | 5           | 7        | 5         | 152                            | 27693            |
| 1982 | 17   | 94       | 8           | 14       | 6         | 147                            | 28337            |
| 1983 | 22   | 94       | 1           | 17       | 5         | 163                            | 29395            |
| 1984 | 13   | 108      | 9           | 7        | 8         | 170                            | 30492            |
| 1985 | 38   | 153      | 15          | 27       | 14        | 257                            | 32031            |
| 1986 | 28   | 166      | 14          | 21       | 14        | 264                            | 40490            |
| 1987 | 26   | 151      | 10          | 17       | 8         | 263                            | 40651            |
| 1988 | 40   | 170      | 22          | 14       | 19        | 248                            | 41836            |

\* Because some cases may involve more than one type of claim, the sum of columns (2) through (6) can exceed the value shown in column (7).

Yet the question remains as to the relative significance of joint and several liability cases. This can be answered through time-series analysis of the percent of cases in which joint and several liability is mentioned (considered to be joint and several liability cases). Three such analysis were performed, one for state cases, a second for federal cases, and the third for state and federal

cases pooled. Both the federal and pooled cases show exponential increases in the relative discussion of joint and several liability. No such increase is statistically evident at the state level.<sup>9</sup>

The contention that joint and several liability has become more commonly used, therefore, cannot be refuted for total case disposition nor for federal cases. The number of cases claiming joint and several liability, however, remains a minor portion of all cases in the system (.41 percent in 1988). Because of statement such as Pressler's that "joint and several liability is the single most serious common law impediment to the underwriting and pricing of insurance," (1988) the authors had expected to find much larger numbers of cases, primarily outside of the contract area. Such small numbers of cases would indicate that award size must be quite large for the doctrine to have a significant overall impact on industry performance. On a policy-by-policy basis, however, the existence of joint and several liability may pose underwriting and pricing difficulties for insurers because of uncertainty about actions of unrelated third parties who may cause insureds to be held liable for significant costs. Data limitations prevent a general analysis of award size in joint and several liability cases here. Future research ought to consider this question.

Finding low numbers of joint and several liability cases is consistent with research conducted by the State Bar of Wisconsin (Walsh, 1989). In that study, all 834 jury trials rendering verdicts in Wisconsin for the two year period 1985-1986 were analyzed for information regarding the impact of joint and several liability. Of the total 834 cases, only 13 were affected by joint and several liability. Further, in none of the cases was a slightly (1 or 2 percent) at fault defendant responsible for the entire judgment. Five of the 13 cases involved motor vehicle accidents, four involved falls on property, three were product liability actions, and one involved a dog attack.

While few other studies examine joint and several liability cases specifically, there exists other analysis of claim frequency. For instance, a study of court filings in 25 states by the National Center for State Courts concludes that "a careful examination of available data . . . provides no evidence to support the often cited evidence of a 'litigation boom' " (Lauter, 1986, p. 46). Hensler, et al., (1987) concluded similarly, but found relevant disparities in growth rates across case type. That is, the frequency of auto cases has declined in the past 25 years, but the frequencies of product liability and medical malpractice have risen significantly. Galanter (1989) addresses this issue by observing patterns of case frequencies for all types of cases heard in federal courts. He attributes the large increase in federal product liability cases to an environmental cause rather than an increase in the litigiousness of society's members. That environmental change is the domination of asbestos, Dalkon Shield and

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<sup>9</sup>Federal and state courts do differ in the types of cases heard. For example, situations involving multiple defendants from several states may be heard as diversity cases (those in which the proper jurisdictional application is uncertain) in federal courts. Separate analysis, therefore, may be warranted.

Bendectin cases, which combined account for 60 percent of all federal cases filed from 1976 through 1986 (GAO, 1988). On the other hand, it should be noted that ignoring these three types of cases, federal product liability filings increased 104 percent from 1976–1986 (GAO). And further still, the increase in filings may be greater under other methodologies, as argued by the Justice Department in its reply to the GAO (GAO, 1988).

To assess the impact of trends, one must determine the representativeness of asbestos-type cases in future litigation. Further, if joint and several liability is used more frequently, if defendants are more often insolvent, and/or if uncertainty of outcomes is greater in these mass tort experiences, then the use of joint and several liability may cause defendants and their insurers greater difficulties today than was true in the past. Several authors address the issue of growing disparity among tort types by suggesting differing rules for distinct torts (see Danzon, 1984; Epstein, 1985; and Spence, 1977).

