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WHO IS RESPONSIBLE WHEN YOU SHOP UNTIL YOU DROP?: AN IMPACT ON THE USE OF THE AGGRESSIVE MARKETING SCHEMES OF “BLACK FRIDAY” THROUGH ENTERPRISE LIABILITY CONCEPTS

Victoria C. Dawson*

I. INTRODUCTION

“Wal-Mart Employee Trampled to Death in Black Friday Stampede”—this was the gist of many headlines that appeared in print and electronic news reports across the country on November 28, 2008.¹ The thirty-four-year-old man was knocked to the ground by a swarm of unruly shoppers who rushed into the store when the doors opened at

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1. See, e.g., Kieran Crowley, *Worker Killed in Wal-Mart Stampede*, N.Y. POST, Nov. 28, 2008, http://www.nypost.com/p/news/regional/worker_killed_in_wal_mart_stampede_stv8Nzjd0Pzla9RuQzydul; Joe Gould, Clare Trapasso & Rich Schapiro, *Worker Dies at Long Island Wal-Mart after Being Trampled in Black Friday Stampede*, DAILY NEWS (N.Y.), Nov. 28, 2008, http://www.nydailynews.com/ny_local/2008/11/28/2008-11-28_worker_dies_at_long_island_walmart_after.html; *Man Dies After Wal-Mart Stampede*, CBSNEWS.COM, Nov. 28, 2008, http://www.cbsnews.com/stories/2008/11/28/national/main4637170.shtml?source=RSSattr=U.S._4637170; Robert D. McFadden & Angela Macropoulos, *A Crowd Seeking Holiday Deals, and a Rush for the Door That Turned Fatal*, N.Y. TIMES, Nov. 29, 2008, at A16; *Wal-Mart Worker Dies During Black Friday Event*, ASSOCIATED PRESS, Nov. 28, 2008, <http://www.1010wins.com/pages/3399867.php>; *Wal-Mart Worker Dies in Shoppers' Stampede*, ASSOCIATED PRESS, Nov. 29, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/11/28/AR2008112802455.html>.

a Wal-Mart in Long Island, New York.² “[W]ith no police officers in sight, the crowd of more than 2000 had become a rabble” about a minute before the doors were scheduled to open.³ “Six to [ten] workers inside tried to push [the crowd] back, but it was hopeless.”⁴ The shoppers physically broke down the doors, and the man was thrown back on the floor and trampled in the stampede that streamed over him.⁵ Four other shoppers, including a father and son, as well as a twenty-eight-year-old pregnant woman, were reported as injured in the episode.⁶ The employee was pronounced dead an hour later.⁷

In prior years, other shoppers reported experiencing uncontrollable crowds in the throngs of Black Friday sales. For instance, after receiving a laptop computer from the sales associate, a lady in Florida was pushed to the ground and found herself under a pile of bodies and feet.⁸ She was trampled, and now suffers permanent injuries.⁹ Another reported incident involved a seventy-two-year-old woman who was trampled by a stampede of shoppers at a local retail establishment.¹⁰ Scenes of the stampedes were, in fact, captured on store cameras.¹¹ Across the country, news stories emerged with images capturing the stampedes, rushing, pushing, shouting, tense moments, and separated family members.¹² However, most incidents go unreported.¹³

2. *Wal-Mart Worker Dies in Shoppers' Stampede*, *supra* note 1.

3. *See* McFadden & Macropoulos, *supra* note 1.

4. *Id.*

5. *Id.*

6. *See id.*

7. *Id.*

8. Jackelyn Barnard, *Woman Sues Retail Giant Over Black Friday Chaos*, FIRST COASTAL NEWS (Jacksonville, Fla.), Nov. 20, 2007, <http://www.firstcoastnews.com/printfullstory.aspx?storyid=96063>.

9. *Id.*

10. Theboxtank, http://theboxtank.typepad.com/walmartbox/2005/11/black_friday_vi.html (Nov. 25, 2005, 17:36 EST).

11. *Id.*

12. *See* Richard Roeper, *Holiday Shopping Madness Puts Us in Dubious Company*, CHI. SUN TIMES, Nov. 28, 2005, at 11 (“Every year we see the news video and read stories about shoppers gone wild.”); *see also Black Friday Stampede* (Fox News broadcast Dec. 1, 2008), <http://www.truveo.com/black-friday-stampede/id/2070184360>; AOL.com, *Black Friday Morning Rush in WNY*, <http://video.aol.com/video-detail/black-friday-morning-rush-in-wny/296739209> (last visited Oct. 24, 2009) (showing video of crowds rushing into the Prime Outlet at midnight, Best Buy at 5:00 a.m., and K-Mart at 6:00 a.m.); YouTube.com, *Black Friday Stampede*, <http://www.youtube.com/watch?v=>

The popularity of Black Friday has caused competitive early-bird shopping to become a holiday norm and, in some specific cases, a holiday nightmare. Over the years, pre-dawn discount deals, coupled with aggressive shoppers, have led to spontaneous stampedes and shoving matches when certain stores opened their doors.¹⁴ At times, mob behavior overcomes shoppers; some get upset about the crowds, the lack of organization, and the shoving that can occur, while others rush to various departments within the store in an attempt to collect the sales items on their lists.¹⁵ Some shoppers describe this as the best time to take advantage of the lowest prices of the season.¹⁶ However, others experience unexpected horror as they are pushed and nearly run over by aggressive crowds.¹⁷

Shoppers are lured to the Black Friday sales by deeply discounted limited sales items which are sacrificed as "doorbuster" items.¹⁸ Doorbusters and loss leader items "have become an increasingly crucial part of the overall annual sales for retailers."¹⁹ Doorbuster prices promise significant savings on holiday gifts and much-wanted

aeSgBL7gpAk&NR=1 (last visited Oct. 24, 2009) (showing news footage of Channel Four and NBC reporting on the stampede in Grand Rapids, Michigan).

13. See Mark Huffman, *Black Friday Gives Wal-Mart a Black Eye*, CONSUMER AFFAIRS.COM, Nov. 28, 2005, http://www.consumeraffairs.com/news04/2005/walmart_black_friday.html (indicating that U.S. media has been slow to report on chaotic conditions at Wal-Mart associated with Black Friday); see also Robert Lee Long, *Wal-Mart Melee Causes Injury*, DESOTO TIMES TRIB., Dec. 2, 2008, <http://www.desototimes.com/articles/2008/12/02/news/doc49351eacaf0b2503877450.txt> (reporting an account from a witness who saw "a lot of pushing and shoving" and people not being very polite).

14. See AOL.com, *supra* note 12; see also Joe Kovacs, "Black and Blue Friday": Americans in Stampede, WORLD NET DAILY, Nov. 25, 2005, http://www.worldnetdaily.com/news/article.asp?ARTICLE_ID=47588 ("Americans across the fruited plain have been stampeding and in some cases fighting each other in the rush for seasonal bargains.").

15. See generally Huffman, *supra* note 13.

16. See Press Release, Nat'l Retail Fed'n, NRF Survey Finds Black Friday Gets Holiday Season off to Energetic Start (Nov. 30, 2008), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=610 [hereinafter Energetic Start].

17. See *supra* note 14 and accompanying text.

18. Doorbusters and loss leaders are items generally sold at a loss to attract customers. JERRY M. ROSENBERG, DICTIONARY OF RETAIL AND MERCHANDISING 123 (1995).

19. Melanie Warner, *The Doorbusters*, N.Y. TIMES, Nov. 26, 2005, at C1, available at <http://query.nytimes.com/gst/fullpage.html?res=9F05E3DA1731F935A15752C1A9639C8B63&sec=&spon=&pagewanted=print>.

household items. For instance, in 2005, a \$749.00 Toshiba laptop computer was marked down to \$379.99, while a Kodak digital camera was selling for \$129.99 at Best Buy electronics stores.²⁰ Also, at Wal-Mart stores, twenty-inch televisions were priced at \$89.00, DVD players were priced at \$79.86, a Kodak Easy Share digital camera was discounted fifty percent off of the original price and was selling for \$89.99, Cabbage Patch Kid dolls were being sold for \$10.00, Nintendo Game Boys were listed at \$48.88, and a plasma television was priced at \$997.²¹ However, there are not enough sales items per store for every customer.²² According to marketing guidelines, retailers must advertise that items are limited.²³ Such notice, coupled with deep discounts, act as bait for a massive consumer response.

By 2008, as a remedy for the depressed retail profits from prior sales months, Black Friday retailers pushed sales with more aggressive price cuts.²⁴ Large, high-definition, flat-panel televisions were offered at give-a-way prices; a forty-two-inch Polaroid HDTV was listed at one store for \$598, down from \$945.²⁵ Another store offered a forty-two-inch plasma set for \$600, though it cost \$1600 the previous year.²⁶ Macy's offered shoppers a \$10 discount on any \$25 purchase before 1 p.m. Best Buy gave away free blue and yellow scarves to the first fifty shoppers waiting in line at twenty-five designated stores. BJ's Wholesale Club offered more than \$3000 worth of coupons and focused its sales assault on electronics.²⁷ As a result of the tough economic times,

20. *Id.*

21. See Mark Chediak, *Pre-Dawn Deals Lure Crowds*, ORLANDO SENTINEL, Nov. 26, 2005, at A1; Anne D'Innocenzio, *Retailers Say Crowds Bigger This Year*, ASSOCIATED PRESS, Nov. 26, 2005, http://www.redorbit.com/news/general/313989/retailers_say_crowds_bigger_this_year/.

22. See Huffman, *supra* note 13.

23. 16 C.F.R. § 238.3(c) (2008) (indicating retailers must make clear and adequate disclosures that supply is limited and/or the merchandise is available only at designated outlets to avoid a bait scheme).

24. Anne D'Innocenzio, *Black Friday Shoppers Out in Force, but Cautious*, ASSOCIATED PRESS, Nov. 29, 2008, http://seattletimes.nwsources.com/html/business/technology/2008445067_apholidaysshoppingblackfriday.html.

25. *Id.*

26. Jefferson Graham, *Best Buy, Wal-Mart, Others Slash TV Prices for Black Friday*, USA TODAY, Nov. 25, 2008, http://www.usatoday.com/money/industries/retail/2008-11-25-tv-deals-black-friday_N.htm.

27. Ylan Q. Mui, *Stores Gird for Critical Weekend*, WASH. POST, Nov. 27, 2008, at D01, available at <http://www.washingtonpost.com/wp-dyn/content/>

customers have flocked to the opportunity to buy at a steeper discount.

For many years, reported incidences of violence have revealed that “shoppers are dropping” while taking part in the Black Friday sales. Injured shoppers, who have filed individual lawsuits based on common law negligence, have not deterred the marketing practice. Private settlements, payments of claims, and judgments are reached without the amount of publicity that is enjoyed by the sales themselves, and the practice of Black Friday is still in full force for the next holiday season. No lawsuit has been able to impact safety measures, nor curtail or abolish the aggressive marketing schemes associated with Black Friday. No single plaintiff or claimant has been able to penetrate the entire retail industry and the related trade associations, which adhere to what is essentially a dangerous industry-wide practice. Shoppers continue to drop, and are even killed, as a result of the industry-wide Black Friday marketing practice.

When a retail store consumer is injured by a wrongful act of a store, the usual means of recovery is a negligence action against the owner or operator of the store.²⁸ However, another possibility is to bring a negligence action against other persons, such as franchisers, distributors or suppliers of merchandise, trade associations, or an entire industry participating in the practice.²⁹ Where widely adhered-to standards or practices exist, an industry-wide custom may influence the applicable standard of care in a negligence cause of action.³⁰ Hence, including major participants of the

article/2008/11/26/AR2008112603981.html.

28. See RESTATEMENT (SECOND) OF TORTS § 344 (1965). It states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.

Id.

29. In *Hall v. E. I. Du Pont De Nemours & Co.*, an industry's duty of care and the foreseeability of accidents was discussed. See *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 361–62 (E.D.N.Y. 1972) (relying on Judge Cardozo, Judge Hand, Judge Frank, and the standard of care rules relating to products liability).

30. *Id.* at 374 (citing PROSSER, LAW OF TORTS § 33, at 166–68 (4th ed. 1971))

practice would be a reasonable manner for seeking redress. Because the aggressive marketing activity of several high profile participating retail stores in the Black Friday sales scheme is a substantial factor in the hazardous conditions that cause injuries, these retailers must be joined as tortfeasors. Because their aggressive marketing schemes might be attributed to the acceptable industry-wide practice, a negligence cause of action must include not only the individual retailer involved, but all participants who contributed to the creation of the risk as well.

Although it is hard to believe, plaintiff lawyers do have the ability to achieve what previous individual lawsuits have been unable to achieve: they may be able to create an impact on the practice of aggressive marketing schemes, by targeting an industry-wide standard. While it is recognized that hosting discount sales is not a tortious act, joint participation in hazardous activities which are likely to incur harm is potentially tortious.³¹ More specifically, the common law damages reform concept associated with joint and several liability encompasses a control mechanism whereby the apportionment of damages can be appropriately distributed to all those retailers involved in the common scheme.³² A court has the authority to produce a prompt, widespread, and equitable distribution of payment in accident cases amongst all participants of aggressive marketing schemes through the damages award mechanism that inheres in the common law version of enterprise liability theory.

This article follows four years of news reports of injuries associated with "Black Friday." Each year, the aggressive nature of the advertisements and gimmicks escalates to attract more excited consumers. And each year, videos surface on the Internet depicting shoppers being pressed against glass doors, pushed, tripped, tackled to the ground, and more recently, trampled to death. I conclude, after four years of assessment, that the Black Friday marketing scheme is problematic for society, and that the solution is to deter

(discussing relationship of industry custom to standard of care)).

31. RESTATEMENT (SECOND) OF TORTS § 876 (stating that for harm resulting to a third person from the tortious conduct of another, one is subject to liability if he does a tortious act in concert with the other or pursuant to a common design).

32. See *id.* § 876(c) cmt e.

such an aggressive marketing practice for the safety and health of consumers. Therefore, I argue that the tort concept of enterprise liability is effective in impacting the practice of aggressive marketing schemes, and will result in the curtailment or elimination of the harmful industry-wide practice associated with Black Friday. Assessing liability on the entire retail industry and its trade association, as an entire enterprise, is the step necessary to influence restrictions on or abolish the destructive marketing scheme.

This article is designed to take steps to resurrect enterprise liability from its misunderstood state and expose its effect on common marketing schemes. This article demonstrates that, wedged between the wrongful conduct requirement of negligence and strict liability for participating in dangerous activities, the concept of enterprise liability would provide not only a remedy to limit the marketing practices associated with Black Friday, but also protection for consumers from risk of harm. To demonstrate this, I reveal the aggressive marketing tactics and the detrimental effects experienced by some consumers in Part II. In Part III, I reflect the history of enterprise liability, from the damage reform era to the modern and innovative application of enterprise liability for the benefit of compensation. Part III will also reveal how years of scholarly theories, judicial interpretation, and administrative uses have progressed to the recognition of enterprise liability as a fair allocation of damages for industry-wide activities. This section will also examine the administrative applications of enterprise liability, from the standpoint of the American Law Institute, and the influence of enterprise liability upon legislative enactments.

In Part IV, I examine how the influence of enterprise liability will impact the marketing practices of the retail enterprise associated with Black Friday. Four analytical discussions will support my thesis. First, joint liability must be declared because the retailers and the trade association together produce an injury-causing activity. They jointly control the risk as a result of the mutual benefits they derive from the profits of the aggressive sales tactics. Second, the hazards associated with the sales schemes are foreseeable and predictable because the retail enterprise has sufficient tracking data. Third, a simple one-on-one negligence cause of

action is not adequate to deter retailers and protect consumers from injuries associated with the aggressive marketing practices. The elements of a negligence cause of action and the defenses available to the retail enterprise prevent judgments that would otherwise impact the industry-wide practice. Enterprise liability establishes joint liability where injuries are caused directly or partially by participants under an industry-wide scheme. Fourth, fairness dictates that the retail enterprises compensate injured consumers because of the deliberate, systematic, and foreseeable risk of harm placed on the consumers. I conclude that individual stakeholders are powerless to impact the aggressive marketing scheme of the retail enterprise without the support of enterprise liability concepts.

II. THE HOLIDAY INDUSTRY-WIDE PRACTICE

Retailers who refuse to hand over their customers to their competitors go to great lengths to lure shoppers into their stores. Retail profits are often in the red most of the calendar year.³³ However, because the modern celebration of Christmas tends to emphasize commercial purchases, profits for retailers are in the black during the Christmas season.³⁴ The day after Thanksgiving, which has been coined as "Black Friday,"³⁵ is the beginning of the biggest sales season and heaviest consumer traffic. Over the years, pre-dawn discount deals have been offered to consumers; sleep-deprived consumers shop at malls, toy stores, electronic stores, department stores, and big-box stores to take advantage of the enormous discounts. Some families use Black Friday as their opportunity to purchase items they could not otherwise afford without the discounts. Other families are willing to cut

33. "[I]n the red" is a retail accounting term indicating a negative gain. See *Black Friday Weekend: Strong Start*, CNNMONEY.COM, Nov. 26, 2006, http://money.cnn.com/2006/11/26/news/companies/blackfriday_wmt_results ("Stores enjoy big crowds around the country on Black Friday, so called because it is when retailers are said to move out of the red (operating at a loss) and into the black.").

34. Press Release, Nat'l Retail, Fed'n, Consumers Out in Full Force on Black Friday Weekend According to Latest NRF Survey (Dec. 2, 2002), <http://www.bigresearch.com/news/bignrf120202.htm> [hereinafter *Consumers Out In Full Force*].

35. "The term 'Black Friday' was coined because, traditionally, the day after Thanksgiving was the day that retailers went from being in the red—or in debt—to being 'in the black'—or making a profit." *Id.*

short or forgo their Thanksgiving to get ahead of big crowds that form overnight at local stores across America.³⁶ The National Retail Federation³⁷ has indicated that “as long as retailers provide deals good enough to entice consumers out of bed, people will shop on Black Friday.”³⁸

While the concept of doorbuster sales dates back at least a decade, recently, in terms of traffic and in large part due to the aid of marketing tactics of major retailers and trade associations, doorbusters have transformed the day after Thanksgiving into the biggest shopping day of the year.³⁹ On Black Friday in 2004, over “133 million shoppers flooded [retail] stores [while] hunting for popular electronics, clothing, and music.”⁴⁰ In 2005, that number increased to 145 million.⁴¹ The 2007 season realized yet another increase in shopper participation, when the number hit 147 million.⁴²

36. See Chediak, *supra* note 21.

37. National Retail Federation, About NRF, http://www.nrf.com/modules.php?name=Pages&sp_id=146&pmenu_id=1&mn_type=1 (last visited Aug. 3, 2009). It states:

The National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services. NRF represents an industry with more than 1.6 million U.S. retail establishments, more than [twenty-four] million employees—about one in five American workers—and 2008 sales of \$4.6 trillion. As the industry umbrella group, NRF also represents more than 100 state, national and international retail associations.

Id.

38. Al Neuharth, *Why “Black Friday” Isn’t My Day to Shop*, USA TODAY, Nov. 23, 2007, at 11A (providing a statement from Tracy Mullin, president and CEO of the National Retail Federation).

39. Snopes.com, Black Friday, <http://www.snopes.com/holidays/thanksgiving/shopping.asp> (last visited Aug. 8, 2009); see also Abigail Beal, *Shopping on Black Friday? Tips for Surviving the Mall*, ASSOCIATED CONTENT, Oct. 12, 2006, http://www.associatedcontent.com/article/69625/shopping_on_black_friday_tips_for_surviving.html?cat=46.

40. Press Release, Nat’l Retail Fed’n, Black Friday Weekend Rings Up \$22.8 Billion in Sales (Nov. 28, 2004), <http://www.bigresearch.com/news/bignrfl12804.htm> [hereinafter \$22.8 Billion in Sales].

41. Press Release, Nat’l Retail Fed’n, Blockbuster Black Friday Weekend Sees Sales Near \$28 Billion (Nov. 27, 2005), <http://www.bigresearch.com/news/bignrfl12705.htm> [hereinafter Blockbuster Black Friday].

42. “According to the National Retail Federation’s 2007 Black Friday Weekend Survey, conducted by BIGresearch, more than 147 million shoppers hit the stores on Black Friday weekend, up a solid 4.8 percent from [the previous] year.” Press Release, Nat’l Retail Fed’n, Black Friday Weekend Traffic Up 4.8 Percent as Consumers Shop for Smaller Ticket Items (Nov. 25, 2007),

Reports from all over America portrayed lines stretching from the front doors of stores to the sides of building, swelling to nearly one thousand people, and shoppers braving the cold to form lines in the northern states.⁴³ By 2008, it was reported that one line grew to two thousand people at one Wal-Mart store.⁴⁴ More than 172 million shoppers visited stores and websites over Black Friday weekend during this period,⁴⁵ including 73.6 million people who hit the stores on Thursday alone.⁴⁶

Analysts say that each year Black Friday sales become more extravagant, with earlier starts, deeper discounts, and longer lines.⁴⁷ Shoppers have been known to flock to malls and shopping plazas to jockey for holiday bargains as part of family traditions.⁴⁸ In 2005, the after-Thanksgiving Day sales were marked in large, voluminous, and brightly colored

http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=420 [hereinafter Traffic Up 4.8 Percent].

43. "At the Best Buy store in Paramus, [New Jersey] the line swelled to nearly 1000." Warner, *supra* note 19.

44. See McFadden & Macropoulos, *supra* note 1.

45. Spending data includes Thursday, Friday, Saturday, and projected spending for Sunday. Energetic Start, *supra* note 16.

46. *Id.*

47. See McFadden & Macropoulos, *supra* note 1; see also Michael Barbaro, *Drained at the Pump, Shopper Cut Back*, N.Y. TIMES, Dec. 2, 2005, at C1 (stating that "Gap, Express, and Aéropostale, among them . . . have been offering deep discounts that could eat into profit margins for the fourth quarter," and that "Wal-Mart sold merchandise at a loss the day after Thanksgiving"); Mark Chediak, *"Black Friday" Fills Stores*, ORLANDO SENTINEL, Nov. 24, 2007, at A1 (reporting that 1000 people were lined up at Best Buy and Circuit City and even smaller stores like Radio Shack had significant sales); Chediak, *supra* note 21 (reporting that stores slashed prices, boosted their promotions, and in some case, opened earlier to lure reluctant consumers); *Holiday Shopping Season Underway*, ABC7.COM, Nov. 25, 2005, <http://abclocal.go.com/kabc/story?section=news/local&id=3668351> (reporting that more than 2500 shoppers were outside the doors of Robinsons-May and Sears had 1000 consumers when its doors opened); Press Release, Nat'l Retail Fed'n, Target, Wal-Mart, Macy's Top List of Shoppers' Favorite Holiday Ads (Dec. 14, 2007), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=437&cm_mmc=NRF+SmartBrief_-12%2F1%2F2007_-Default_-Default [hereinafter Shoppers' Favorite Holiday Ads] (reporting results of a survey that television advertisements "are catching shoppers' attention in creative ways"); *Woman, 73, Says She Was Knocked Down, Stepped on During "Black Friday" at Sawgrass Mills*, INFORMATIONLIBERATION.COM, Nov. 26, 2005, <http://informationliberation.com/index.php?id=3456> (reporting "by 6 a.m., when the store opened, hundreds of people waited in long lines snaking around the building outside the main entrance").

48. See generally McFadden & Macropoulos, *supra* note 1.

advertisements in the Thanksgiving edition of the newspapers. The Wal-Mart ads, most memorable because of the variety of discounted merchandise available, promised superior bargains as compared to other competitors. For example, in 2005, Wal-Mart offered plasma television screens for \$997.⁴⁹ Wal-Mart soon became one of the biggest participants and the leading competitor in the after-Thanksgiving sales race.⁵⁰

By 2006, many retailers, experiencing increased competition from the previous year, lured more shoppers into their stores with extra sales tactics such as earlier shopping hours,⁵¹ deep discounts,⁵² and gift cards.⁵³ Approximately one third of Black Friday shoppers arrived at their shopping destination before sunrise.⁵⁴ The toy store chain, KB Toys, opened thirty percent more stores at midnight.⁵⁵ J.C. Penney Company stores and others opened at 4:00 a.m.⁵⁶ Shoppers flocked to stores based on heavy promotions and aggressive pricing sales of LCD and plasma televisions. Holiday sales for Black Friday in 2006 rose 4.6 percent while previous years had averaged 4.8 percent growth over the last decade.⁵⁷ The 2006 Black Friday marketing scheme had proven to be a

49. D'Innocenzio, *supra* note 24.

50. See Chediak, *supra* note 21; Ylan Q. Mui, *Wal-Mart Throws an Undercut at Target*, WASH. POST, Dec. 16, 2005, at D01 (reporting Wal-Mart's more aggressive attempts to lure customers with "blockbuster discounts," compared to competitor Target's "stay the course" strategy); see also Barbaro, *supra* note 47 ("Wal-Mart blitzed shoppers with early television advertisements just after Halloween and offered \$400 laptops after Thanksgiving . . . outperforming its trendier rival, Target . . . for the first time in a year.").

51. Anne D'Innocenzio, *Retailers Post Robust Start to Holidays*, ASSOCIATED PRESS, Nov. 24, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/24/AR2007112400227_pf.html.

52. Erica Sagon, *On Your Mark, Get Set, Shop; Price Wars, Free Shipping Online Likely to Fuel Annual Holiday Flurry*, ARIZ. REPUBLIC, Nov. 23, 2006, at 1.

53. Press Release, Nat'l Retail Fed'n, *Holiday Gift Cards Reach All-Time High*, According to NRF (Nov. 17, 2006), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=411.

54. Press Release, Nat'l Retail Fed'n, *Retailers Have Lucrative Black Friday* (Nov. 26, 2006), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=47 [hereinafter *Lucrative Black Friday*].

55. Rachel Konrad, *Retailers Ponder "Diminished Returns" as Midnight Shopping Gains Popularity*, ASSOCIATED PRESS, Nov. 22, 2007, http://www.usatoday.com/money/industries/retail/2007-11-22-midnightshopping-returns_N.htm.

56. *Id.*

57. D'Innocenzio, *supra* note 51.

success.

By 2007, Black Friday marketing competition rose to a new level—more pervasive television commercials were used to reach more consumers. The visual lure created more aggressive shoppers. Target Corporation entered into the Black Friday advertising market more aggressively.⁵⁸ Through its television commercials, consumers were able to get a glimpse of Target's discounts days before the sale.⁵⁹ A 2007 Target stores commercial depicted a white, silhouetted stick figure performing calisthenics next to a shopping cart bearing a Target emblem on the side.⁶⁰ The silhouette stick figure is seen running with the shopping cart in an attempt to get to the Target 2-day sale.⁶¹ Commercial viewers were then informed that the sale would start at 6:00 a.m. on Friday, and the stick figure was seen running with the shopping cart across the television screen. This commercial served as the pep rally needed to prompt customers to set their shopping sights on Target stores.

Kohl's Department Store aired an equally alluring television commercial prompting viewers to rise early for their sales specials.⁶² The commercial depicted a dog waking up, turning on the espresso machine, turning on the blender (pre-sorted foods were already in the blender), and drawing the curtains back in his female owner's bedroom.⁶³ The audio chimed in, "Honey, this is no time to sleep."⁶⁴ The visual ads

58. In the music version of the commercial, the animated figure limbers up, then takes his cart and starts running. In this version, he goes through the woods, through clotheslines, around the gears of a large clock, off a trampoline, down a corridor, looks over a cliff, loops around a roller coaster, surfs a wave, skis as an avalanche chases him, almost gets abducted by aliens, slips across a frozen pond, carts a bear through an amusement park, and launches off a hill into the air. splendAd.com, Target—2-day Sale—2007 Commercial, <http://www.splendad.com/ads/show/1643-Target-2-Day-Sale-2007> (last visited Oct. 21, 2009). Television commercial depicts the doors to an Advent calendar are opened revealing live-action scenes of people and products. splendAd.com, Target—Christmas Countdown Calendar Commercial, <http://www.splendad.com/ads/show/1588-Target-Christmas-Countdown-Calendar> (last visited Oct. 21, 2009).

59. See splendAd.com, Target—Christmas Countdown Calendar Commercial, *supra* note 58.

60. splendAd.com, Target—2-day Sale—2007 Commercial, *supra* note 58.

61. *Id.*

62. SPIKE.com, Kohl's Sales Commercial . . . with Dog, <http://spike.com/video/kohls-sale/2914238> (last visited Oct. 21, 2009).

63. *Id.*

64. *Id.*

worked: the parking lot at one particular Kohl's Department Store in Orange County, Florida was the scene of 1000 people snaked in a line around the building.⁶⁵

By 2008, many Black Friday retailers used their websites,⁶⁶ free giveaways,⁶⁷ and earlier hours⁶⁸ to drive the consumer traffic to their stores.⁶⁹ The declining economy of 2008 was met with rampant discounts of up to seventy percent throughout the holiday month.⁷⁰ Stores also prepared for extra Black Friday giveaways to entice shoppers.⁷¹ "Macy's [offered] a \$10 discount on any \$25 purchase until 1:00 p.m"⁷² "Bed, Bath & Beyond [offered] early bird shoppers an extra [twenty] percent discount on their entire purchase between 6 a.m. and 10 a.m."⁷³ Pier 1 Imports held a weekend-long sweepstakes for shoppers to win a new car and gift certificates.⁷⁴ Battles for sales caused some malls and stores to open their doors at 12:00 a.m., in order to compete with the big-box chains that were slated to open at 5:00 a.m.⁷⁵ It was reported that "Wal-Mart's marketing department did a great job of promoting its website in its advertising efforts, [using] television advertising to inform shoppers that . . . Black Friday sale prices were also available online."⁷⁶ The website experienced such a huge surge of customers that the servers could not handle the load.⁷⁷ Retailers pulled out all the stops to motivate the declining market.⁷⁸ At stores across the country, the aggressive advertisements created just what the

65. Chediak, *supra* note 47.

66. Press Release, Nat'l Retail Fed'n, Retailers Counting on Cyber Monday as Bright Spot of Challenging Holiday Season (Nov. 24, 2008), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=607.

67. *Retailers Tout Freebies, Coupons to Lure Shoppers*, ASSOCIATED PRESS, Nov. 26, 2008, <http://abcnews.go.com/Business/wireStory?id=6343381>.

68. D'Innocenzio, *supra* note 51.

69. See Mui, *supra* note 27.

70. See D'Innocenzio, *supra* note 24.

71. See *Retailers Tout Freebies, Coupons to Lure Shoppers*, *supra* note 67.

72. *Id.*

73. *Id.*

74. *Id.*

75. See Mui, *supra* note 27.

76. See Quartz Mountain Communications, <http://www.quartzmntn.com/weblog/walmart-black-friday> (Nov. 24, 2008).

77. *Id.*

78. See D'Innocenzio, *supra* note 24 (reporting promotions up seventy percent throughout the month amid a deteriorating economy).

retailers bargained for: crowds of shoppers.⁷⁹

Over the years, the pre-dawn discount deals were also accompanied by detrimental effects experienced by some consumers. Reported incidents of violence and injuries suffered by consumers began to surface; chaotic episodes became commonplace at many stores; and some customers opined that the crowds were to blame, while others blamed the retail establishment.⁸⁰ Consumers, who were not happy with the shopping experience, described it as “insanity,” or as “madness.”⁸¹ Some stores were unable to open their doors because there were too many people pushing and/or pressed against them.⁸² Shoppers created a bottleneck in entryways, while some customers pushed and shoved.⁸³ Media across the country reported stories such as:

“[A]t a Wal-Mart store in Elkton, [Maryland], more than 300 people waited for [twelve] hours for a 12:01 a.m. Tuesday opening. When the manager announced the [X-Boxes] would be sold on a first-come, first-serve basis, there was a stampede. The sale was cancelled, and police were called to the scene.”⁸⁴

In Wallkill, New York, a Wal-Mart employee yelled, “On your mark. Get set. Kill each other.” In the ensuing frenzy people were pushed to the floor and the police were called in to restore order.”⁸⁵

“[P]olice called for back-up after customers grew angry because several featured items, including laptops priced

79. See Shoppers' Favorite Holiday Ads, *supra* note 47 (reporting the total spending was up 7.2 percent over last year).

80. McFadden & Macropoulos, *supra* note 1 (reporting a grocery union president questioning the irresponsibility of Wal-Mart in not foreseeing the dangerous conditions of allowing numbers of customers to enter the store in an unsafe manner).

81. Chediak, *supra* note 47.

82. *Id.*; see also WEBnME.com, Black Eye Friday, <http://webnme.com/2005/11/black-eye-friday.asp> (last visited Aug. 8, 2009) (reporting customers outside a Shreveport, Louisiana Circuit City breached the doors, causing the store to opened an hour late after because of the situation).

83. Dan Richman, Joseph Tartakoff & Craig Harris, *Bargain Hunters Fight the Crowds for Year's Best Deals*, SEATTLE POST-INTELLIGENCER, Nov. 24, 2007, http://seattlepi.nwsource.com/business/340863_blackfriday24.html.

84. Roeper, *supra* note 12.

85. Tony Lystra, *Black Friday Frenzy Hits Local Wal-Mart*, TIMES HERALD-REC., Nov. 26, 2005, <http://archive.recordonline.com/archive/2005/11/26/riot25.htm>.

under \$400, sold out in minutes.”⁸⁶

“[A]t Wal-Mart in Hamilton Township . . . people [were] fighting over laptops and Xboxes. Over a dozen officers were required to gain control.”⁸⁷

“A customer at a Wal-Mart [store] in East Orange County[, Florida] had to be wrestled to the ground by security guards during the distribution of specially priced laptops”⁸⁸

“At one Macy’s entrance, a scuffle broke out, with one shopper punching another in the face.”⁸⁹

“An early-morning shopper, caught in the crush of a Black Friday crowd, got more than he bargained for. Lafayette police say a man suffered a broken leg . . . at Wal-Mart”⁹⁰

“Early morning shoppers at [a Beaumont, Texas] Wal-Mart reported instances such as being pepper sprayed by an off-duty police officer working security and one woman fell and chipped her tooth on the ground”⁹¹

In Grand Rapids, Michigan, a [thirteen]-year old had to be taken away from a Wal-Mart by ambulance on Black Friday after “5 a.m., [when] the doors opened [and] holiday shoppers rushed in and immediately [a] customer was pushed to the ground”⁹²

“People were rioting back in [the] Electronics [section at Wal-Mart] . . . managers screamed over the radio to call a sheriff’s department. Some woman in a rush for a computer knocked over a toddler, and two other women got into a fight over a portable DVD player.”⁹³

86. Dick Standish, *Local Holiday Shoppers Back at It*, CBS3.COM, Nov. 26, 2005, <http://cbs3.com/local/Holiday.Shopping.Black.2.296453.html?detectflash=false>.

87. WEBnME.com, *Black Eye Friday*, *supra* note 82; *Local Shoppers Injured During Mob-Like Behavior* (NBC Greater Philadelphia television broadcast Nov. 25, 2005).

88. Chediak, *supra* note 21. The article reported “momentary stampedes and shoving matches at stores throughout the country.” *Id.*

89. Chediak, *supra* note 47.

90. *Black Friday Injury*, KATC.COM, Nov. 27, 2006, <http://www.katc.com/global/story.asp?s=5726038&ClientType=print>.

91. Roeper, *supra* note 12.

92. *Id.*

93. Theboxtank, http://theboxtank.typepad.com/walmartbox/2005/12/jesus_i_barely_.html (Dec. 18, 2005, 11:49 EST).

"The rush to get into a Michigan Wal-Mart store when the doors opened turned into a stampede. Shoppers fell and tripped over each other. A lady lost her wig and quickly put it back on as the melee continued."⁹⁴

Josephine Hoffman, a seventy-two year-old woman, was injured by shoppers at Sawgrass Mills in South Florida. "She got trampled, basically."⁹⁵ "They stepped on her back." Ms. Hoffman stated, "I was trying to get out of the way, but they knocked me down."⁹⁶

Ms. Brannen, a shopper in Bradford County, Florida, was "pushed to the ground under a pile of bodies and feet" while trying to buy a laptop computer for her daughter.⁹⁷ She reports she found herself on the floor in the fetal position "praying to God that somebody would find [her]."⁹⁸ After being trampled, "Ms. Brannen now suffers permanent injuries, walks with a cane, and is required to take numerous prescription drugs as part of her daily life."⁹⁹

"Therese Sgro, the mother of a [fourteen]-year-old girl who said she had her wrist fractured when she was punched by a woman in the crowd around 3:45 a.m., said police 'pretty much dismissed us as if it was no big deal' and refused to take a police report."¹⁰⁰

However, the most contemptible and detrimental effects of Black Friday happened as the 5:00 a.m. store opening neared at a Wal-Mart located at the Green Acres Mall in Valley Stream, New York.¹⁰¹ Jdimytai Damour, a temporary Wal-Mart worker, was crushed to death as he and other employees attempted to unlock the doors of the store.¹⁰² "The impatient

94. David Louie, "Black Friday" Shopping Frenzy, ABC7NEWS.COM, Nov. 27, 2005, <http://abclocal.go.com/kgostory?section=business&id=3668552>.

95. Theboxtank, *supra* note 10.

96. *Id.*

97. Jackelyn Barnard, *Woman Sues Retail Giant Over Black Friday Chaos*, FIRST COASTAL NEWS, Nov. 20, 2007, <http://www.firstcoastnews.com/printfullstory.aspx?storyid=96063>.

98. *Id.*

99. *Id.*

100. Laura Rivera & Alfonso A. Castillo, *Worker Died of Asphyxiation*, NEWSDAY, Dec. 1, 2008, <http://www.newsday.com/news/worker-died-of-asphyxiation-1.750906>.