Further, the possibility exists that joint and several liability litigation is increasing in unreported trial courts or in settled cases that do not result in written court opinions and, hence, are not reported in the LEXIS system. In fact, a recent claim study by the Insurance Services Office (ISO) reported that 15 percent of all claims studied and 33 percent of large claims (i.e., greater than \$25,000) involved multiple defendants. The ISO study did not specifically address whether the joint and several liability doctrine was being used by claimants. But of the claims involving multiple defendants (both in total and for the subgroup of large cases), in the *Claims File Data Analysis* (1988) some 40 percent involved situations where the estimated percentage of the defendant's settlement (liability) exceeded the estimated percentage of defendant's fault. It is precisely this sort of result, of course, that most concerns defendants and their insurers regarding joint and several liability.

One must consider also that while the authors' LEXIS-based research does not show the overall number of cases mentioning joint and several liability to be particularly significant, the implementation of the doctrine in specific cases may be causing problems for defendants and their insurers. To consider this possibility, a random sample of cases was read and analyzed, as presented in the next section.

### *Analysis of a Random Sample of Cases*

Recognizing that legal issues are highly complex, and therefore not easily evaluated by counting cases, the authors undertook to extract information from a sample of cases in which joint and several liability was claimed by the parties involved. A random sample of 129 cases was obtained from the same LEXIS procedure described previously. Each case was read and codified according to several key characteristics. Table 3 illustrates the composition of the cases by year, type of case, and status of the court hearing the case as either federal or state. Other characteristics of interest include the status of both plaintiffs and defendants as either individuals or business/municipal organizations, and the size of damages involved in the case. Analysis of the

**Table 3**  
 Characteristics of Sample Cases

|                          | # cases | % total | cases/year | % accept |
|--------------------------|---------|---------|------------|----------|
| <i>Time Distribution</i> |         |         |            |          |
| 1963-1969                | 36      | 27.9%   | 5.1        | 27.6%    |
| 1970-1979                | 57      | 44.2    | 5.7        | 44.1     |
| 1980-1988                | 36      | 27.9    | 4.0        | 28.9     |
|                          | 129     | 100.0   |            |          |
| <i>Case Type</i>         |         |         |            |          |
| Automobile               | 24      | 18.6%   |            |          |
| Contract                 | 52      | 40.3    |            |          |
| Malpractice              | 5       | 3.8     |            |          |
| Products                 | 20      | 15.5    |            |          |
| Pollution                | 14      | 10.9    |            |          |
| Other                    | 14      | 10.9    |            |          |
|                          | 129     | 100.0   |            |          |
| <i>Jurisdiction</i>      |         |         |            |          |
| State                    | 64      | 49.6%   |            |          |
| Federal                  | 65      | 50.4    |            |          |
|                          | 129     |         |            |          |

relationships among these variables was conducted on the full sample of 129 cases in which joint and several liability was claimed. Such analyses were also conducted on the subgroup of 76 cases (59 percent) in which the joint and several liability doctrine was accepted (permitted to be applied) by the courts.

**Party Status:** A break down of the sample into plaintiff and defendant status provides some interesting results. As illustrated in Table 4, of the total sample, 69 percent of the plaintiffs and 36 percent of the defendants are individuals. Most of the remaining plaintiffs are business organizations, while defendants are more diverse. Only 4 percent of defendants are municipal organizations, 40 percent are businesses, and 20 percent are represented by a combination of the other categories. Combinations often involve situations such as a corporate director being jointly sued with the corporation for mismanagement of funds or a joint claim against a driver, owner, and manufacturer of an automobile for injuries arising out of an accident. Because of the general perception that tort filings often involve individual plaintiffs suing corporate or municipal defendants, the large percentage of individual defendants and corporate plaintiffs was unexpected by the authors, as was the small involvement of municipal organizations.

Municipalities have been some of the more vocal opponents of joint and several liability, yet their involvement as depicted by this sample is limited. These results are consistent with a Wisconsin study in which municipalities indicated no joint and several liability claims had been made against them