101. See McFadden & Macropoulos, *supra* note 1.

102. Kristen Hamill, *Customers Injured in Crush Suing Wal-Mart*, CNN.COM, Dec. 2, 2008, <http://www.cnn.com/2008/CRIME/12/02/walmart.trampling.suit/index.html>.

crowd knocked the man down as he opened the doors, leaving a metal portion of the door frame crumpled like an accordion.”¹⁰³ The autopsy showed that the trampling caused the thirty-four-year-old employee to die of asphyxiation.¹⁰⁴ After the incident, it was reported that local police had met with mall security officials in anticipation of the sale.¹⁰⁵ The police department indicated that the Black Friday events fell within the purview of mall security and not the local police.¹⁰⁶ Thus, mall security was tasked with organizing and policing approximately 2000 shoppers.¹⁰⁷ “Police reports on the Black Friday disturbance [at this store] showed a total of five cases requiring medical attention, with people suffering injuries ranging from a broken ankle to complaints of pain, along with three reports of harassment and Damour’s death”¹⁰⁸

The doorbuster promotional sales, the use of loss leaders, and other aggressive sales schemes have not only created a risk of harm throughout the United States, but in other countries, which have also experienced similar catastrophes as a result of holiday marketing schemes. In Australia, the post-Christmas rushes generated by department store marketing tactics persist.¹⁰⁹ “Myer [Department Store] has been forced to defend its post-Christmas sales marketing campaign, insisting [that] it [does] not contribut[e] to a frenzied mood among shoppers.”¹¹⁰ One critic expressed his amazement that the Government did not ban this type of marketing practice.¹¹¹ Despite minor governmental intervention, hundreds of thousands of shoppers were still expected to descend upon department stores across the country when the annual post-Christmas sales kicked off in

103. D’Innocenzio, *supra* note 21.

104. See Rivera & Castillo, *supra* note 100.

105. See *id.*

106. *Id.*

107. *Id.*

108. Keith Herbert, *Cops: Crowd Confrontation Sparked Black Friday Stampede*, *NEWSDAY*, Dec. 3, 2008, <http://bpandwalmartsucks.com/Documents/Cops%20-%20Crowd%20confrontation%20sparked%20Black%20Friday%20stampede.pdf>.

109. Wendy Frew, *Discounting a Costly Tactic for Retailers*, *SYDNEY MORNING HERALD*, Jan. 27, 2005, at 33, available at <http://www.smh.com.au/news/Business/Discounting-a-costly-tactic-for-retailers/2005/01/16/1105810770967.html>.

110. *Id.*

111. *Id.*

2008.¹¹²

In China, three shoppers died and at least thirty-one others were injured in a stampede when the doors opened at the start of a 2007 sale at a supermarket in the southwest region.¹¹³ As part of a sales promotion, Carrefour supermarket offered twenty percent off of five-liter containers of rapeseed oil.¹¹⁴ The customers started lining up as early as 4:00 a.m. to purchase the oil used for cooking the special celebratory meals for the tenth anniversary celebration of Chongqing. Some customers slipped when the doors opened at 8:30 a.m. and those who fell were then crushed by oncoming shoppers.¹¹⁵ This was the second known stampede to occur in a short time period during sales of the highly priced cooking oil.¹¹⁶

The list of injuries associated with doorbuster sales locally and internationally only represent those reported; experts say that only one out of every ten injuries associated with doorbuster sales are actually reported. This number also does not account for the emotional harm suffered by consumers who were terrified when they found themselves in the midst of fights, beneath piles of bodies, crushed against glass doors, knocked to the floor, and separated from their families.¹¹⁷ Thus, when retail store consumers like Ms. Brannen are permanently injured or a store employee dies in a stampede caused by the marketing promotions of the retail

112. *Shoppers Gear Up for Post-Christmas Sales*, N.Z. HERALD, Dec. 25, 2007, http://www.nzherald.co.nz/christmas/news/article.cfm?c_id=1500988&objectid=10484221 ("Singer Natalie Imbruglia [would] ring a bell for the start of the store's 102nd post-Christmas sale at 6.50am [], before the doors open at 7am.").

113. *Three Killed in Stampede in China Supermarket*, REUTERS, Nov. 10, 2007, <http://www.reuters.com/article/worldNews/idUSL108439020071110>.

114. Associated Press, *Stampede At Supermarket Kills 3, Injuries 31*, FOX NEWS.COM, Nov. 10, 2007, <http://www.foxnews.com/story/0,2933,310396,00.html>.

115. *Id.*

116. *Id.* (noting that the price of cooking oil had soared by more than a third due to inflation).

117. See Lystra, *supra* note 85 (reporting an employee screaming expletives at the crowd when she was pinned against a cash register by a 300-pound man and employees looking frightened and bewildered); Mark Albright, *Let the Shopping Begin: Stores Put Extra Effort Into Kicking Off Season*, ST. PETERSBURG TIMES, Nov. 26, 2005, at 1A, available at http://www.sptimes.com/2005/11/26/news_pf/State/Stores_put_extra_effo.shtml ("I was terrified. . . . People were screaming at each other. They were falling over each other and wrestling over stuff. I ran through the clothing department just to get away from the mob.").

industry, there must be a policy, regulation, or cause of action that is designed to impact the practice.

New York lawmakers took the first step towards controlling future crowds by proposing regulations of Black Friday sales.¹¹⁸ “Two days after a mob of impatient shoppers trampled to death [the Wal-Mart worker], a Queens lawmaker announced plans to propose a new law aimed at controlling future Black Friday crowds”¹¹⁹ “New York City Councilman James Gennaro . . . announce[d] his plans to craft a ‘Doorbuster Bill’ that would require retailers to enact greater security measures during major sales.”¹²⁰ Long Island and Suffolk County officials said they were considering similar measures.¹²¹ “[T]he New York City law would seek to define the appropriate amount of security for a major sale and mandate that retailers meet that standard.”¹²² However, because these efforts would concentrate exclusively on crowd control and not on retailer behavior, they are likely to only be effective at the local level.

III. THE RISE OF ENTERPRISE LIABILITY

A. The Early Years

The history of enterprise liability suggests that it is an ideal judicial tool effective enough to deter the aggressive marketing schemes that have become problematic for our society. Enterprise liability spawned from the reform of torts compensation plans,¹²³ and was first coined by Albert Ehrenzweig in his 1951 book entitled *Negligence Without Fault*.¹²⁴ Ehrenzweig’s hypothesis was that thousands of accidents resulting from foreseeably hazardous activities demanded full liability to the innocent victim.¹²⁵ He realized “that the law, for the sake of social gain and progress,” limits

118. Patrick Whittle, *Officials Planning “Doorbuster” Sale Crowd-Control Laws*, *NEWSDAY*, Dec. 1, 2008, at A06.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. See Virginia E. Nolan & Edmund Ursin, *Enterprise Liability Reexamined*, 75 OR. L. REV. 467, 471 (1996).

124. *Id.* at 472 n.25 (referring to ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), reprinted in 54 CAL. L. REV. 1422, 1423 (1966)).

125. EHRENZWEIG, *supra* note 124.

liability as it relates to the elements of negligence—duty of care and proximate cause.¹²⁶ Ehrenzweig saw enterprise liability as stretching beyond the elements of negligence and embracing negligence without fault,¹²⁷ which would replace the non-fault character of a negligent cause of action with an assessment of lawful dangerous activities and injuries that are typical for the particular enterprise.

The father of enterprise liability and other scholars recognized the need to link damages reform with the expansion of liability.¹²⁸ In the ensuing years, the theory of enterprise liability commanded almost complete support by the academic community. In 1961, Guido Calabresi highlighted a correlation between risk distribution and the law of torts.¹²⁹ He observed that enterprise liability is usually explained in terms such that "[a]ctivities should bear the costs they engender."¹³⁰ He further indicated that enterprise liability was based on "the notion that losses should be borne by the doer[s], the enterprise, rather than distributed on the basis of fault" derived from an individual negligence cause of action.¹³¹ "[T]he injury," he says, "is a real cost of those activities."¹³²

Guido Calabresi appeared to have the retail industry in mind when he paired the system of loss distribution to a strict allocation-of-resources theory. He indicated that "the prices of goods accurately reflect their full cost to society" and that enterprise liability theory requires that the cost of the injury allows for consideration of the activity that caused them.¹³³ He proposed that "the allocation-of-resources [theory] is tied to free enterprise . . . [in that] in . . . such a system . . . it

126. *Id.*

127. *Id.* at 1449, 1455.

128. See Nolan & Ursin, *supra* note 123, at 472-74 (citing ALBERT A. EHRENZWEIG, FULL AID INSURANCE FOR THE TRAFFIC VICTIM—A VOLUNTARY COMPENSATION PLAN (1954); FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 25 (1956); Louis L. Jaffe, *Damages for Personal Injury: The Impact of Insurance*, 18 L. & CONTEMP. PROBS. 219, 221 (1953); Fleming James, Jr., *Damages in Accident Cases*, 41 CORNELL L.Q. 582 (1956); Clarence Morris, *Liability for Pain and Suffering*, 59 COLUM. L. REV. 476, 476 (1959)).

129. See Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961).

130. *Id.* at 500.

131. *Id.*

132. *Id.* at 505.

133. *Id.*

matters most whether prices reflect all . . . costs of production, including accident costs.”¹³⁴ He also recognized that the “[c]urrent legal doctrine require[d] strict, or nonfault, liability for injuries resulting from certain types of activities labeled ‘extra-hazardous.’”¹³⁵ While the emphasis of risk distribution has historically been associated with hazardous activities, he suggested that “some justification may be found for limiting the label ‘extra-hazardous,’ [commonly associated with strict liability,] to activities involving frequent, substantial, harm.”¹³⁶

By 1965, Calabresi endorsed framing “the problem of accident law in terms of activities rather than in terms of careless conduct [as] the first step toward a rational system of resource allocation.”¹³⁷ He recognized “that one of the functions of accident law is to reduce the cost of accidents, by reducing those activities that are accident prone.”¹³⁸ One proposal was to dispose of the small activity that is a sub-part of the large activity.¹³⁹ There, Calabresi argued that “[t]he best way . . . [to] establish the extent to which [society will] allow [dangerous] activities is by a market decision based on the relative price of each of these activities and of their substitutes when each bears the costs of the accidents it causes.”¹⁴⁰ Calabresi stated that “[t]his can be done by a system of nonfault enterprise liability, a system that assesses the costs of accidents to activities according to their involvement in accidents.”¹⁴¹ He supported the notion that “a system of accident liability based on accident ‘involvement’ instead of fault” would aid our society in its determining the degree to which it wants to deter accidents.¹⁴²

Enterprise liability gained recognition and was executed “as a tool of social policy in the early 1960s, first by the courts and later by legislators and regulatory bodies.”¹⁴³ Fleming

134. *Id.* at 531.

135. Calabresi, *supra* note 129, at 541.

136. *Id.* at 543.

137. See Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Cost*, 78 HARV. L. REV. 713, 716 (1965).

138. *Id.* at 718.

139. See *id.*

140. *Id.* at 719.

141. *Id.*

142. *Id.* at 742–43.

143. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Foundation of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463–64

James, a leading academic in favor of legislative reform, advocated for the application of "strict enterprise liability" in products cases.¹⁴⁴ Two scholars, Robert Keeton and Jeffrey O'Connell, proposed "the automobile no-fault compensation plan . . . as a promising new 'form of enterprise liability.'" ¹⁴⁵ O'Connell also proposed "extensions of no-fault insurance beyond auto accidents as a 'form of tort liability called 'enterprise liability.'" ¹⁴⁶ As for judicial execution, California Supreme Court Justice Roger Traynor, in a dissenting opinion, wrote that damages for pain and suffering "become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses. . . ." ¹⁴⁷ Justice Traynor recognized that ultimately, such losses are borne by a public free of fault as part of the price for the benefits of mechanization. Relying on the scholarly work of Louis Jaffe,¹⁴⁸ and legal precedent,¹⁴⁹ he urged courts to recognize the damages implications of the enterprise liability theory by limiting the size of damage awards for pain and suffering.¹⁵⁰

Scholars continued to debate the damages allocation of enterprise liability. Most scholars believed Calabresi's 1965 viewpoint was a mistake and that the strongest argument for enterprise liability was the goal of victim compensation.¹⁵¹

(1985).

144. Nolan & Ursin, *supra* note 123, at 471.

145. *Id.*

146. *Id.* (quoting Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 773 (1973)).

147. *Seffert v. L.A. Transit Lines*, 364 P.2d 337, 345 (Cal. 1961) (Traynor, J., dissenting).

148. *Id.* (citing Jaffe, *supra* note 128, 222-23).

149. *Id.* (citing *Peterson v. Lamb Rubber Co.*, 353 P.2d 575, 580-82 (Cal. 1960); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944); *Henningsen v. Bloomfield Motors Inc.*, 161 A.2d 69, 77 (N.J. 1960)).

150. *Seffert*, 364 P.2d at 345-47.

151. Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law*, 57 OHIO ST. L.J. 835, 848 (1996). However, other goals of accident law were considered. Factors such as deterrence, administrative cost, and political feasibility could point to no-fault or strict liability alternatives to both fault and social insurance. *Id.* (citing EHRENZWEIG, *supra* note 124, at 1450-55) (discussing strict liability); KARL N. LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* 342 (1930) (discussing the seller's obligation of quality and the then decreasing standard of proof to bring a negligence claim); STEPHEN D. SUGARMAN, *DOING AWAY WITH PERSONAL INJURY LAW* xviii, 3 (1989) (discussing social insurance, expanded employee benefit plans, and skepticism about deterrent effect of tort law);

Over the years there have been several controversies relating to the application of enterprise liability to products liability cases or cases of activity-related liability.¹⁵² Although the discussions were robust, the goal remained the same: to compensate the injured victim for harm incurred at the hand of the injurer. The leading academic advocates for enterprise liability, the judicial architect (Justice Traynor), and the scholar who gave the enterprise liability theory its name unambiguously endorsed the need for damages reform as tort law embraced the loss-spreading premise.¹⁵³

B. The Adoption of Enterprise Liability by the Courts

By 1972, enterprise liability reached the judicial system via *Hall v. E.I. Du Pont De Nemours & Co.*¹⁵⁴ This pioneering case illustrated the benefits of applying enterprise liability standards, in the context of damages for products liability, brought on by injuries caused by a blasting cap.¹⁵⁵ It culminated in a thirty-seven page opinion, bifurcated by two

Albert A. Ehrenzweig, "Full Aid" Insurance for the Traffic Victim—A Voluntary Compensation Plan, 43 CAL. L. REV. 1, 24–48 (1955) (discussing automobile compensation plan); Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967) (discussing social insurance with safety incentives); Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 924 (1957) (discussing strict products liability); Fleming James, Jr., *The Columbia Study of Compensation for Automobile Accidents: An Unanswered Challenge*, 59 COLUM. L. REV. 408, 413 (1959) (discussing automobile compensation plans); Karl N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 704 (1936) (discussing strict products liability); Jeffrey O'Connell, *Expanding No-Fault Beyond Auto Insurance: Some Proposals*, 59 VA. L. REV. 749, 771 (1973) (considering no-fault); Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366–76 (1965) (examining strict liability, compensation plans)).

152. See, e.g., Mark D. Geistfield, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. REV. 1157 (1992); Priest, *supra* note 143, at 462–64 (1985). *Contra* James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991).

153. Seffert, 364 P.2d at 344–47 (Traynor, J., dissenting); Nolan & Ursin, *supra* note 123, at 475 (referring to Fleming James, Jr., author of *Damages in Accident Cases*, 41 CORNELL L.Q. 582 (1956) and co-author of *THE LAW OF TORTS* § 25 (1956) and other works); see also EHRENZWEIG, *supra* note 124.

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

155. See *id.*

groups of plaintiffs,¹⁵⁶ in which the court wrote that “[w]hile the [two groups] cases [were] closely linked in their litigation history and underlying legal theory, they differ[ed] in several crucial respects.”¹⁵⁷ One grouping, the *Hall* plaintiffs, involved three families’ children, two defendant manufacturers, and a trade association.¹⁵⁸ While the amended complaint linked each injury to a particular manufacturer, it also sought to preserve the joint liability approach by alleging “that virtually the entire blasting cap industry had cooperated with regard to certain safety features of its product.”¹⁵⁹ The plaintiffs lodged their claims against “all defendants,”¹⁶⁰ and the court held that there was no benefit in joining all defendants, where the plaintiffs could not show an industry-wide practice.¹⁶¹ The other plaintiff group garnered better success.¹⁶² This group, the *Chance* plaintiffs, consisted of thirteen plaintiffs who could not identify the specific manufacturer that made the injury-causing defective product.¹⁶³ Six defendant manufacturers were named in the lawsuit along with the trade association.¹⁶⁴ The decision involving the *Chance* Plaintiffs left an impact on the long-standing industry practice of not placing warnings on the blasting caps and of failing to take other safety measures to avoid risk of harm to the consumers.

The court found reason to extend the “established doctrines of joint tort liability to the area of industry-wide cooperation in product manufacture and design.”¹⁶⁵ That extension was meant to “guard against a broad spectrum of risks with regard to the general population.”¹⁶⁶ The appellate court utilized enterprise liability as a loss allocation remedy,

156. *Id.*

157. *Id.* at 358.

158. *Id.* at 382.

159. *Id.* at 381–82.

160. *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 382 (E.D.N.Y. 1972).

161. *Id.* at 383–84.

162. The allegations in this case suggest that the entire industry and its trade association provide the logical locus at which precautions should be taken and liability imposed. *Id.* at 378.

163. *Id.* at 359.

164. *Id.* at 358.

165. *Id.* at 371.

166. *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 371 (E.D.N.Y. 1972).

requiring all defendants-manufacturers of the same product to pay, although the specific manufacturers that caused the injuries were not known to the plaintiffs. It reasoned that the parallel safety practices of several corporations in different states provide a basis for joint liability. In addition, the court recognized that the key requirement had been that the risk-creating conduct be "simultaneous in time, or substantially so, and [be] . . . of substantially the same character, creating substantially the same risk of harm, on the part of each actor."¹⁶⁷ The court also stated that the existence of a safety program run by the trade association and the possibility of intervening acts by others were relevant.¹⁶⁸ Based on these findings, the court applied enterprise liability theory because it was "no longer dealing with specific conduct but [rather] with the broad scope of a whole enterprise."¹⁶⁹

One rationale in the *Hall* case was the recent "[d]evelopment[] in negligence and strict tort liability [law that] imposed extensive duties on manufacturers to guard against a broad spectrum of risks with regard to the general population."¹⁷⁰ In *Hall*, safety planning in manufacture and design had been delegated to a central association in the blasting cap industry.¹⁷¹ Such a nexus triggers a reason to impose enterprise liability.¹⁷² The court found that enterprise liability applied when (1) a small number of manufacturers, virtually all of whom were named defendants, produced the injury-causing product; (2) the defendants had joint knowledge of the risks inherent in the product and possessed a joint capacity to reduce the risks; and (3) each delegated the

167. *Id.* at 380 (citing RESTATEMENT (SECOND) OF TORTS § 433B cmt. h (1965)).

168. *Id.* at 367.

169. *Id.* at 377.

170. *Id.* at 371.

171. *Id.* at 375.

172. *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 376 (E.D.N.Y. 1972). Factors to be considered to determine the existence of joint control of risk and appropriate remedies for imputing the trade association include the size and composition of the trade association's membership, its announced and actual objectives in the field of safety, its internal procedures of decision-making on this issue, the nature of its information-gathering system with regard to accidents, the safety program and its implementation by the association and member manufacturers, and any other activities by the association and its members (such as legislative lobbying) with regard to safety during the time period in question.

responsibility to set safety standards to a trade association, which failed to reduce the risk.¹⁷³ The court also said that "[t]he allegations in this case suggest that the entire blasting cap industry and its trade association provide the logical locus at which precautions should be taken and liability imposed."¹⁷⁴

Another rationale for the *Hall* court's utilization of enterprise liability was that there was joint control because there was actual knowledge of risk by the manufacturers and the trade association, and collective control over the safety measures to prevent the risk-creating activity.¹⁷⁵ The court explained three ways in which joint control of risk could be shown to occur.¹⁷⁶ First, plaintiffs can prove the existence of an explicit agreement and joint action among the defendants with regard to warnings and other safety features—the classic "concert of action."¹⁷⁷ Second, "plaintiffs can submit evidence of defendants' parallel behavior sufficient to support an inference of tacit agreement or cooperation."¹⁷⁸ Third, "plaintiffs can submit evidence that defendants, acting independently, adhered to an industry-wide standard or custom with regard to the safety features of blasting caps."¹⁷⁹ The court applied the third alternative, while expressing an interest in deterring hazardous behavior throughout the industry. Thus, the enterprise theory of tort liability emerged in application: an enterprise is to carry the banner not of corrective justice and social welfare, but of "the foreseeability of the kinds of risks which the enterprise is likely to create."¹⁸⁰

The *Hall* court considered the same criteria with which previous scholars had been concerned: group control of risk, the policy of assigning foreseeable cost of an activity to those in the most strategic position to reduce them, the social cost of the activity, and the desire to avoid denying recovery to an innocent injured plaintiff because proof of causation may be

173. *Id.* at 378.

174. *Id.*

175. *See id.* at 375–76.

176. *Id.* at 373.

177. *Id.*

178. *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 374 (E.D.N.Y. 1972).

179. *Id.*

180. *See id.* at 369, 378.

within the control of the defendant or otherwise unavailable.¹⁸¹ The court relied heavily on scholars, namely Calabresi, in coming to the conclusion that “[t]he point is not only that the damage is caused by multiple actors, but that the sole feasible way of anticipating costs or damages and devising practical remedies is to consider the activities of a group.”¹⁸² The court realized that private actions were not the best way to meet the demands for imposing safeguards.¹⁸³ In these situations, “the only feasible method of ascertaining risks, imposing safeguards and spreading costs is through joint liability or other methods of joint risk control.”¹⁸⁴

The rationale of the *Hall* court was clearly in accordance with the historical damage reform movement; however, scholars, lawyers, and jurisdictions began to apply a diluted version of enterprise liability. Scholars wavered on the damages reform agenda of enterprise liability;¹⁸⁵ law professors believed that *Hall* applied only to situations in which there were unknown defendants;¹⁸⁶ and courts failed to

181. *Id.* at 373–74.

182. *Id.* at 378 (citing Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1108–10 (1972); Frank I. Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs*, 80 YALE L.J. 647 (1971); Marc J. Roberts, *River Basin Authorities: A National Solution to Water Pollution*, 83 HARV. L. REV. 1527, 1540–56 (1970)).

183. *Id.* at 377–78.

184. *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 377 (E.D.N.Y. 1972).

185. See Nolan & Ursin, *supra* note 123 (discussing who the widely held beliefs about enterprise liability are fundamentally flawed); see also *infra* notes 217, 233.

186. The edited opinion of the *Hall* case in one torts textbook provides a four-page rendition of the thirty-seven page opinion. See *Hall*, 345 F. Supp. 353, in RUSSELL L. WEAVER ET. AL., TORTS: CASES, PROBLEMS, AND EXERCISES 300–03 (2d ed. 2005). The edited version captures the many sub-sections and the summary conclusion of the bifurcated opinion, thus creating the impression that failure to identify the particular manufacturers is a problem for joint and enterprise liability. See *id.* While the original opinion, in the sub-section entitled “Causation and Burden of Proof,” describes the contention of the plaintiff that all “defendants’ conduct combined to cause injury at the point of the labeling and designing of the [blasting] caps” and they acted “as a joint enterprise, with respect to the labeling and design of the caps.” *Hall*, 345 F. Supp. at 379. The court held that if the “plaintiffs can establish by a preponderance of the evidence that the injury-causing caps were the product of some unknown one of the named defendants, that each named defendant breached a duty owed to plaintiffs[,] and that these breaches were substantially concurrent in time and of a similar nature,” the burden of proof is met to allow plaintiffs to combined named and unnamed defendants as a joint enterprise. *Id.*

recognize that the imposition of enterprise liability could take effect after a determination that a class large enough to assume an industry-wide responsibility had engaged in joint control of the risk. Consequently, by the 1980s, the common-law version of enterprise liability lost its flavor.¹⁸⁷

From 1981 to 2004, fifteen jurisdictions actually considered the application of enterprise liability, but certain public policy concerns and misunderstandings about the doctrine appeared to reveal problems with applying the compensation concept.¹⁸⁸ Eight of the fifteen jurisdictions found the requirement of "unknown defendants" necessary to following the precedent established by *Hall*.¹⁸⁹ These courts

at 380.

187. See Nolan & Ursin, *supra* note 151, at 850 (describing enterprise liability as "in a shambles" and the limitations on damages was "virtually forgotten").

188. These jurisdictions include the following: California, Connecticut, Florida, Hawaii, Idaho, Iowa, Kentucky, Montana, New Hampshire, New Jersey, New York, North Carolina, Pennsylvania, South Carolina, and Wisconsin. See *infra* notes 189, 193.

189. See *Doe v. Cutter Biological*, 852 F. Supp. 909 (D. Idaho 1994) (applying Idaho law and holding that because Idaho essentially abolished joint and several liability when it passed Idaho Code § 6-803, an enterprise liability theory would not be appropriate, and concluded that the Idaho courts would not adopt it); see also *Griffin v. Tenneco Resins, Inc.*, 648 F. Supp. 964 (W.D.N.C. 1986) (applying North Carolina law, the court held that there was no discernible trend indicating that the North Carolina courts would adopt enterprise liability); *Gullotta v. Eli Lilly and Co.*, No. Civ.H-82-400, 1985 WL 502793 (D. Conn. May 9, 1985) (applying Connecticut law, which required establishment of a "cause-in-fact" relationship between a drug manufacturer and the injured party, to find that the plaintiff had not identified such a manufacturer and thus summary judgment was warranted); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1017 (D.C.S.C. 1981) (applying South Carolina law to a products liability action brought against the manufacturers of the drug DES by a woman who alleged that she developed a precancerous condition as a result of her prenatal exposure to the drug, the court said that adoption of such a theory "would render every manufacturer an insurer not only of the safety of its own products, but of all generically similar products made by others"); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241 (Mo. 1984) (rejecting enterprise liability because of the large number of manufacturers in the industry, the absence of delegation of responsibility for safety, and the significant role played by the Food and Drug Administration in regulating the drug, and also indicating that such a drastic change in the law should more properly be made by the legislature); *Namm v. Charles E. Frosst & Co.*, 427 A.2d 1121 (N.J. Super. Ct. App. Div. 1981) (stating that adoption of this legal theory would, of necessity, result in a total abandonment of the well-settled principle that manufacturers are only responsible for damages caused by a defective product upon proof that the product was defective and that the defect arose while the product was in the control of the defendant); *Cummins v. Firestone Tire & Rubber Co.*, 495 A.2d 963, 971 (Pa. Super. Ct. 1985) (stating that enterprise liability "has heretofore

failed to consider joint control of risk or view their cases from the perspective of compensation. The jurisdictions rejected enterprise liability on the grounds of public policy; something other than damages reform.¹⁹⁰ In *Namm v. Charles E. Frosst and Co.*, one court stated that “traditional methods of assessing and apportioning damages among defendants would . . . have to be abandoned and new ones fashioned” if enterprise liability were to be adopted.¹⁹¹ However, it appears from the opinion that the *Namm* court confused enterprise liability with market share liability.¹⁹² Seven other jurisdictions recognized the enterprise liability theory as a viable basis for imposing liability and awarding damages, if there is evidence of the defendants adhering to an industry-wide standard, but the courts were forced to reject the theory because the specific facts in their cases did not satisfy the criteria of enterprise liability.¹⁹³ The lack of

not been recognized by the courts of this Commonwealth as affording a basis for relief to an aggrieved plaintiff, and will not now be so adopted,” and noting that enterprise liability as embodied in *Hall v. E. I. Du Pont de Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972), has now been rejected by virtually every other jurisdiction confronted with this issue); *Thomas ex rel. Gramling v. Mallett*, 685 N.W.2d 791 (Wis. Ct. App. 2004), *aff’d in part and rv’d in part*, 701 N.W.2d 523 (Wis. Sup. Ct. 2005) (stating that expansion of the “risk contribution” theory of liability was not necessary or appropriate as Article I of the Wisconsin constitution never required that the injured party have exactly the remedy desired).

190. See *supra* note 189.

191. *Namm*, 427 A.2d at 1129.

192. See *id.* at 1128–29. Apportioning damages among defendants is the basis concept of market share liability. The theory permits plaintiff to recover from each defendant based on the share relevant to the market. See *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980).

193. See *Sindell*, 607 P.2d at 924; see also *Hurt v. Pa. Hous. Auth.*, 806 F. Supp. 515 (E.D. Pa. 1992); *Univ. Sys. of N.H. v. U.S. Gypsum Co.*, 756 F. Supp. 640 (D.N.H. 1991); *Lee v. Baxter Healthcare Corp.*, 721 F. Supp. 89 (D. Md. 1989), *aff’d*, 898 F.2d 146 (4th Cir. 1990); *Lillge v. Johns-Manville Corp.*, 602 F. Supp. 855, 856 (E.D. Wis. 1985) (stating that the manufacturer of the product injuring the plaintiff (asbestos fibers) could not readily be identified); *Morton v. Abbott Labs.*, 538 F. Supp. 593, 595 (D.C. Fla. 1982) (observing that 149 drug companies manufactured DES during the relevant time period, and no industry-wide delegation of safety functions to a drug manufacturer’s trade association occurred, and if there was anybody responsible for safety in the drug industry, it was the Food and Drug Administration); *Smith v. Cutter Biological, Inc.*, 823 P.2d 717 (Haw. 1991) (stating that the court was amenable to consideration of group theories of liability but the facts did not show an industry-wide cooperation); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 72 (Iowa 1986) (stating that enterprise liability is predicated upon industry-wide cooperation of a much greater degree than occurred among the DES manufacturers in this case);

relevant facts therefore prevented these jurisdictions from fully developing a policy decision about the theory.¹⁹⁴

C. Recommendations for Change: The Five-Year Study

American law, concerning tort reform and compensation, was pulled in different directions by the mid-1970s—a torts crisis emerged. “At the [beginning] of the decade the enterprise liability theory had stood at the forefront of tort theory [yet] strict . . . liability and no-fault auto compensation plans achieved striking successes in [the] courts and [in the] legislature[.]”¹⁹⁵ No-fault insurance had become the alternative to tort damages and “enterprise liability had become obscured to the point that it had virtually disappeared from the scholarly consciousness.”¹⁹⁶ The entire tort agenda and theory of enterprise liability soon required attention. Advocates of compensation plans “overlooked the common law agenda of enterprise liability, which included damages reform.”¹⁹⁷ By the late 1970s, an economic analysis in tort theory arose and “enterprise liability theory was in a shambles.”¹⁹⁸

The American Law Institute (“ALI”) commissioned a project known as the Reporters’ Study on Enterprise Responsibility for Personal Injury (“Reporters’ Study”).¹⁹⁹

Farmer v. Newport, 748 S.W.2d 162, 165 (Ky. Ct. App. 1988) (holding that the defendants’ trade association, which represented only one-third of U.S. mattress manufacturers, did not assume a duty to warn consumers concerning product safety); *Burnside v. Abbott Labs.*, 505 A.2d 973 (Pa. Super. Ct. 1985).

194. See *Sindell*, 607 P.2d at 932 (stating that plaintiffs did not allege facts sufficient to state a cause of action under the “enterprise liability” or industry-wide liability doctrine); see also *Hurt*, 806 F. Supp. at 533 (finding that the plaintiffs failed to allege the delegation of safety responsibility to a trade association); *Univ. Sys. of N.H.*, 756 F. Supp. at 657 (applying New Hampshire law, the court found that a university failed to name all manufacturers of asbestos products that contaminated its buildings); *Lee*, 721 F. Supp. at 94 (stating that the plaintiff-patient did not sue the entire breast prosthesis industry, and there was no evidence indicating that the patient’s injury was caused by a sub-par design or manufacturing standard in the industry); *Burnside*, 505 A.2d at 985 (finding that the plaintiffs could not show, *inter alia*, that the companies they named as defendants constituted substantially the entire industry that produced DES as a miscarriage preventative during the relevant time period).

195. Nolan & Ursin, *supra* note 151, at 849.

196. *Id.* (referring to the 1970s no-fault movement).

197. *Id.* at 850.

198. *Id.*

199. 1 AM. LAW INST., REPORTERS’ STUDY: ENTERPRISE RESPONSIBILITY FOR

This two-volume work detailed the legal and social concerns of tort law, and distilled contemporary scholarship discussing the success of various institutions, such as tort litigation, in addressing the human and economic problems created by personal injuries.²⁰⁰ The Reporters' Study "analyze[d] and evaluate[d] key issues of tort law within the context of [a] 'broader array of social institutions that seek to prevent and to compensate personal injuries'" relating to product defects.²⁰¹ With the collaborative work of fourteen scholars over five years, "the Study's recommendations are both provocative and diverse."²⁰² More importantly, the Reporters' Study repudiates the primary goals of victim compensation and loss spreading previously discussed by other scholars.²⁰³

Though the no-fault theory and damages reform are central aspects of enterprise liability, the Reporters' Study condemned enterprise liability on one hand and supported the no-fault theory and damages reform on the other.²⁰⁴ Contrarily, the Reporters' Study "supports the view that the enterprise liability theory is once again emerging as [a] generally prevailing scholarly theory . . . [in] tort law."²⁰⁵ The "formal rules of liability and entitlement" are viewed in the Reporters' Study as "still largely based on the historic corrective justice rational."²⁰⁶ The Reporters' Study indirectly "endorses damages reforms that resemble those proposed by enterprise liability scholars."²⁰⁷ "More fundamentally, when the [Reporters'] [S]tudy broadened its focus from tort law (narrowly defined) to personal injury law generally, [the study endorsed] no-fault compensation plans, which are seen to provide a 'promising blend of efficient compensation,

PERSONAL INJURY xii (1991) [hereinafter 1 REPORTERS' STUDY].

200. *Id.* at xvii.

201. Virginia E. Nolan & Edmund Ursin, *Forward: Symposium on the American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury*, 30 SAN DIEGO L. REV. 213, 216 (1993).

202. *Id.*

203. 1 REPORTERS' STUDY, *supra* note 199, at 28–29.

204. See 2 AM. LAW INST., REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 28–30, 35 (1991) [hereinafter 2 REPORTERS' STUDY] (indicating current law respecting design defects should be substantially altered such that (b) reference to loss spreading is excluded from the inquiry).

205. Nolan & Ursin, *supra* note 151, at 851.

206. 1 REPORTERS' STUDY, *supra* note 199, at 29.

207. Nolan & Ursin, *supra* note 151, at 851 (citing 2 REPORTERS' STUDY, *supra* note 204, at 19–24).

economical administration, and effective prevention' of accidents."²⁰⁸ This compensation plan would not only apply to defective products, but would include personal compensation for harm deriving from tortious acts.

Following the release of the Reporters' Study, scholars saw the resurrection of the enterprise liability theory from many angles.²⁰⁹ The Reporters' Study caused scholars to reconsider efficient compensation for administrative matters and accident prevention.²¹⁰ Victor Schwartz and Mark Behrens²¹¹ encouraged legislators and the courts to pay close attention to the punitive damages portion of the Reporters' Study.²¹² Yet another scholar, Professor Emeritus Alfred Conard, recognized that the Reporters' Study, "like most juristic discussions of injury compensation, gives generous attention to the [hefty compensation] of injury victims and to deterrent effects of liability on the persons who are held liable."²¹³ As an opponent of enterprise liability, he "suggest[s] reforms that seem to balance more beneficially the welfare of actual and potential injury victims and the welfare of contributors."²¹⁴ His belief is that the people who actually pay for tort judgments generally are not the tortfeasors themselves, but the enterprises that have employed or insured the tortfeasors, or have purveyed the faulty

208. *Id.* (citing 2 REPORTERS' STUDY, *supra* note 204, at 534).

209. *See* Nolan & Ursin, *supra* note 151, at 851-54 (reporting on scholars such as Jeffrey O'Connell, Stephen Sugarman, Gary Schwartz, and Peter Huber and their views that enterprise liability was in some form accident deterrence).

210. *Id.* at 854.

211. According to his biographical history:

Victor Schwartz is a senior partner at the law firm of Crowell & Moring, Washington, D.C., where he co-chairs the firm's Torts and Insurance Practice Group. He is coauthor of the most widely used torts casebook in the United States: *William Prosser, John Wade & Victor Schwartz, Cases and Materials on Torts*.

Victor E. Schwartz & Mark A. Behrens, *The American Law Institute's Reporters' Study on Enterprise Responsibility for Personal Injury: A Timely Call for Punitive Damages Reform*, 30 SAN DIEGO L. REV. 263, 263 n.a1 (1993). "Mark Behrens is an associate at the law firm of Crowell & Moring, Washington, D.C., where he specializes in the firm's Torts and Insurance Practice Group." *Id.* at 263 n.a.a1.

212. *Id.* at 281.

213. Alfred F. Conard, *Who Pays in the End for Injury Compensation? Reflections on Wealth Transfers from the Innocent*, 30 SAN DIEGO L. REV. 283, 284 (1993).

214. *Id.* at 286.

products.²¹⁵ Conard reiterates the economic analysis position taken by Calabresi, that enterprises “recover their expenditures by charging higher prices to their consumers, or by reducing the benefits that they confer on investors, workers, and the general public.”²¹⁶ With the contributions of these scholars, discussions of enterprise liability resurfaced, and with the restorative influence of the Reporters’ Study, the theory of enterprise liability has, in its rebirth, reverted to its original goal of victim compensation.

D. Contemporary and Practical Application of Enterprise Liability

Years after the Reporters’ Study, one proponent for enterprise liability defended the concept with his fairness thesis, rather than the traditional economic approach. Professor Gregory Keating suggests that “[m]odern vicarious liability, abnormally dangerous activity liability, and product liability all show the influence of an ‘enterprise’ or ‘activity’ conception of strict liability.”²¹⁷ His proposal noted that the justification for activity liability—the sentiment that a business enterprise cannot justly disclaim responsibility for accidents that are fairly characteristic of its activity—“insists that considerations of fairness . . . call for making activities that benefit from the imposition of particular risks bear the cost of accidental injuries issuing out of those risks.”²¹⁸ “That conception [posits] that the characteristic risks of the modern world are the inevitable by-products of planned activities [rather than] the random consequences of discrete acts and seeks to make activities—not actors—bear the costs of the accidental injuries that they occasion.”²¹⁹ Therefore, Keating’s position is that “[w]hen enterprises are in a position to spread the costs of non negligent accidents across the class of those who benefit from the risks that inevitably issue in such accidents, enterprise liability is . . . reasonable”²²⁰

Professor Keating’s emphasis on fairness shows his

215. *See id.* at 284.

216. *Id.*

217. Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1267 (1997).

218. *Id.* at 1269.

219. *Id.* at 1267.

220. *Id.* at 1266 (emphasis omitted).

preference for the use of enterprise liability over a negligence liability regime.²²¹ He compares the differences between negligence liability and enterprise liability to determine which regime compensates the victim more fairly. Keating reports that a regime of negligence liability confers benefits on prospective injurers, confers the right to certain risks, confers the savings of precaution costs necessary to reduce risk, and confers a lesser cost of compensating those injured by justified risk impositions.²²² Applying enterprise liability theory to a case challenges the activities, not the acts. Keating notes that enterprises exist in the world of activities, foreseeable “with statistical precision, and inflicted with deliberation.”²²³ “Enterprises are therefore able to anticipate those accidents that [derive] from their characteristic risks, minimize their incidence in advance, and disperse their costs after the fact.”²²⁴ Because enterprise liability charges the liability to the party in the best position to prevent the accidents from occurring, “enterprises [must] bear the eminently foreseeable costs of their characteristic risks—costs whose incidence they are in an excellent position to estimate and minimize ex ante, and to disperse ex post.”²²⁵ Thus, enterprise liability apportions the burden of the activity and the financial cost of non-negligent harm fairly to all enterprises involved.