**Table 4**  
Status of Parties

|                                                 | Plaintiff                    |      |                               |      | Defendant                    |      |                               |      |
|-------------------------------------------------|------------------------------|------|-------------------------------|------|------------------------------|------|-------------------------------|------|
|                                                 | Cases where<br>J & S Claimed |      | Cases where<br>J & S Accepted |      | Cases where<br>J & S Claimed |      | Cases where<br>J & S Accepted |      |
|                                                 | #                            | %    | #                             | %    | #                            | %    | #                             | %    |
| Individual(s)                                   | 89                           | 69%  | 54                            | 71%  | 46                           | 36%  | 31                            | 41%  |
| Business<br>Organization(s)                     | 35                           | 27   | 18                            | 24   | 51                           | 40   | 25                            | 33   |
| Municipality(s)                                 | 2                            | 2    | 1                             | 1    | 6                            | 4    | 4                             | 5    |
| Combination of<br>more than one<br>of the above | 3                            | 2    | 3                             | 4    | 26                           | 20   | 16                            | 21   |
|                                                 | 129                          | 100% | 76                            | 100% | 129                          | 100% | 76                            | 100% |

during the period 1981 through 1985 (*Final Report*, 1986). One must be cognizant, however, of the possibility that joint and several liability is a greater problem for municipalities in cases that are settled prior to a court decision. For settled cases, no court opinion is written, omitting them from the sample reported on here. Indeed plaintiffs may be using the leverage of joint and several liability to force municipalities to settle. Yet, regarding cases that go to court and are analyzed in the present study, municipalities do not appear to be disproportionately affected by the imposition of joint and several liability.

**Damage Value:** Considering plaintiff/defendant status with respect to damage size provides further insight. Table 5 presents different breakdowns of the 72 cases (56 percent) in which damage values were available.<sup>10</sup> As shown there, cases in which plaintiffs or defendants are individuals have lower mean damage values than when they are not individuals. When *both* plaintiff and defendant are individuals, mean damage values fall even more. The general relationship of plaintiff/defendant status holds when the sample is further refined to consider only those cases in which joint and several liability is accepted (see Table 5).

As with the dominance of contract cases and the relatively large percentage of corporate plaintiffs, the large damage values for non-individual plaintiffs provides some indication that the deep pocket syndrome, at least on a superficial level, exists among business plaintiffs as well as among individual plaintiffs. To establish the full impact of corporate versus individual

<sup>10</sup>Not all cases reveal a damage value. A court hearing an appeal, for example, often will merely consider whether or not to accept the lower court's decision without mention of damages. Most cases reported in LEXIS are likely to be appeals because a trial court (the lowest court) only infrequently involves a written and reported opinion. Further, the damage values reported may differ from ultimate payment by defendants following relevant appeals and settlements.

**Table 5**  
**Damages Categorized by Plaintiff/Defendant Status\***  
**Cases Claiming Joint and Several Liability**

| Status                          | Mean Value | Standard Deviation | Maximum Value | MAX value percentage of total (%) | # Cases   |
|---------------------------------|------------|--------------------|---------------|-----------------------------------|-----------|
| Individual Plaintiff(s)         | \$ 240,777 | 487,928            | \$ 2,180,000  | 19.7                              | 46        |
| Not Individual Plaintiff(s)     | 1,107,721  | 2,290,211          | 10,000,000    | 34.7                              | 26        |
|                                 |            |                    |               |                                   | <u>72</u> |
| Individual Defendant(s)         | 365,438    | 1,541,871          | 10,000,000    | 65.2                              | 42        |
| Not Individual Defendant(s)     | 817,602    | 1,355,384          | 4,918,011     | 20.0                              | 30        |
|                                 |            |                    |               |                                   | <u>72</u> |
| Both Parties Are Individuals    | 142,162    | 270,419            | 1,177,881     | 25.9                              | 32        |
| Neither Party Is Individual(s)  | 1,125,096  | 1,685,412          | 4,912,086     | 27.3                              | 16        |
| Only One Party Is Individual(s) | 721,907    | 2,065,515          | 10,000,000    | 57.7                              | 24        |
|                                 |            |                    |               |                                   | <u>72</u> |

Cases Accepting Joint and Several Liability

| Status                          | Mean Value | Standard Deviation | Maximum Value | MAX Value percentage of total (%) | # Cases   |
|---------------------------------|------------|--------------------|---------------|-----------------------------------|-----------|
| Individual Plaintiff(s)         | \$ 263,684 | 538,978            | \$ 2,180,000  | 25.1                              | 33        |
| Not Individual Plaintiff(s)     | 701,577    | 1,520,987          | 4,918,436     | 50.1                              | 14        |
|                                 |            |                    |               |                                   | <u>47</u> |
| Individual Defendant(s)         | 136,118    | 249,979            | 1,178,943     | 29.9                              | 29        |
| Not Individual Defendant(s)     | 809,791    | 1,423,848          | 4,918,436     | 33.7                              | 18        |
|                                 |            |                    |               |                                   | <u>47</u> |
| Both Parties Are Individuals    | 134,869    | 270,979            | 1,178,943     | 36.4                              | 24        |
| Neither Party Is Individual(s)  | 1,012,391  | 1,856,716          | 4,918,436     | 54.0                              | 9         |
| Only One Party Is Individual(s) | 441,091    | 728,680            | 2,180,000     | 34.3                              | 14        |
|                                 |            |                    |               |                                   | <u>47</u> |