Professors Virginia Nolan and Edmund Ursin replaced the theoretical arguments of enterprise liability with a practical concept.²²⁶ They urge courts to recognize a doctrine of business premises enterprise liability.²²⁷ This position is akin to the practical position adopted in this article. Business premises enterprise liability would be “applicable to persons injured on the premises of supermarkets, department stores, restaurants, and similar establishments.”²²⁸ These scholars promote the new doctrine to impose strict enterprise liability on such businesses engaged in planned activities while

221. *Id.* at 1350–54.

222. *Id.* at 1350.

223. Keating, *supra* note 217, at 1353.

224. *Id.* at 1354.

225. *Id.*

226. Nolan & Ursin, *supra* note 123, at 469 (indicating a turn away from the theoretical to the practical in their proposal).

227. *See id.* at 482–92.

228. *Id.* at 482.

abandoning the traditional negligence requirements in business premises cases.²²⁹ They speak of a business premises concept that could be broadly or narrowly defined, perhaps even limited to the specific class of business depending on the type of action a court wishes to take.²³⁰ These scholars state:

[T]he doctrinal building blocks are in place for courts to adopt [the] proposed business premises enterprise liability . . . [because a] 'business premises' concept is aimed at defining a discrete class of cases in which persons are encouraged to come onto the premises of a business enterprise with a justifiable expectation that their safety has been assured.²³¹

This practical approach to a business premises doctrine avoids problems associated with negligence and defect requirements that have been traditionally mandated in products cases.²³²

Professor Keating has taken a middle-of-the-road approach regarding the law of negligence, corrective justice, and economic justice,²³³ which embraces distributive justice.²³⁴ He argues that "[i]t is unfair to concentrate the burdens of a mutually beneficial activity[, albeit a risky activity,] on a handful of participants when the benefits of the

229. See *id.* at 428–83.

230. *Id.* at 484–85.

231. *Id.* at 484.

232. Nolan & Ursin, *supra* note 123, at 487.

233. See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193 (2000).

234. The author states:

Tort scholarship on the law of negligence has long been torn between two competing conceptions. One of these conceptions—the justice conception—holds that negligence law is (and should be) an articulation of our ordinary moral conceptions of agency and responsibility, carelessness and wrongdoing, harm and reparation. The other conception—the economic conception—holds that the law of negligence embodies an appropriate public morality, but it takes that morality to be at best a distant echo of the morality of responsibility and reparation found in ordinary life. . . . [T]o the extent we are concerned with justice and fairness in tort law, we should be concerned more with matters of distributive justice—with the fair apportionment of the burdens and benefits of risky activities—and less concerned than we have been with matters of corrective justice—less preoccupied with questions of wrongdoing and rectification.

Id. at 193–95.

activity are widely dispersed.”²³⁵ He states that the “[b]urden and benefit should be proportional . . . [because] fairness demands that the burdens of mutually beneficial but harmful activities should be shared, ideally in proportion to the benefits reaped.”²³⁶ He defines this principle of fairness as a principle of distributive justice.²³⁷

In stretching the substance of the fairness concept, Keating favors strict liability rather than negligence liability as a fair remedy for distributive justice.²³⁸ He reports “strict liability in its enterprise form generally yields the fairest distribution of risk [because] it distributes the costs of activity-related accidents across all those who benefit from the activity.”²³⁹ He notes that negligence liability is unfair in two ways: “First, it leaves the costs of non negligent injuries on those whose misfortune it is to suffer them. Second, it tends to distribute costs unfairly among negligent injurers, concentrating . . . damages on those negligent injurers unlucky enough to have their carelessness issue in injury.”²⁴⁰ Keating supports the concept of fairness with enterprise liability as a remedy in distributive justice on account of four aspects: (1) enterprise liability is fair to victims because of the costs of characteristic risk must be absorbed by those who impose it; (2) it “is fair to injurers because it simply asks them to accept the costs of their choices”; (3) it “is fair because it exacts a just price from injurers for the freedom tort law confers upon them” and; (4) it “distributes accident costs among actual and potential injurers more fairly than [does negligence liability].”²⁴¹ Advocates of favoring strict enterprise liability believe that the ultimate fairness is in dispersing the cost of blameless accidents and avoiding dispersing those losses across pools of victims who are bound together in class action suits.

Professor Keating also notes that “if considerations of fairness favor enterprise liability within tort, [then] they also favor enterprise liability beyond tort.”²⁴² He presents

235. *Id.* at 196.

236. *Id.*

237. *Id.*

238. *Id.* at 202.

239. Keating, *supra* note 233, at 202.

240. *Id.*

241. *Id.* at 219–21.

242. Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of*

examples of administrative alternatives to the law of torts such as workers' compensation schemes, no-fault automobile insurance, statutory schemes for the compensation of certain kinds of injuries, and, most importantly, industry and society-wide liability.²⁴³ He points to one feature of non-tort administrative schemes, in which persons injured by the pertinent type of activity recover from an industry-wide fund—not from the particular firm that injured them—on a no-fault basis.²⁴⁴ Keating argues that “Society-wide liability compensates victims out of general tax revenues: [t]he whole society is the source of reparation.”²⁴⁵ Associating fairness with the distribution of harm guided Keating's support for the expansion of enterprise liability beyond tort law.²⁴⁶

In regard to the expansion of enterprise liability beyond tort law, Professors Kenneth Abraham, Robert L. Rabin, and Paul C. Weiler describe the possibility of medical malpractice organizational liability.²⁴⁷ They recognize that tort law will continue “as an instrument that should, and will, remain

Accidents, 72 *FORDHAM L. REV.* 1857, 1898 (2004).

243. “Industry-wide liability charges accident costs arising from the type of activity conducted by a particular industry to the industry as a whole.” *Id.* at 1899–1903.

244. *Id.* (presenting an example of a legislative act and a judicial application of the same).

The National Childhood Vaccination Act imposes industry-wide liability, as does the federal scheme for compensating the victims of black lung disease. Tort law itself reaches beyond enterprise liability toward industry-wide liability in the special case of market share liability. Under *Sindell v. Abbott Laboratories*, for example, victims whose injuries are caused by generic products may sue every producer of the generic product that injured them, and may recover from each firm in proportion to that firm's share of the product market.

Id.

245. *Id.* at 1904.

The New Zealand Accident Compensation Scheme is the most famous example, but administrative schemes such as the Price-Anderson Act—which governs the liability of licensed private operators of nuclear power plants for nuclear accidents—also embodies the idea of societal responsibility. Under society-wide liability, reparation is made not by the firm and its insurer (as under enterprise liability), or by the industry as a whole (as under industry liability), but by society as a whole.

Id. The primary difference between this proposal and an application of industry liability is rooted in the added imposition of liability on the trade association.

246. Administrative schemes sometimes reach beyond enterprise liability to industry-wide liability and even society-wide liability. *Id.* at 1903.

247. Kenneth S. Abraham et al., *Enterprise Responsibility For Personal Injury: Further Reflections*, 30 *SAN DIEGO L. REV.* 333 (1993).

available for other kinds of injury problems not adequately dealt with in either the private marketplace or the political and regulatory arenas.”²⁴⁸ They identify a “clear-eyed recognition of the fact that the tort bill is *not* ultimately paid by the guilty actor, but instead is distributed among the several constituencies of the enterprises that are sued” as “a major premise of [the] proposed recasting of tort damages.”²⁴⁹ They argue further that “[a]n additional implication of that point of view was our proposal for a new model of ‘organizational’ liability for medical injuries in place of the apparently-personalized liability presently imposed on the individual doctor judged negligent.”²⁵⁰ Under the professors’ 1993 proposal, also discussed in the Reporters’ Study, “individual hospitals . . . would bear exclusive liability for any malpractice-related injuries inflicted on the hospital’s patients by doctors . . . [regardless of whether] the doctors were employees of the organization.”²⁵¹ This discussion is consistent with the twenty-first century application of enterprise liability to the medical reform models of today.

E. Enterprise Liability in the Twenty-First Century

Today, enterprise liability is no longer confined to courtrooms and the minds of law professors; it has journeyed into the legislative and administrative sectors of our society. The activity—not the act—has become a central focus of enterprise liability-like remedies²⁵² such as workers’ compensation legislation, as well as no-fault automobile insurance and health care policies. Contemporary scholars, judges, professors, and business administrators are continuously evaluating the application of today’s enterprise liability. Some critics support seeking compensation through tort reform, while others argue that too much compensation is derived from the tort system.²⁵³ However, the ironic journey associated with enterprise liability eventually leads back to

248. *Id.* at 360.

249. *Id.* at 355.

250. *Id.* (referring to Chapter Four, “Medical Malpractice,” in 2 REPORTERS’ STUDY *supra* note 204, at 111–26; PAUL C. WEILER, MEDICAL MALPRACTICE ON TRIAL 122–32 (1991)).

251. Abraham et al., *supra* note 247, at 355–56.

252. See Keating, *supra* note 217, at 1267.

253. See Schwartz & Behrens, *supra* note 211; see also Conard, *supra* note 213.

Albert Ehrenzweig and Calabresi who both contend that activities should bear the cost they engender from foreseeable hazardous activities.²⁵⁴ Both the founders of enterprise liability and contemporary scholars have successfully taken enterprise liability full circle to the idea of damages reform within and beyond tort law.

1. The Influence of Enterprise Liability on Legislative Enactments

Legislators concerned about consumer safety and fairness started to accept the concept of enterprise liability in the consideration of legislative reform bills.²⁵⁵ This support for fair distribution of harm led to favoring such an expansion.²⁵⁶ Legislative reform bills of state no-fault automobile insurance and the federal Black Lung Compensation Program are examples of the influence of enterprise liability.²⁵⁷ For example, "The National Childhood Vaccination Act . . . incorporates a 'Vaccine Injury Table,' listing illnesses associated with various vaccines and time periods following the administration of a vaccination" ²⁵⁸ "Proof that an illness occurred within a specific time period creates a rebuttable presumption that the vaccination was its cause," thus working to establish causation.²⁵⁹ The workers' compensation and society-wide liability of the New Zealand Accident Compensation Act provides another example of administrative schemes, which has also found the application of enterprise liability suitable to its administration.²⁶⁰ The

254. See Calabresi, *supra* note 137; see also Nolan & Ursin *supra* note 123, at 472 (referring to EHRENZWEIG, *supra* note 124, at 1423).

255. See Keating, *supra* note 242, at 1899 (discussing enterprise liability beyond torts).

256. *Id.* at 1860 (recapping the fairness theory).

257. See *id.* at 1900 (discussing under compulsory loss insurance no-fault, each member of such a community of risk bears his or her fair share of its characteristic accident costs in the form of a loss insurance premium); see also Albert C. Lin, *Beyond Tort: Compensating Victims Of Environmental Toxic Injury*, 78 S. CAL. L. REV. 1439, 1509 (2005) (presenting the Congressional establishment of the Black Lung Program to compensate an estimated 100,000 retired coal miners who were presumed to be disabled if they had worked in a coal mine for at least ten years and had medical evidence of the disease).

258. See Keating, *supra* note 242, at 1901.

259. *Id.*

260. See, e.g., *id.* at 1860, 1860 n.10 (citing JULES L. COLEMAN, RISKS AND WRONGS 395-406 (1992); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 171-204 (1995)) ("Many legal scholars likewise see administrative accident schemes,

New Zealand Accident Compensation Scheme is most famous for the society-wide liability principles discussed above.²⁶¹

In the area of medical malpractice legislation, the Reporters' Study shed light on the exacerbated concerns within the medical community demanding a mechanism to relieve doctors from the extensive by-product of malpractice litigation. Costs derived from medical malpractice insurance and litigation prompted well-organized doctors' constituencies to take on trial lawyers in the legislative arena.²⁶² Their challenges targeted high insurance premiums and high litigation awards.²⁶³ Individual doctors faced individual lawsuits that were contrary to the magnitude and type that large private or public enterprises faced.²⁶⁴ Nearly seventy-five percent of all medical malpractice claims were brought as the result of an individual doctor's own, allegedly negligent actions.²⁶⁵ Doctors protested that they "experienced severe threats to their professional self-esteem and autonomy" while "trusting relationships with their patients are being seriously impaired."²⁶⁶ These emotions fueled the passion with which doctors and their political allies attacked the entire tort litigation process during legislative reform hearings.²⁶⁷

The Reporters' Study identified medical malpractice field as one in which fault is still the chief principle in action,²⁶⁸ but in which the burden of liability could be distributed "across the broad pool of the enterprise's constituents" when enterprise liability rules are adopted.²⁶⁹ The Reporters' Study sought to "relieve doctors of the direct financial burden of malpractice insurance by shifting the locus of legal liability from the physician to the hospital or other health care institution connected with the incident."²⁷⁰ This would cause

and even enterprise liability within tort, as animated by ideas which are foreign to the core of tort law.").

261. See *id.* at 1904.

262. See 1 REPORTERS' STUDY, *supra* note 199, at 289.

263. *Id.* at 290-93.

264. See *id.* at 289.

265. *Id.*

266. *Id.* (citing F. Patrick Hubbard, *The Physician's Point of View Concerning Medical Malpractice: A Sociological Perspective on the Symbolic Importance of "Tort Reform,"* 23 GA. L. REV. 295 (1989)).

267. *Id.*

268. See 2 REPORTERS' STUDY, *supra* note 204, at 111.

269. *Id.* at 115.

270. *Id.* at 113.

the hospital to be liable under the enterprise liability rule for the incidents at the hands of physicians providing treatment through hospitals.²⁷¹ Insurance obtained by the hospitals would cover the risk and distribute the burden of providing treatment. This proposal resulted from the expansion of tort liability over the last few decades, within the framework of fault principles advocated by scholars and judges who supported the notion that expensive liability “can safely be imposed on the *enterprise*.”²⁷² It was asserted that such a system of health care enterprise liability would also benefit the administration of torts claims because they would be channeled to one responsible party.²⁷³

2. Health Care Reform and Enterprise Liability

Health care reform in various states embraced the concepts of enterprise liability and established a scheme for health care cost and liability.²⁷⁴ Following judicial reaction, scholarly research, and the appraisal of new laws, much of the current tort reform agenda within legislative considerations—relating to the fault principle, the scope of damages, and the contingent fee—was pioneered in the malpractice setting.²⁷⁵ Proponents of enterprise liability determined that a prescription for health care reform would include a scheme of coverage that would absorb liability as a result of the activity of providing affordable health care.²⁷⁶ Medical professors, legal scholars, and administrative bodies have considered how health care and medical malpractice reform, once affected by the imposition of enterprise liability considerations, could provide a more logical system of

271. *Id.* at 114.

272. *Id.* at 115.

273. *Id.* at 119 (indicating that as a general practice, many medical malpractice claims involve the hospital, doctors, insurers, lawyers, and health care staff). Such cases are time consuming, complicated, and expensive as a result of several participants. To simplify the process and reduce the cost the proposal would fix the legal responsibility for an injury on a single entity. *Id.*

274. *See infra* Part III.E.4.

275. *See* 2 REPORTERS' STUDY, *supra* note 204, at 112–13 (indicating it was the doctors' vigorous criticism of the common law approach to the cost of malpractice litigation and the level of awards that initially provided numerous state legislatures to all forms of tort litigation in the eighties).

276. Charles T. Carlstrom, *Enterprise Liability: A Prescription for Health Care Reform?*, FED. RES. BANK CLEVELAND ECON. COMMENT., July 1, 1993, <http://www.clevelandfed.org/research/Commentary/1993/0701.pdf>.

operation.²⁷⁷ The fairness agenda for progress and reform in the health care arena corresponded to the proposed reduction in administrative cost, consistency in judgment awards, patient safety, damages for malpractice-injuries, and other considerations.²⁷⁸ When legislation and regulations sought to incorporate hospital liability for patient care, medical scholars embraced the potential effect of enterprise liability.²⁷⁹ Thus, the tort reform proposed by the Reporters' Study spoke primarily to the scheme for health care cost and liability.

3. Proposed Federal Health Care Reform and Enterprise Liability

The national health care reform proposed by the Clinton Administration, embraced the enterprise liability concept on a nationwide level. President Clinton appointed a Blue-Ribbon Task Force for Health-Care Reform, and charged it with exploring an approach for restraining the sky rocking cost of health care while increasing access to the nation's doctors and hospitals.²⁸⁰ After several years of debate, the proposals to shift the focus of liability for medical injury from individual physicians to the organizations that deliver health care finally materialized into a viable solution.²⁸¹ Legal

277. For the medical legal scholars, see Robert A. Berenson & Randall R. Bovbjerg, *Enterprise Liability in the 21st Century*, in MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM 219-44 (William M. Sage & Rogan Kersh eds., 2006), available at <http://urban.org/publications/1001036.html> (stating that enterprise liability means holding hospitals or health plans responsible for patient injuries from physician care and that this type of reform seeks better prevention of injury and more efficient insurance). See also *infra* Part III.E.4. For the perspective of medical professors, see Sanford E. Feldman, Letter to the Editor *The Potential Effects of Enterprise Liability*, W. J. MED., Oct. 1993, at 507-08, available at <http://www.pubmedcentral.nih.gov/pagerender.fcgi?artid=1022302&pageindex=1> (urging physicians to be adequately prepared to have an equal share in developing and guiding the new organizational environments). For the legal scholars, see *infra* note 281.

278. See 2 REPORTERS' STUDY, *supra* note 204, at 113.

279. Carlstrom, *supra* note 276, at 2.

280. See *id.*

281. See Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Choice of the Responsible Enterprise*, 20 AM. J.L. & MED. 29, 29 n.2 (1994) (citing the proposals that have appeared in various forms); WEILER, *supra* note 250, at 122-32; see Abraham et al., *supra* note 247, at 355-58. See, e.g., 2 REPORTERS' STUDY, *supra* note 204, at 113 (referring to the proposal by the American Law Institute to shift the locus of legal liability from the physician to the hospital).

scholars glorified the idea that enterprise liability, or as they coined it “‘organizational liability,’ for medical malpractice” was on the national agenda.²⁸² Some legal scholars went as far as recommending “adoption of enterprise liability to President Clinton’s Health Care Task Force.”²⁸³ A proposal for enterprise liability demonstration projects was ultimately included in the legislation submitted to Congress.²⁸⁴ After years of political debate and internal strife, the national health-care bill hit a brick wall and never received a congressional sponsor.²⁸⁵ Thus, the Clinton Administration’s national health-care proposal, which included enterprise liability rules, never materialized.

4. State Health Care Reform and Enterprise Liability

Some states ultimately took on the challenge to legislate health care reform.²⁸⁶ Pennsylvania enacted a statute that

282. See WEILER, *supra* note 250, at 122–32; Abraham & Weiler, *supra* note 281, at 29 (citing the proposals that have appeared in various forms); see also Abraham, et al., *supra* note 247, at 355–58.

283. See Abraham et al., *supra* note 247, at 29 (indicating that they recommended adoption of enterprise liability to President Clinton’s Health Care Task Force). “The Task Force did embrace a version of the idea as its own.” *Id.*

284. See *id.*

285. See Paul Starr, *What Happened to Health Care Reform?*, AM. PROSPECT, Winter 1995, available at <http://www.princeton.edu/~starr/20starr.html> (indicating that after a failure of Congressional compromise important figures in both the executive and legislative branches were never committed to comprehensive health care reform; they favored reforms of the insurance market and some limited expansion of access, but not universal coverage).

286. See CONN. GEN. STAT. ANN. § 220–319 (West 2007); ME. REV. STAT. ANN. tit. 24-A, §§ 6902–1916 (2008). There is established the Charter Oak Health Plan for the purpose of providing access to health insurance coverage for “state residents who have been uninsured for at least six months and who are ineligible for other publicly funded health insurance plans.” See Old Research Report, Health Care Reform Bills, <http://www.cga.ct.gov/2007/rpt/2007-R-0311.htm> (last visited Apr. 2, 2007). Regarding Pennsylvania:

The Pennsylvania Children’s Health Insurance Program (CHIP) was modeled after the Blue Cross Blue Shield Caring Program. . . . The Caring Program model was designed to provide transitional care for children without insurance coverage and as such did not include a comprehensive benefit package.

. . . .

The CHIP program was signed into law in December 1992 and was implemented in May 1993.

Innovative State Strategies to Insure Children, Pennsylvania, <http://aspe.hhs.gov/health/schip/States/Pennsylvania.html> (last visited Aug. 3, 2009). Regarding New Jersey, see Adrienne Lu, *Universal Healthcare Bill Readied for N.J.*, PHILA. INQUIRER, Mar. 15, 2008, at B01 (reporting that New

provided elective health care for children, either for limited periods of time or under limited circumstances.²⁸⁷ Meanwhile, Maine formulated one of the most comprehensive plans to include all facets of a universal health care system.²⁸⁸ Maine's close attention to the influence of enterprise liability assisted it in the management of legal responsibilities associated with universal health care.²⁸⁹ Liability was shifted from the individual physician and health care provider to the health care plan.²⁹⁰ Maine's all-inclusive statewide healthcare plan ("Plan") is a model of how the enterprise liability reform concept was designed to work. Maine adopted the Dirigo Health Reform Act ("Dirigo Act") on September 13, 2003,²⁹¹ and Maine negotiated with Anthem Blue Cross and Blue Shield as the target insurer-partner.²⁹² The Maine legislature expanded access standards that provided for medical malpractice lawsuits, and the affordability and availability of medical malpractice insurance, as well as an indemnity clause for employee/physicians of Dirigo Health.²⁹³ Therefore, under the Dirigo Act, the employee is not subject to any personal liability for having acted within the course and scope of membership or employment to carry out any power or duty.²⁹⁴ The indemnity clause covers expenses

Jersey would become one of only a handful of states nationwide with universal health care, under a plan being pitched by the Democratic chairman of the state Senate's health committee).

287. Children's Health Care Act, 62 P.S. §§ 5001.101–103, *repealed* by 40 P.S. §§ 991.2301–991.2311.

288. See Karen Imas, *Under the Microscope: States Serve as Laboratories for Universal Health Care Programs*, 2007 COUNCIL ST. GOV'TS (Council of State Governments, Lexington, Ky.), Feb. 2007, at 22–23, *available at* <http://www.csg.org/pubs/Documents/sn0702UndertheMicroscope.pdf> (identifying Maine as one of the laboratory states that has "grabbed the nation's attention and [serves] as a catalyst for discussion for creative expansion options at both state and federal levels").

289. See ME. REV. STAT. ANN. tit. 24-A, § 6905 (2008). Compare *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 374 (E.D.N.Y. 1972) (indicating situations in which enterprise liability can apply to joint control of risk relationships).

290. See *id.* (referring to the existence of an industry-wide standard).

291. *Id.*

292. "The Request for Proposal resulted in a bid from Anthem Blue Cross and Blue Shield of Maine and the commencement of negotiations with this insurer, which are now completed." DIRIGO HEALTH AGENCY BD., ANNUAL REPORT TO THE MAINE STATE LEGISLATURE 12 (2004), *available at* <http://www.dirigohealth.maine.gov/Documents/Annual%20Report%20SFY04.pdf>.

293. See ME. REV. STAT. ANN. tit. 24-A, § 6905 (2008).

294. See *id.*

“actually and necessarily incurred by that member or employee in connection with the defense of any action or proceeding in which that member or employee is made a party by reason of past or present authority with Dirigo Health.”²⁹⁵ The Plan also maintains the Dirigo Health Enterprise Fund, created for the deposit of any funds advanced for initial operating expenses.²⁹⁶ The proposals by advocates for enterprise liability actually materialized on the state level.

Four years later, a similar proposal was made by one medical legal scholar, Thomas McLean, who observed that the idea of enterprise liability has another expression in medicine.²⁹⁷ His proposal included a small-scale version of risk allocation in a non-traditional surgical technique known as “cybersurgery.”²⁹⁸ Cybersurgery is a medical technique performed by only “three key actors: the surgeon[,] the robotic product manufacturer[,] and an information conduit service provider (like a telephone company).”²⁹⁹ As a proponent for enterprise liability, McLean analyzed a cybersurgical “misadventure” with regard to traditional medical malpractice and products liability concepts.³⁰⁰ He noted that there are two drawbacks to the traditional causes of action that are associated with their uses in cybersurgery litigation.³⁰¹ First, “two similarly situated plaintiffs may receive substantially different compensations,” one for a products liability claim and another for a traditional medical malpractice claim.³⁰² Second, the transactional cost of claims

An employee of Dirigo Health is not subject to any personal liability for having acted within the course and scope of membership or employment to carry out any power or duty under this chapter. Dirigo Health shall indemnify any member of the board and any employee of Dirigo Health against expenses actually and necessarily incurred by that member or employee in connection with the defense of any action or proceeding in which that member or employee is made a party by reason of past or present authority with Dirigo Health.

Id.

295. *Id.*

296. *Id.* § 6915.

297. See Thomas R. McLean, *Cybersurgery—An Argument for Enterprise Liability*, 23 J. LEGAL MED. 167 (2002).

298. *Id.* at 168.

299. See *id.*

300. See *id.* at 203–09.

301. *Id.* at 204.

302. *Id.* (citing two cases where the nature of the injuries was

administration by the insurance company would be greater than before because the insurance company would set aside excessive funds, not knowing what is necessary for this unusual type of claim.³⁰³ This would “increase[] the transactional cost of the insurance coverage,” which is “ultimately passed on to the patient.”³⁰⁴ The costly drawbacks could be avoided by the use of the enterprise liability concepts.

Therefore, McLean’s proposal suggests that enterprise liability is the solution to irrational awards. “[A]s a method of shifting the liability for the adverse events occurring during the delivery of health care from the individual physician to the business organization,” he suggests that the medical service provider “obtain enterprise liability insurance coverage.”³⁰⁵ To support his theory, McClean relies heavily on tort scholars who participated in the Reporters’ Study,³⁰⁶ and on contemporary torts scholars who have assessed the use of enterprise liability in medical injury cases.³⁰⁷ His analysis suggests that “the cybersurgeon alone (and not the robotic manufacturer or the information conduit provider) would bear all liability associated with the performance of cybersurgery.”³⁰⁸ McLean indicates that enterprise insurance liability coverage would “eliminate finger-pointing,” simplify

indistinguishable: *Pearson v. Bridges*, 544 S.E.2d 617 (S.C. 2001), where the plaintiff was awarded \$750,000, and *Dicks v. U.S. Health Corp.*, 673 N.E.2d 142 (Ohio 1996), where the plaintiff received \$150,000).

303. McLean, *supra* note 297, at 204.

304. *Id.* at 204–05.

305. *Id.* at 205.

306. *See id.* (relying on Kenneth S. Abraham & Paul C. Weiler, *Enterprise Medical Liability and the Evolution of the American Health Care System*, 108 HARV. L. REV. 381, 400 (1994) (suggesting “malpractice liability is a judicially mandated (non-waivable) feature of the patient-physician relationship” and suggesting that enterprise liability would function like a workers’ compensation system with scheduled compensation)).

307. *Id.* (relying on Barry R. Furrow, *Managed Care Organizations and Patient Injury: Rethinking Liability*, 31 GA. L. REV. 419, 506 (1997); Sharon M. Glenn, *Tort Liability of Integrated Health Care Delivery Systems: Beyond Enterprise Liability*, 29 WAKE FOREST L. REV. 305, 306 (1994); Jack K. Kilcullen, *Groping for the Reins: ERISA, HMO Malpractice, and Enterprise Liability*, 22 AM. J.L. & MED. 7 (1996); William M. Sage, *Enterprise Liability and the Emerging Managed Health Care System*, 60 L. & CONTEMP. PROBS. 159, 159 (1997); David M. Studdert et al., *Can the United States Afford a “No-Fault” System of Compensation for Medical Injury?*, 60 L. & CONTEMP. PROBS. 1, 16 (1997)).

308. *Id.* at 207.

litigation, and likely “decrease the amount of money that the insurer would place on reserve.”³⁰⁹ As a result, “the transactional cost associated with compensation for adverse cybersurgical events would decrease.”³¹⁰ He also believes that an enterprise insurance liability concept for cybersurgery “would facilitate patient safety because the medical service provider would have a financial incentive to select only the best cybersurgical instruments and conduit service provider.”³¹¹

The conclusion is clear: enterprise liability has a strong presence in the reform of the compensation system. The theory has actually become known in the administrative and legislative models that seek to design a more accessible and more economical compensation package to aid all injured consumers.³¹² Both legal and medical scholars now advocate for the use of enterprise liability.³¹³ Legislators have taken the advice of legal experts and incorporated enterprise liability into health care statutes.³¹⁴ Enterprise liability is now widely accepted at the state levels. The contributions and responses to the Reporters’ Study “reflect a range of interests at stake in the ongoing debate about personal injury law and compensation in this country.”³¹⁵ Scholars, judges, and professors alike must take note of the once-misunderstood usage of enterprise liability. Once thought of as a legal theory without teeth, enterprise liability has proven itself as one of the most useful tools in and outside of tort law.

IV. THE INFLUENCE OF ENTERPRISE LIABILITY ON BLACK FRIDAY

The abundance of Black Friday injuries dictates that consumers are not aware of the challenges that face them when they participate in the sale events. They do not have

309. McLean, *supra* note 297, at 207.

310. *Id.*

311. *Id.*

312. See Carlstrom, *supra* note 276 (noting that enterprise liability eliminates the high cost of defensive medicine, lower administrative cost, and eliminates high cost of proving negligence in court); see also McLean, *supra* note 297.

313. See *supra* note 277.

314. See *supra* note 286 (listing legislative enacted health care statutes in three states).

315. Abraham et al., *supra* note 247, at 364.

the information necessary, such as numbers of reported injuries, to make an informed decision about whether to participate. The news media reported some incidences during the 2005 and 2006 sales event; however, by 2007, reports of injuries were extremely limited and hard to find. It is not hard to believe that today, most consumers have not viewed the web videos that depict the horror of thousands of shoppers being smashed by people into the glass doors; nor have they listened to the screams of horror, watched people being carried by the crowd pushing from the back, witnessed families being separated, watched the looks of horror on the faces of those who survived the ordeal, nor viewed shoppers trampling over clothes and shoes left behind by other shoppers who did not dare pick up them up for fear of being run over.³¹⁶ Thus, consumers are unable to assume the risk because the risk has not been made clear or publicized in a manner that suggests danger.

It took a Wal-Mart employee being stampeded to death during last year's sales rush for Black Friday to become a topic of the national media. For example, Fox News commentator, Bill O'Reilly, blamed the controversial incident on Americans and Wal-Mart.³¹⁷ O'Reilly's guest, Bernard Goldberg, responded that the shoppers were to blame.³¹⁸ Goldberg refused to blame Americans, blaming instead only the people who stepped on the man.³¹⁹ Another segment of the "O'Reilly Factor" featured a discussion of how Wal-Mart had met with the cops two weeks prior to the sale because Wal-Mart knew that the crowd would get out of control.³²⁰ There was notice that lack of crowd control was going to occur, so the questions then became, how much security is enough?³²¹ The news media finally addressed the hard questions associated with Black Friday. However, the root of

316. *E.g.*, *Idaho News Now* (KTVB television broadcast Nov. 23, 2007) (recording images of a mass amount of customers entering into a store, running, pushing, and shoving); see YouTube.com, *supra* note 12 (displaying the video images of the terror associated with the mob of shoppers at Black Friday sale).

317. See *O'Reilly Factor: Crazies to the Left, Sane to the Right* (Fox News television broadcast Dec. 3, 2008).

318. *Id.*

319. *Id.*

320. See *O'Reilly Factor: Is It Legal?* (Fox News television broadcast Dec. 3, 2008).

321. *Id.*

the catastrophe is still not being addressed with enough seriousness to affect marketing modifications.

The historical and the theoretical foundation of enterprise liability supports the premise that the major participants in the retail enterprise, which adhere to a standard of practice sufficient enough to constitute an industry-wide practice, while creating foreseeable hazards for consumers, must bear all liability for injuries associated with the aggressive marketing schemes in which they participate. Damages awarded by the courts against the participants must encompass a control mechanism whereby such damages are appropriately distributed to all those retailers involved in the common scheme.³²² Regardless of whether one embraces the doctrine of strict enterprise liability,³²³ the compensation goals of enterprise liability,³²⁴ the adoption of a business premises enterprise liability,³²⁵ or the argument for fairness,³²⁶ all positions lead to the conclusion that the entire retail enterprise must pay for the injuries it causes. Thus, changing the damages distribution should serve as a deterrent to retailers who choose to participate in an aggressive marketing practice that results in harm to consumers.

The practical application of enterprise liability to Black Friday litigation is necessary to assess the possibility of an impact on the industry-wide practice of aggressive marketing schemes. The parallel practices of competition-seeking in the retail industry create the basis for joint liability because they invoke "activities" in which there is a high degree of risk. Advertising deep discounts, using doorbuster promotional sales and loss leaders, announcing limited quantities, early-bird specials, free giveaways, and the range of other enticing communication tools available to retailers provide stimuli to consumers, calling for them to respond in a specific way.³²⁷

322. See *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 372 (E.D.N.Y. 1972) (stating that the issue of who caused the injury is secondary when common duties, groups, or joint enterprises are involved).

323. See *supra* note 144 and accompanying text.

324. See *supra* notes 148–50 and accompanying text.

325. See *supra* notes 227–28 and accompanying text.

326. See *supra* notes 236–37 and accompanying text.

327. See Kovacs, *supra* note 14 (reporting people were lured by the ad which was designed to get people into the store); see also Chediak, *supra* note 21 (reporting deals that lure crowds). See generally Janet Hoek & Ninya Maubach,

At the same time, the use of those tactics by retailers reinforces predictive consumer behavior. Although a risk of injury is foreseeable, based on statistics from previous sales events, retailers continue to increase their sales tactics without an increase in safety precautions for the consumers.

News reports reveal that retailers battle to outdo each other in price slashing and therefore cause bargain hunters to swarm malls and stores in massive numbers.³²⁸ Reports of stampedes and individuals being trampled have been documented for many years; yet no one paid much attention until Black Friday sales were cited as having caused the death of a store worker.³²⁹ Now, local government officials are considering legislation to regulate the crowds.³³⁰ However, no real attention has been paid to the cause of the crowds.³³¹ These are critical issues which require factual development.

A. The Joint Control of Risk Between Retailers

The risk retailers are taking, whether individual or collective, is a cooperative decision, incidental to the enterprise they have undertaken.³³² Black Friday marketing tactics are purposely designed to temporarily stimulate purchase patterns.³³³ The psychological ploy administered by

Self-Regulation, Marketing Communications and Childhood Obesity: A Critical Review From New Zealand, 39 LOY. L.A. L. REV. 139, 152 (2006) (indicating behavior modification theory views marketing activities as environmental interventions that may cue new behaviors or maintain existing behaviors in the face of competitors' promotions).

328. See generally Greta Guest, *Bargains Yank Shoppers Out of Bed, Into Crowded Stores*, DETROIT FREE PRESS, Nov. 26, 2005, at 1.

329. See generally Whittle, *supra* note 118 (reporting legislators are now considering a bill to control crowds as a remedy).

330. See *id.*

331. See *id.* (limiting the legislation to crowd control with no mention of aggressive marketing schemes).

332. See *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 373-74 (E.D.N.Y. 1972) (delineating three ways in which joint control of risk can occur).

333. Wendy H. Mason states:

One of the best ways to influence consumer behavior is to give buyers an acceptable motive. . . . Consumers want to feel they are doing something good . . . or that they just deserve to be spoiled a little bit. If marketers can convince consumers that they need a product . . . for some "legitimate" reason, customers will be more likely to make a purchase.

Wendy. H. Mason, *Consumer Behavior*, REFERENCE FOR BUS. (2007), <http://www.referenceforbusiness.com/management/Comp-De/Consumer->

retailers is intended to broaden the range of products consumers can purchase from their stores, at a deeply discounted price for a short period of time, in the hope that consumers will be less likely to defect to another retailer.³³⁴ Thus, the yearly offerings of discounted products and the release of limited-period special items help to provide incentives to bait consumers into the store.

Major participants in the Black Friday marketing promotions are those retailers that aggressively advertise in such a manner as to entice large quantities of customers into their stores.³³⁵ The participants include the national chain department stores, specialty stores, discount stores, and mass merchandise and independent stores that are all members of the National Retail Federation (NRF) trade association.³³⁶ With a membership list which includes 1.4 million American retail companies, the NRF is the world's largest retail trade association.³³⁷ More specifically, on the national level, the major participants over the years have been Target, Wal-Mart, Macy's,³³⁸ Best Buy, Sears, Kohl's, Kmart, and JC

Behavior.html.

334. D'Innocenzio, *supra* note 21 (reporting what shoppers find in terms of deals and service influences where they will shop for the rest of the season and steep discounts were being offered); *see also* Press Release, Nat'l Retail Fed'n, Discounts on Electronics, Toys, Luxury Apparel Entice Early-Bird Shoppers This Morning (Nov. 28, 2008), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=609 (reporting that retailers are doing their part to entice early bird shoppers) [hereinafter Discount on Electronics].

335. *See generally* Hoek & Maubach, *supra* note 327.

336. *See generally* Consumers Out in Full Force, *supra* note 34 (identifying "membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, Internet, and independent stores")

337. NAT'L RETAIL FED'N, MOR 1996 EDITION MERCHANDISING & OPERATING RESULTS OF RETAIL STORES IN 1995 (Alexandra Moran ed., 71st ed. 1996). *See also* National Retail Federation, About NRF, *supra* note 37 (stating that "the National Retail Federation is the world's largest retail trade association, with membership that comprises all retail formats and channels of distribution including department, specialty, discount, catalog, internet, independent stores, chain restaurants, drug stores and grocery stores as well as the industry's key trading partners of retail goods and services"). "NRF represents an industry with more than 1.4 million U.S. retail companies, more than 24 million employees—about one in five American workers—and 2008 sales of \$4.6 trillion. As the industry umbrella group, NRF also represents over 100 state, national and international retail associations." *Id.*

338. Shoppers' Favorite Holiday Ads, *supra* note 47 (indicating the results of a survey in which consumers indicated that these retailers implemented the top holiday television advertisements for 2007).