\* "Individual" represents a person in his/her own interest. "Not Individual" represents businesses, municipalities, and non-profit organizations.

plaintiffs, however, one would need to control for injury characteristics as well as party status. When this is done with respect to defendant status, Peterson (1984) finds a significant reduction in the disparity of awards against corporation versus awards against individuals, although the disparity remains. A further important refinement to Peterson's effort to assess the existence of

biases in tort awards may be to control for plaintiff status. Because of the relatively small sample used here, such refinement is not feasible.

The full distribution of damage values exhibits the skewed shape generally found in liability lines. That is, most suits involve relatively low damage values, but a potential exists for large liabilities, as is evident by considering both the mean and maximum value. As can be seen in Table 5 the maximum claim value represents a significant proportion of total claims, indicating a positive skewness in the claim distribution, a characteristic that proves troublesome for the underwriting of individual risks and that has received attention in other analysis (e.g., ISO claims analysis). Furthermore, the size of damages appears to be increasing over time. Time-series analysis supports this contention with a significant coefficient at the .05 level. The rate of increase in cases accepting joint and several, however, is about 6 percent, which roughly mirrors the rate of inflation.

**Jurisdiction:** As can be seen in Table 6, the cases are split almost evenly between state and federal courts.<sup>11</sup> And while the numbers indicate a slightly greater tendency for state courts to accept joint and several liability, cross-tabulations show no statistically significant relationship between jurisdiction and acceptance of the doctrine. Furthermore, state and federal courts are approximately the same with respect to claim type, damage value, and chronology. A distinction does exist, however, with respect to plaintiff and defendant status. The sample of federal cases is biased toward corporate plaintiffs and defendants. This result may be due to the use of federal courts for diversity suits, which are more likely to involve corporate parties. Diversity suits are those for which more than one jurisdiction is applicable, such as a products liability case in which component parts manufacturers domiciled in several states are all parties to the suit. Because no single state has jurisdictional preference, the federal court hears the case.

**Case type:** An analysis of case type for this sample is difficult because of the small number in each category. The authors can, nevertheless, offer some impressions from their review of the cases. Because product liability and medical malpractice cases receive so much attention in both academic and industry media, the authors expected these cases to dominate. Thus, the significant role of contract cases was unanticipated, although the result is consistent with Galanter (1989). Important to note is that these are not contract cases involving personal injury, such as products liability claims. Rather, many of the state contract cases involve the joint and several liability of individuals having cosigned a note or maintained funds in a joint bank account. At the federal level, derivative suits and enforcement of contractual agreements among business organizations are the dominant form of contract cases. Furthermore, at the federal level the decision to impose joint and several liability often is made relatively easy by specific wording calling for it in

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<sup>11</sup> To study the effect of jurisdictional differences, one ought to evaluate each court independently rather than aggregated to the state and federal levels. The small sample size relative to the number of courts, however, does not permit a more specific evaluation.

**Table 6**  
 Characteristics of Sample Cases  
 State Versus Federal

|                                   | State      | Federal    |
|-----------------------------------|------------|------------|
| Accept Joint and Several          | 41         | 35         |
| Do Not Accept Joint and Several   | 23         | 30         |
| <i>Claim Type</i>                 |            |            |
| Automobile                        | 14         | 10         |
| Contract                          | 29         | 23         |
| Malpractice                       | 4          | 1          |
| Products                          | 7          | 13         |
| Pollution                         | 8          | 6          |
| Other                             | 2          | 12         |
| <i>Chronology</i>                 |            |            |
| 1963-1969                         | 21         | 15         |
| 1970-1979                         | 28         | 29         |
| 1980-1988                         | 15         | 21         |
| <i>Plaintiff/Defendant Status</i> |            |            |
| Individual Plaintiff              | 51         | 38         |
| Corporate Plaintiff               | 12         | 23         |
| Municipal Plaintiff               | 1          | 1          |
| Combination                       | 0          | 3          |
| Individual Defendant              | 34         | 12         |
| Corporate Defendant               | 18         | 33         |
| Municipal Defendant               | 1          | 5          |
| Combination                       | 11         | 15         |
| <i>Mean Damage Value</i>          |            |            |
| Individual Plaintiff(s)           | \$ 178,770 | \$ 321,385 |
| Not Individual Plaintiff(s)       | 584,880    | 863,464    |
| Individual Defendant(s)           | 45,383     | 277,898    |
| Not Individual Defendant(s)       | 931,688    | 760,560    |
| Both are Individuals              | 38,858     | 314,335    |
| Neither Is An Individual          | 1,361,504  | 1,046,293  |

contracts of sale or performance and/or legislative wording requiring joint and several liability, such as under the Employee Retirement Income Security Act, Security Exchange Regulations, or motor vehicle requirements.