Penney.³³⁹ At the local level, stores may often become key newspaper and local television advertisers, thus joining in as major participants.³⁴⁰

The NRF's involvement is relevant, given that the retailers producing the injury-causing activity obtained most of their knowledge through membership in this industry-wide trade association.³⁴¹ The NRF is credited with providing forecasts to retailers about consumer spending habits; it provides materials and advisory services to its members, including financial planning, shortage control, credit EDP, buying, and legislative influence.³⁴² Its lobbying team serves as the voice of retail in the nation's capital.³⁴³

The NRF houses a special division, known as the Retail Advertising & Marketing Association ("RAMA"), which is responsible for marketing and advertising concepts for retailers.³⁴⁴ RAMA's mission is to provide visionary leadership that promotes creativity, innovation, and excellence within all marketing disciplines that strategically elevates the members and the retail industry.³⁴⁵ Retailers are thus provided with marketing strategies that can help them decide on selected merchandise for marketing during the next sales seasons.³⁴⁶ Additionally, the NRF also provides access to information about the risk inherent in retail, such as loss prevention and how to defend litigation.³⁴⁷ The

339. *Id.* Television ads were launched by other stores, including Publix, Meijer, Big Lots, Hallmark, Staples, Toy R Us, Kay Jewelers, Old Navy, Verizon, Lowes, Circuit City, Zales, and Overstock.com.

340. *See generally* Black Friday.com, The Official Black Friday 2009 Site, <http://www.theblackfriday.com> (showing over sixty store logos for national and local stores).

341. *See, e.g.,* Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 378 (E.D.N.Y. 1972) (contending that the trade association was delegated the responsibility to set safety standards and therefore could be held as a jointly liable).

342. *See* National Retail Federation, Home Page, <http://www.nrf.com> (last visited Sept. 6, 2009).

343. *Id.* NRF's lobbying team represents retailers of all types—from mass merchandisers and specialty stores to department stores and discounters. *Id.*

344. *Id.* Search "Marketing" for "RAMA" and click "About Us."

345. *Id.*

346. *See generally* Press Release, Nat'l Retail Fed'n, NRF's RAMA and Shop.org Announce Retail Innovation and Marketing Conference (Aug. 31, 2009), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=779 (inviting retailers to take part in a new marketing strategy for e-commerce).

347. *See generally* NAT'L RETAIL FED'N, CHALLENGES RESOURCE GUIDE FOR RETAILERS (2004), <http://www.retail-revival.com/ResourceGuide.pdf>.

advantage of membership in the NRF lies in joint knowledge of the benefits and risk of retail sales.³⁴⁸ Because of its role in encouraging and coordinating standards of practices, the NRF is a vital party to retail-related litigation.

In order to ensure a respectable retail season, retailers adhere to standards that amount to joint control of risk.³⁴⁹ Although retailers are not bound to a profit-sharing joint venture, the fact that they experience mutual benefits or pleasure is sufficient to impose joint liability on the enterprises.³⁵⁰ The retailers' parallel behavior supports an inference of tacit agreement or cooperation and points to joint control of risk.³⁵¹ In the context of Black Friday, there is a parallel behavior suggesting a manifested or understood agreement. Each year at the same time, major retailers like Target, Wal-Mart, Macy's,³⁵² Best Buy, Sears, Kohl's, Kmart, JC Penny, Toys R Us, KB Toys, and Circuit City dangle a long list of incentives and deep discounts in front of consumers during the same shopping period, while using the same marketing forecast supplied to them by the NRF. For instance, in 2005 the NRF predicted that the hot selling holiday items that year would include Xbox 360 consoles, iPods, computers, and MP3 players.³⁵³ These retailers promptly discounted the items to include a \$370.00 Toshiba laptop marked down from \$749.00,³⁵⁴ an MP3 player for

348. See generally NAT'L RETAIL FED'N, LEADERSHIP STARTS HERE: 2008 ANNUAL REPORT 1 (2008), <http://www.nxtbook.com/nxtbooks/nrfe/annualreport08> (identifying their mission to protect and advance the interests of the retail industry).

349. See *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 376 (E.D.N.Y. 1972) (indicating that joint liability has been traditionally imposed on multiple defendant who exercise actual collective control over a particular risk-creating product or activity).

350. *Connor v. Great Western Sav. & Loan Ass'n*, 447 P. 2d 609, 616 n.6 (Cal. 1968); see PROSSER, LAW OF TORTS § 72 at 475–80 (4th ed. 1971).

351. *Hall*, 345 F. Supp. at 371 (citing three ways in which joint liability of risk can be achieved: (1) “[proving] the existence of an explicit agreement and joint action among the defendants with regard to warnings and other safety features,” (2) proving that the “defendants’ parallel behavior [is] sufficient to support an inference to tacit agreement or cooperation,” and (3) submitting “evidence that defendants, acting independently, adhered to an industry-wide standard or custom” with regard to safety).

352. Shoppers' Favorite Holiday Ads, *supra* note 47.

353. Press Release, Nat'l Retail Fed'n, NRF Projects Moderate Holiday Gains (Sept. 21, 2005), <http://www.nrf.com/content/press/release2005/forecast0905.htm> [hereinafter NRF Projects].

354. BarganShare.com, Best Buy Black Friday Ad (Now Online),

\$39.99 after a \$60.00 rebate,³⁵⁵ and an iPod Nano at \$199.00 with a \$25.00 gift card from iTunes. The day after Black Friday, the NRF subsequently reported that the electronics category experienced its largest year-over-year jump, with 36.7 percent of shoppers purchasing in that category.³⁵⁶ This industry-wide report from the NRF is the forecast retailers rely in deciding what to sacrifice as doorbusters.

Three months prior to the holiday season the NRF prepares participating retailers for the magnitude of the crowds projected to participate in the Black Friday Sale. Each September, retailers are provided with a holiday forecast.³⁵⁷ In 2004, the September forecast stated that after strong growth in the first half of the year and a more subdued growth in the third quarter, retailers should anticipate the arrival of the all-important holiday season at 4.5 percent growth over the last year.³⁵⁸ In 2005, the total holiday retail sales were expected to increase 5.0 percent over previous year;³⁵⁹ in 2006, the forecast to retailers indicated that the holiday numbers were expected to increase another 5.0 percent;³⁶⁰ and by 2007, the economy drove the NRF to forecast only a 4.0 percent gain.³⁶¹ The recent economic downturn cause the NRF to forecast an even a lower gain of only at 2.2 percent in its 2008 forecast.³⁶² Retailers were also provided with follow-up indicators after each Black Friday

<http://www.bargainshare.com/index.php?showtopic=71641&st=0&p=612536&#entry612536> (last visited Oct. 24, 2009).

355. D'Innocenzio, *supra* note 21.

356. *Id.*

357. See Press Release, Nat'l Retail Fed'n, NRF Anticipates Solid Holiday Growth (Sept. 22, 2004), <http://www.nrf.com/content/press/release2004/forecast0904.htm> [hereinafter NRF Anticipates]; see also Press Release, Nat'l Retail Fed'n, Citing Economic Concerns, NRF Forecast Holiday Sales Gain of Four Percent (Sept. 20, 2007), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=370 [hereinafter Gain of Four Percent]; Press Release, Nat'l Retail Fed'n, NRF Foresees Challenging Holiday Season, Forecasts Meager Sale Gain of 2.2 Percent (Sept. 20, 2008), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=573 [hereinafter Meager Sale Gain]; NRF Projects, *supra* note 353; Press Release, Nat'l Retail Fed'n, NRF Sees Subdued Holiday Gains in 2006 (Sept. 19, 2006), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=150 [hereinafter Subdued Holiday Gains].

358. See NRF Anticipates, *supra* note 357.

359. See NRF Projects, *supra* note 353.

360. See Subdued Holiday Gains, *supra* note 357.

361. See Gain of Four Percent, *supra* note 357.

362. See Meager Sale Gain, *supra* note 362.

from the National Retail Federation's Black Friday Weekend Survey.³⁶³ Such cooperation in data sharing, forecasting, and follow-up by itself does not warrant joint control. However, providing the information for the participation in a joint activity has the same effect as does overt joint action.³⁶⁴

Some may point to the fact that retailers act alone in the design of their sales, and therefore, do not jointly control the risk. However, though they act independently, each retailer adheres to an industry-wide standard or custom with regard to the Black Friday sale's features.³⁶⁵ The NRF specifically states that when it comes to offering deals to bring customers into stores, retailers are holding up their end of the bargain.³⁶⁶ Black Friday sales are always scheduled on the day after Thanksgiving. The sales usually occur very early in the morning and feature doorbusters. The "hot items" that the NRF projects usually end up as the major participant's sales items.³⁶⁷ The deep discounts offered by the retailers are designed to create the impression that a retailer is offering

363. See \$22.8 Billion in Sales, *supra* note 40; Blockbuster Black Friday, *supra* note 41; Consumers Out in Full Force, *supra* note 34; Lucrative Black Friday, *supra* note 54. According to the 2006 National Retail Federation's Black Friday Weekend Survey, 140 million shoppers hit the stores for Black Friday. *See id.* This indicates the only decline in five years.

364. In *Hall*, Judge Weinstein states:

[J]oint control of risk can exist among actors who are not bound in a profit-sharing venture. . . . Where [the] standards or practices exist, the industry operates as a collective unit in the double sense of stabilizing the production costs of safety features and in establishing an industry-wide custom which influences, but does not conclusively determine, the applicable standard of care.

Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 373-74 (E.D.N.Y. 1972).

365. See generally Energetic Start, *supra* note 16 (referring to the two-day sales buoyed by retailers and retailers in all categories were featuring big bargains); see Discounts on Electronics, *supra* note 334 (indicating retailer's store openings as mostly four to five a.m.); see Press Release, Nat'l Retail Fed'n, Strong Black Friday Promotions Generate Consumer Excitement, Sales (Nov. 23, 2007), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=418 (reporting retailers pre-dawn openings and strong promotions of similar types of goods and lower-priced merchandise).

366. *Id.*

367. Compare the 2005 forecast predicting that if gas prices continue to fall, consumers will have more money to spend with the news reports that stores concerned about the lingering effect of high gas prices reduced prices, boosted promotions, and opened earlier in the day, all in an attempt to attract reluctant consumers. NRF Projects, *supra* note 353; see also Chediak, *supra* note 21.

better values than competitors.³⁶⁸ Each year, competitive sales become more extravagant, with earlier starts and deeper discounts.³⁶⁹ The group activity parallels cases in which the standard of care was challenged, for instance those involving a horse race in a crowded street or defendants acting in concert in an automobile race.³⁷⁰

The parallel behavior creates unreasonable risk of harm, even though only one member of the group may have been the direct or physical cause of the injury. Earlier accounts of injuries occurring during Black Friday sales mostly cite to Wal-Mart stores,³⁷¹ and it was a Wal-Mart employee who was killed during a stampede at one of its stores.³⁷² However, the issue of who caused the injury is distinctly secondary to whether the group engaged in joint hazardous conduct.³⁷³ Joint tort liability is not limited to a narrow set of relationships and circumstances.³⁷⁴ "It has been imposed in a wide range of situations, requiring varying standards of care, in which defendants cooperate in various degrees, enter into business and property relationships, and undertake to supply goods for public consumption."³⁷⁵

The fact that the risks imposed by Black Friday participants are recurrent and isolated to the retail enterprise suggest that the use of enterprise liability would deter the practice, internalize the cost of the joint activity, distribute the burden, and impose liability upon the injury-causing entrepreneurial activity instead of one injurer standing alone. The historical judicial use of enterprise liability provides confidence that applying the concept is a

368. See Michael Barbaro, *Dawn Rush Hints at Strong Start to Holiday Sales*, N.Y. TIMES, Nov. 26, 2005, at A1.

369. Warner, *supra* note 19.

370. Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 372 (E.D.N.Y. 1972) (citing Hanrahan v. Cochran, 42 N.Y.S. 1031, 1032-33 (App. Div. 1896); Lemons v. Kelly, 397 P.2d 784, 787 (Or. 1964)).

371. See Roeper, *supra* note 12; see also *Black Friday Injury*, *supra* note 90; Chediak, *supra* note 21; Lystra, *supra* note 85; Theboxtank, *supra* note 93; WEBnME.com, *Black Eye Friday*, *supra* note 82.

372. Kiernan Crowley, *Worker Killed in Wal-Mart Stampede*, N.Y. POST, Nov. 28, 2008, http://www.nypost.com/seven/11282008/news/regionalnews/man_killed_woman_miscarries_in_wal_mart_141313.htm.

373. Hall, 345 F. Supp. at 372.

374. *Id.* at 371.

375. *Id.*

viable route for Black Friday litigation.³⁷⁶ The 1972 judicial application of enterprise liability supports the idea that, in a case like this, such industry-wide practice suggests that the industry and trade association provide the logical locus in which precautions should have been taken and upon which liability must be imposed.³⁷⁷ The point of reference includes multiple retailers involved in the activity and the practical remedy that would deter the activity.³⁷⁸ The scholarly discussions of deterrence, corrective justice, and distributive justice are also determinative keys to the joint control of risk remedies to be considered for the benefit of consumers who are injured by Black Friday participants.³⁷⁹

B. Foreseeable Hazards Associated with the Sales Scheme

Knowledge that Black Friday sales schemes, coupled with aggressive marketing tactics, result in injuries of the type representative for the particular practice, signifies a societal problem. The problem with the aggressive marketing scheme associated with Black Friday is that it constitutes a foreseeable risk-creating activity, because of the failure to guard against risk of foreseeable misconduct of others.³⁸⁰ The retail enterprise exposes consumers to risk because sales competition is a huge component of the retail industry during the holiday season.³⁸¹ This type of market warfare is worth the risk to some retailers. However, the retail enterprise fails to acknowledge that it is under a duty to protect the consumer against misconduct, and that the conduct of the enterprise must not increase the risk of harm.³⁸²

The retail enterprise is fully aware that sales promotions are designed to have a direct impact on consumer behavior. This identified behavior evidences the creation of the type of foreseeable risk-creating activity that Ehrenzweig identifies

376. See generally *id.* at 372.

377. See *id.* at 378.

378. See *id.*

379. See generally Keating, *supra* note 233 (discussing the implementation of distributive and corrective justice for the fair apportioning of the burdens and benefits of risky, yet valuable activities).

380. Hall, 345 F. Supp. at 367 (citing RESTATEMENT (SECOND) OF TORTS § 449 cmt. b (1965)).

381. See *supra* notes 1–12 and accompanying text.

382. See RESTATEMENT (SECOND) OF TORTS § 449 cmt. a (1965).

as demanding full liability to the innocent victim.³⁸³ Given the current consumer trend toward value-consciousness, aggressive competition among the retailers continues to escalate.³⁸⁴ Even when statistics indicate that shopping crowds increase year after year,³⁸⁵ and total sales realize a substantial gain during the holiday months,³⁸⁶ the retail enterprise continues to manipulate the time and offerings for purchasing by incorporating purchase acceleration tactics to target the deal-prone consumers.³⁸⁷ While offering an invitation to purchase is not an illegal act, the group control of risk, coupled with the foreseeability of harm, is the lethal weapon.³⁸⁸ The aggressive sales schemes used during Black Friday set in motion a complex interaction of industry-wide decisions and consumer behavior that amounts to risk-taking behavior on the part of the retail enterprise.

The retail enterprise is in a position to foresee harm because it is equipped with information as to traffic patterns of shoppers, provided to them by the NRF and affiliated companies that provide retail expertise.³⁸⁹ The retail

383. EHRENZWEIG, *supra* note 124, at 1452–53.

384. NAT'L RETAIL FED'N, *VALUE RETAILING IN THE 1990S: OFF-PRICERS, FACTORY OUTLETS, AND CLOSEOUT STORES* 14 (1995).

385. Retailers receive new releases with results of surveys and analysis by the National Retail Federation. *See, e.g.*, \$22.8 Billion in Sales, *supra* note 40; Blockbuster Black Friday, *supra* note 41; Consumers Out in Full Force, *supra* note 34.

386. *See* NAT'L RETAIL FED'N, *supra* note 384, at 11–14 (stating the results of thirty department stores whose sales volume totaled \$52.8 billion). The 1995 monthly sales distributions in the month of December for conventional department stores indicate an 8.7 percent increase, discount department stores a 5.73 percent increase, national chain department stores a 7.4 percent increase, and family clothing stores a 7.69 percent increase. *Id.* When sales from these same types of stores were compared with 1991 total sales for the year the results indicated; conventional department stores total increased sales as 3,141 million, discount department stores total increased sales as 55,302 million, national chain department stores total increased sales as 5,968 million, and family clothing stores total increased sales as 10,560 million. *Id.*

387. Retailers use purchase acceleration, which encourages consumers to purchase at different times than they would have, had not the promotion been available. ROBERT C. BLATTBERG & SCOTT A. NESLIN, *SALES PROMOTION CONCEPTS, METHODS, AND STRATEGIES* 128 (Barbara Grasson ed., 1990).

388. *See generally* Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 362 (E.D.N.Y. 1972) (relying on the precedent cases to support the foreseeability of risk needed to trigger the duty of reasonable care).

389. *See, e.g.*, ShopperTrak, <http://www.shoppertrak.com/traffic-indices> (last visited Aug. 4, 2009) (discussing ShopperTrak's National Retail Sales Estimate, referred to as the NRSE).

enterprise also has in its possession statistical data of categories of injuries associated with stores during the Black Friday sales.³⁹⁰ Such data reveals the numbers of injuries that occur during the time that the doors are opened for the sales. In addition, each retailer has in its possession videotapes of crowds entering the doors on Black Friday, documenting the incidents of the risk involved.³⁹¹ However, the number of injuries is not available as a public record and written data consists only of the reported injuries. In past litigation, expert witnesses have testified that only one out of every ten incidents of injury associated with Black Friday is reported.³⁹²

Thus, reasonableness would require that the foreseeable risk of harm—that is, the subjective action taken by the retail enterprise—requires imposition of liability. The deliberate practice must be deterred. Advertising and sales promotion are activities that encourage consumers to go onto the premises of a retailer's store with a justifiable expectation that their safety has been insured.³⁹³ Where the retailer and buyer come together to interact and the predicted crowd is a resource for the retailer and a detriment to the buyer, the retailer is imposing a greater risk on the buyer and bearing less in the way of exposure to risk.³⁹⁴ In addition, the

390. Telephone Interview with Charles Sorenson, Attorney at Law, Coker, Schickel, Sorenson & Posgay Trial Attorneys (July 2008).

391. See, e.g., FoxNews.com, *Police Try to ID Shoppers in Wal-Mart Trampling Death Surveillance Tape*, Dec. 1, 2008, <http://www.foxnews.com/story/0,2933,459387,00.html> (reporting police “[o]fficials are combing through surveillance tape of a post-Thanksgiving shopper stampede that killed a Wal-Mart worker in New York to identify individual shoppers who may be responsible”); see also Kristen Hamill, *Customers Injured in Crash Suing Wal-Mart*, CNN.COM, Dec. 2, 2008, <http://www.cnn.com/2008/CRIME/12/02/walmart.trampling.suit/index.html> (reporting a video showing a Wal-Mart employee and others being knocked to the floor by people trying to get into the store); McFadden & Macropoulos, *supra* note 1 (commenting on store surveillance cameras).

392. Telephone Interview with Charles Sorenson, Attorney at Law, *supra* note 390.

393. See Nolan & Ursin, *supra* note 123, at 484 (indicating “the ‘business premises’ concept is aimed at defining a discrete class of cases in which person are encouraged to come onto the premises of a business enterprise with a justifiable expectation that their safety has been assured”).