**General Observations:** A greater willingness to accept joint and several liability with passage of time does seem to exist. Sometimes the courts rationalize the change by referencing the shift to comparative negligence from

contributory negligence. Other times, the increasingly complex risks faced by plaintiffs is cited by courts to accept the joint and several liability doctrine. The trend toward acceptance, however, is not highly pronounced in the sample used for this study; rather it is a gradual, subtle shift.

Additionally, courts appear to be quite concerned with equity in assessing the value of imposing joint and several liability. Not one of the 129 cases used in the study involved an opinion which stated that joint and several liability was accepted because of availability of funds. While those cases certainly exist outside of the sample considered, the authors consider them to be unrepresentative of the general civil court system as evidenced by the research reported here. The courts, of course, may make decisions based on the availability of funds without being explicit about their rationale.

### **Summary and Conclusions**

One of the central issues in the tort reform debates of the 1980s has been the use of joint and several liability. Yet despite the doctrine's importance in the rhetoric, only limited data have been offered in support of or against its modification. The research reported here was undertaken to aid the tort reform decisionmaking process by generating and analyzing a broad scope of data on the use of joint and several liability.

Data were generated using two procedures. The first determined the annual number of joint and several liability cases at the state and federal levels identified in the LEXIS system from 1963 through 1988. The second procedure analyzed various attributes of a random sample of joint and several liability cases.

The overall number of joint and several liability cases identified in the first procedure is small, just 534 (286 at the state level and 248 at the federal level) out of more than 130,000 cases in total. Further, of those 534 cases in which joint and several liability was mentioned, 363 (68 percent) were contract cases. Despite the small number of joint and several liability cases, time series analysis does indicate an exponential increase in this number since 1963. The increase is found even when considered as a percentage of all cases both for the whole judicial system and for the federal system, but not for the state system. Investigation into the cause of this difference between the federal and state systems appears worthy of consideration.

Several patterns are observed from analyzing attributes of the random sample of cases. These include dominance of contract cases, large representations of corporate plaintiffs and individual defendants, minimal involvement of municipalities as defendants, larger damage values for corporate plaintiffs than for individual plaintiffs, and an increase in claimed damages over time. Interesting to note, although tempered by the small sample, is the absence of any statistically significant relationship between accepting or rejecting joint and several liability and the other considered characteristics.

A number of these results were not anticipated by the authors. Because of the conviction of tort reformists that joint and several liability poses an unbearable burden to American businesses, the expected outcome of the analyses was dramatic growth in both numbers of cases and size of damages. Dramatically increasing damage values were not found. And while the number of cases did grow rapidly, their small size in total is noteworthy. Furthermore, the dominance of business disputes in court actions runs counter to the general impression that individual plaintiffs are reaping huge awards from an inequitable and inefficient system. The effectiveness of tort reform likely differs depending on the status of parties involved; hence, decision makers should be cognizant of the role played by corporate plaintiffs.

The implications of the results of this study for the insurance industry are not obvious. The results suggest that at least for cases in which written opinions exist, the financial impact of claims involving joint and several liability may be minimal. While the existence of joint and several liability poses underwriting and pricing difficulties for insurance company underwriters in evaluating individual insureds, it would seem that their concern over attempting to identify risks with a joint and several liability exposure may exceed the actual problem posed by the courts in imposing joint and several liability. On the other hand, as previously noted, the sample studied did not include settled claims or cases without a written opinion. It is possible that the use of joint and several liability is greater in these two groups than in judge-decided court cases, which would imply that insurance underwriters and actuaries should be more concerned with joint and several liability exposures. Indeed it is possible that joint and several liability is being used as a lever to force settlements, but this scenario has yet to be documented by research.

Fruitfull areas of future research would include an examination of samples of settled claims and those jury-decided court cases for which no written opinion exists, in order to measure the extent of joint and several liability claims in these groups. Another research effort might examine a larger sample of cases which would permit a more detailed statistical analysis of relationships among the identified variables, including severity. Lastly, the general involvement of businesses as both plaintiffs and defendants needs to be explored with regard to whom will be affected by tort reforms, who is clogging the court system, and what are the causes of the often referred to "civil justice crisis."

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