394. See Keating, *supra* note 242, at 1873–74 (making an analogy between parties running a mill and other parties running a mining operation, with the use of water illustrated as a resource beneficial to the miller and a detriment to the miner).

foreseeable hazards associated with Black Friday sales squarely align with the business premises concept articulated by Nolan and Ursin. Limiting this type of aggressive marketing with foreseeable hazards to the retail enterprise as one of the discrete classes of cases or specific classes of business would be a reasonable step towards deterring the practice. This would allow the courts to abandon the traditional negligence requirements and apply enterprise liability to achieve a reasonable distribution of the cost of the incidents to those who benefited by the practice.

C. Individual Lawsuits: Negligence v. Enterprise Liability

The industry-wide practice on Black Friday must be challenged with a strong legal authority that can impact the system of retail competitive jockeying that exposes consumers to harm. The courts must "register society's moral condemnation of such corporate behavior by rendering awards in . . ." a manner that propels a message to not only one defendant but also to the enterprise to curtail or eliminate the risk-creating behavior.³⁹⁵ The law professors and scholars who participated in the Reporter's Study agreed that "the simplest and most venerable justification for tort liability is that it secures the value of *corrective justice*."³⁹⁶ Aligning with these scholars, I echo that the common law of negligence is not strong enough to effect the risk reduction required from the retail enterprise.³⁹⁷ Imposition of liability, based upon proof by a preponderance of the evidence that the defendant failed to exercise a standard of care, must be pitted

395. See Abraham et al., *supra* note 247, at 337 (quoting the position of torts advocates).

396. 1 REPORTERS' STUDY, *supra* note 199, at 24 (citing the illuminating treatments of the contemporary tort debates from Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risk*, 37 UCLA L. REV. 439 (1990); Stephen D. Smith, *The Critics and "the Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765 (1987); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 285 (1980); Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141 (1981)).

397. See Keating, *supra* note 217, at 1350-54 ("[A] negligence regime confers on injurers the right to impose certain risks . . . save the precaution costs necessary to reduce or eliminate those risks . . . [and] frees injurers from bearing the lesser cost of compensating those injured by their justified risk impositions.").

against recognizing the “activities” that create risk of harm.³⁹⁸ Therefore, individual private lawsuits are not the best way to impose safeguards on the industry-wide practice of Black Friday.

Presently, a negligence cause of action still does not provide enough deterrent value to reduce the risk of aggressive marketing practices for five main reasons. First, the Restatement (Second) of Torts indicates that the plaintiff must prove that the defendant breached the standard of care for the activity and the magnitude of the risk must outweigh the utility of the act.³⁹⁹ Relating to physical harm in the negligence doctrine, both the Restatement (Second) of Torts and the Tentative Draft of the Restatement (Third) of Torts indicates that an actor ordinarily has a duty to exercise reasonable care when the actor’s conduct creates a risk of physical harm; however, in exceptional cases, a court may decide that the defendant has no duty or that the ordinary duty of reasonable care requires modification.⁴⁰⁰ Here the no-duty rule is a matter of law to be decided by the courts, while the defendant’s scope of liability will be a question for the fact-finder.⁴⁰¹ The factors of duty, as a matter of liability, would leave to question whether courts could hold that an actor is liable for a breach of a limited duty when an entire industry is participating in the Black Friday sales scheme.⁴⁰² Therefore, the issue becomes one of consistency in individual cases. When one retailer is found liable under the limited duty application, his damages do not far exceed the risk involved in his conduct.⁴⁰³ Thus, this retailer will continue to avoid turning his consumers over to the competitors and will

398. See *id.* (balancing the pros and cons of each regime).

399. See RESTATEMENT (SECOND) OF TORTS § 291 cmt. b (1965).

400. RESTATEMENT (THIRD) OF TORTS, PHYSICAL HARM § 7 (2008). As of the date of publication, this draft has not been considered by the members of the American Law Institute and does not represent the position of the Institute on any of the issues with which it deals. The action, if any, taken by the members with respect to this draft may be ascertained by consulting the Annual Proceedings of the Institute, which are published following each Annual Meeting.

401. *Id.*

402. See generally Keating, *supra* note 217, at 1350 (pointing out the rights of injurers to impose certain risks without stigma or criticism).

403. See generally Keating, *supra* note 233, at 200 (stating that those who chose to impose risk on others generally do so for their own benefit and reap the rewards of so doing).

more probably than not resume the practice the following holiday season.

Second, under the traditional form of negligence law, the Restatement (Second) of Torts allows proof of breach and proximate cause to produce inconsistencies in litigation outcomes. "It is impossible to state any definite rules by which it can be determined that a particular result of the actor's negligent conduct is or is not so highly extraordinary as to prevent the conduct from being considered the legal cause of that result."⁴⁰⁴ For instance, Ms. Brannen, the customer from Bradford County, Florida who suffered the 2007 Black Friday injury, chose to sue Wal-Mart for negligence—for creating the dangerous condition through its failure to control the crowds.⁴⁰⁵ Wal-Mart attempted to avoid liability by stating that because there was no corporate policy requiring the individual store managers to conduct the sale in a certain manner, there was no breach.⁴⁰⁶ This defense was never considered on the merits.⁴⁰⁷ Subsequently, this case was settled two weeks prior to trial without full consideration of liability.⁴⁰⁸ In a New Jersey case, *Silzerglate vs. Wal-Mart Store, Inc.*,⁴⁰⁹ plaintiff brought a negligence cause of action claiming that the proximate cause of its injury was the retailer's failure to control the crowd.⁴¹⁰ There, the jury, citing a lack of proximate cause ruled in Wal-Mart's favor.⁴¹¹ However, more recently, in *Clinton v. Kohl's*,⁴¹² the plaintiff sued Kohl's Department Store and alleged the same cause of action as in the other two cases. Ms. Clinton slipped in lamp oil that spilled on the floor amid a Black Friday sale.⁴¹³ She

404. See RESTATEMENT (SECOND) OF TORTS § 435 cmt. e (1965).

405. Posting of Eddie Farah to Injuryboard.com, <http://jacksonville.injuryboard.com/worksite-injuries/warning-watch-out-for-black-friday.aspx?googlied=228206> (Nov. 21, 2007, 18:33 EST).

406. Telephone Interview with Charles Sorenson, Attorney at Law, *supra* note 390.

407. *Id.*

408. *Id.*

409. *Silzerglate v. Wal-Mart Store, Inc.*, 22 JURY VERDICT REV. PUBLICATIONS (2002), available at http://www.lexisnexis.com/lawschool/research/default.aspx?ORIGIN_CODE=00092&signoff=off. Select "Public Records" then "Jury Verdicts and Experts" and enter "Silzerglate" into the party name box.

410. *Id.*

411. *Id.*

412. *Clinton v. Kohls*, 5 TENN. JURY VERDICT REP. 7 (2008).

413. *Id.*

was knocked unconscious and sustained six cracked teeth during the fall.⁴¹⁴ The jury found Kohl's liable and the court awarded damages in the amount of \$45,000 to Clinton.⁴¹⁵ The inconsistencies between the individual negligence cases—with sufficient cohesiveness among the plaintiffs and injuries derived out of the same type of event or course of conduct by the retailers—all resulted in different outcomes under the negligence regime.⁴¹⁶ Enterprise liability would avoid such a result and place common responsibility on the retail enterprise to deter such a practice for the safety and health of consumers.

A third reason why the negligence regime would not be a strong enough authority to reduce risk is that it requires proof that the retailer failed to perform a common duty owed to the plaintiff when the incidental acts relating to the practice caused harm to the consumer.⁴¹⁷ The injurer must perform the duty attached to his act with reasonable care to prevent the act from creating an unreasonable risk of harm to another.⁴¹⁸ However, individual negligence cases confer on

414. *Id.*

415. *Id.*

416. Other factors indicating different results would include location of litigation, the financial drain associated with litigation incurred on the consumer, expertise or lack thereof of the plaintiff's attorney, and other unique facts.

417. See RESTATEMENT (SECOND) OF TORTS § 441 (1965) (defining "an intervening force as one which actively operates in producing harm to another after the actor's negligent act or omission has been committed"). See generally *id.* § 284(b) (defining duty to act as "a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do").

418. See *id.* § 298. It states:

When an act is negligent only if done without reasonable care, the care which the actor is required to exercise to avoid being negligent in the doing of the act is that which a reasonable man in his position, with his information and competence, would recognize as necessary to prevent the act from creating an unreasonable risk of harm to another.

Id. See generally Mark C. Christie, *Economic Regulations in the United States: The Constitutional Framework*, 40 U. RICH. L. REV. 949, 956 (2006). The author states:

"There is no doubt that the general principle is favored, both in law and justice, that every man may fix what price he pleases upon his own property, or the use of it; but if for a particular purpose the public have a right to resort to his premises and make use of them, and he have a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must, as an equivalent, perform the duty attached to it on reasonable terms."

the retailer the right to impose certain risks associated with the enterprise.⁴¹⁹ One such risk may be defended, based on compliance with custom or with the business industry standards for the injurer.⁴²⁰ If the roles of customs or business standard defenses are raised, then a certain well-defined and consistent way of performing the activity by the retail industry may negate a common duty owed.⁴²¹ The defense could include the years of operations of this type of practice, the endorsement of this type of practice by the association and other retailers, or the reasonable act of hiring security to control the crowds.⁴²² The injurer could successfully avoid liability by showing compliance with the custom.⁴²³ Therefore, the inability to show proof of breach would be detrimental to the injured consumer while the retailer shields the risk involved in Black Friday based on legal defenses.

Fourth, as exhibited in *Silzerglate*, the negligence regime would also require plaintiffs to prove proximate cause while the retailer would have the right to raise a proximate cause defense.⁴²⁴ The challenge in proof lies between the reasonably foreseeable consequence of harm and the intervening acts of third persons.⁴²⁵ Retailers are aware that

Id. (quoting *Aldnutt v. Inglis*, (1810) 104 Eng. Rep. 206, 210–11 (K.B.) (Lord Ellenborough, C.J.)).

419. See RESTATEMENT (SECOND) OF TORTS § 496B (1965) (defining express assumption of risk); *id.* § 496C (defining implied assumption of risk); *id.* § 496D (defining knowledge and appreciation of risk).

420. See *T.J. Hooper v. N. Barge Co.*, 60 F.2d 737, 739–40 (2d Cir. 1932).

421. “In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them.” RESTATEMENT (SECOND) OF TORTS § 295A (1965).

422. See *id.*; see also *Ward v. Lutheran Hosps. & Homes Soc. of America, Inc.*, 963 P.2d 1031 (Alaska 1998) (holding that the guidelines for a blood bank industry were set by regulatory agencies and national blood banking associations, and therefore customs and practices are entitled to judicial deference).

423. See generally *Ward*, 963 P.2d 1031 (holding summary judgment was properly granted to defendant hospital when compliance with custom of the national standards or official guidelines for blood banks where there was no requirement to obtain informed consent).

424. “Two or more intervening forces not acting in concert may combine to create a superseding cause of a plaintiff’s injuries and the existence of intervening and superseding causes of injury can be defenses to actions brought under theories of both negligence and strict liability in tort.” 65 C.J.S. *Negligence* § 202 (2009).

425. See RESTATEMENT (SECOND) OF TORTS § 433A cmt. a (1965) (indicating

a claim of negligence associated with injuries during a sales promotion would require that the type of harm must be reasonably foreseeable and that the precise manner in which the harm occurs need not be foreseeable.⁴²⁶ However, the burden is on plaintiffs to put forth evidence that the type of harm suffered resulted from a risk of which the retailer knew or should have known.⁴²⁷ More specifically, such risk must have been reasonably foreseeable.⁴²⁸ The negligence regime would limit the plaintiff's ability to prove causation because such evidence may be within defendants' control or entirely unavailable to the plaintiff.⁴²⁹ If plaintiffs are able to prove such facts, the retailer can seek relief from liability by asserting that there is a superseding, intervening force that broke the chain of causation.⁴³⁰ The superseding force is usually alleged to be the extraordinarily rude crowd that intervened to create the dangerous circumstances.

A fifth argument against the negligence regime as an aide in the reduction of risk imposed on consumers is that a retailer is entitled to assert that the business practices defenses, reasonable care standards and invitee principles, do not apply to non-negligent accidents.⁴³¹ Retailers possess the right to create non-negligent risk and "to save the precautionary cost necessary to reduce or eliminate risk."⁴³² "By conferring these benefits on the retailers, a negligence regime imposes corresponding burdens on prospective victims of non-negligent accidents" and allows the retailers to capture

that the manner in which the harm occurs may involve the cooperation of other assisting factors so numerous and so important that the actor's negligence cannot be regarded as a substantial factor in bringing about the harm). For more information, see section 433A.

426. See, e.g., *Dardiarian v. Felix Contracting Corp.*, 414 N.E.2d 666, 670 (N.Y. 1980).

427. See RESTATEMENT (SECOND) OF TORTS § 435 cmt. e (1965).

428. *Id.* § 435(2).

429. Evidence such as statistical data on injuries on the premises on the same day, security details, operational procedures for the sales scheme, and more. See local rules of evidence pertaining to discovery of documents. See also *id.* § 328A cmt. b (allowing for an exception to the general rule that the burden of proof is on the plaintiff to prove all four elements of negligence).

430. "A superseding cause is an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about." *Id.* § 440.

431. See Keating, *supra* note 217, at 1350.

432. *Id.*

the benefits.⁴³³ The retailer is at liberty to spend large amounts of its operating cost on aggressive advertising and gain excessive amounts of profit, so long as consumers derive some benefit from the low prices and retailers are able to gain profits, retailers believe there is a mutual benefit.⁴³⁴ However, what is overlooked, regarding the retailer's entitlement under the negligence regime, is that costs spent on safety precautions minimizes the dollars that may otherwise be spent "preventing and paying for accidents, thereby maximizing the wealth at society's disposal."⁴³⁵

Enterprise liability, on the other hand, assesses liability against the entire retail industry for participating in an activity as a group, under any theory of joint liability, for injuries that arose out of individual acts.⁴³⁶ Here, the theory of joint liability is that the independent acts of the retailers combine to produce indivisible harmful consequences to consumers and that the foreseeable group control of risk indicates that the retailers failed to perform a duty owed. Joint liability would apply to these businesses upon a plaintiff's showing that the retailer, acting independently, adhered to an industry-wide standard or custom with regard to the marketing practice associated with Black Friday.⁴³⁷ The injury-causing entrepreneurial activity would be the basis of any compensation for any resulting harm.

With the enterprise liability regime, the desire to deter hazardous behavior on the part of the retail enterprise can be addressed. The retail enterprise synchronizes marketing activities because it is equipped with the most accurate and timely information on consumer trends, made available by the NRF and its affiliates.⁴³⁸ The NRF provides sales

433. *Id.*

434. See generally Keating, *supra* note 233, at 206 (referring to "when reciprocal risks are imposed for reasons that are both good . . . and equally good, reciprocity of risk defines a regime of mutual benefit").

435. Gregory C. Keating, *Pressing Precaution Beyond the Point of Cost-Justification* (Apr. 19, 2002) (unpublished research paper for U.S.C. Law School), available at <http://ssrn.com/abstract=308485>.

436. See *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353, 371 (E.D.N.Y. 1972).

437. Cf. *id.* at 374.

438. See generally NAT'L RETAIL FED'N, *supra* note 348 (providing a forty-eight-page book of information on conventions, government relations participation by the company, CEO summits, finances of the company, media relations, memberships, loss prevention summary, information technology

projections based on surveys,⁴³⁹ and on holiday sales results.⁴⁴⁰ NRF also provides e-newsletters and publications with the latest in public policy activity, international trade, industry forecasting, updated legislative news, technology, and trends.⁴⁴¹ The retail enterprise is in the most strategic position to predict, create, and reduce foreseeable injuries associated with Black Friday sales. Parallel activity and joint control of risk is the hazardous behavior spun from a tacit agreement or cooperation.⁴⁴²

Enterprise liability charges the imposition of risk to the joint activities associated with Black Friday.⁴⁴³ Such behavior also requires contribution from the NRF, which is attributed with enhancing the movement of retailers from the world of individual acts to a world of joint activities causing foreseeable injuries.⁴⁴⁴ The injuries sustained by consumers are no longer unpredictable misfortunes. There are consumer-related statistics charted by individual retailers, the NRF, the Bureau of Labor Statistics, and the National Institute of Occupational Safety and Health FTC that reconcile the patterns of consumer injuries.⁴⁴⁵ Black Friday

offered, and divisions within the retail organization).

439. See Blockbuster Black Friday, *supra* note 41; see also Press Release, Nat'l Retail Fed'n, Strong Black Friday Promotions Generate Consumer Excitement (Nov. 23, 2007), http://www.nrf.com/modules.php?name=News&op=viewlive&sp_id=418.

440. See Traffic Up 4.8 Percent, *supra* note 42. "The NRF 2007 Black Friday Weekend Survey was designed to gauge consumer behavior and shopping trends related to the winter holidays. NRF defines the weekend as sales from Thursday, November 23 to Sunday, November 26." *Id.* "The survey, which polled 2395 consumers, was conducted for NRF by BIGresearch from November 22–24, 2007." *Id.*

441. See generally Consumers Out in Full Force, *supra* note 34.

442. *Hall*, 345 F. Supp. at 373–74 (defining joint control).

443. See generally Keating, *supra* note 233, at 219–20 (noting that those who create characteristic risks do so for their own advantage, fully expecting to reap the benefits that accrue from imposing those risks).

444. See Keating, *supra* note 217, at 1353. "When we leave the world of acts and enter the world of activities, the character of non-negligent accidents and the effects of strict—that is, enterprise—liability change markedly." *Id.* Retailers have been trained at the NRF Loss Prevention Conferences about workplace violence that includes customers. Retailers are supplied with the Bureau of Labor Statistics of the numbers of reported workplace incidences of violence. The number of employees affected and the cost to be incurred are all part of the training. Workshops also include successful legal strategies to defend civil and criminal lawsuits.

445. See, e.g., Press Release, Nat'l Retail Fed'n, As Economy Impacts Halloween, Americans Get Creative (Sept. 29, 2009),

injuries are foreseen with statistical precision and inflicted with reckless disregard for the safety of the consumers.⁴⁴⁶ The world of retail activity is one that best conforms to the theoretical and the practical justification for enterprise liability because the industry holds a substantial amount of monopoly power over the retail shopping season, and imposes the risk of harm in the process.⁴⁴⁷ The burden of the competitive conditions must be spread to all producers of the accident-prone industry.⁴⁴⁸ The retailers assume the foreseeable cost of the Black Friday activity as well as the allocation of resources to pay the cost for injuries.

The retail industry has bargained for the results of its activities by the very means of acting in concert in the competitive game of "let's get the customer." Therefore, the activity requires the application of enterprise liability. The aggressive sales promotions, early hours, deep discounts, and encouraging advertisements all play a role in creating numbers of shoppers aspiring to shop at the same place and time.⁴⁴⁹ This very act places the retail industry within the core meaning of acting as joint tortfeasors;⁴⁵⁰ they knowingly joined in the performance of a tort, which in some cases may be subject to the theory of negligence *per se*, for violating statutory city ordinances that limit building occupancy, local fire-code violations, and other local statutory violations.⁴⁵¹

http://nrf.com/modules.php?name=News&op=viewlive&sp_id=790 (citing statistics for various Americans' holiday spending plans—in this case, Halloween). See generally Bureau of Labor Statistics, Census of Fatal Occupational Injuries Summary, 2008, <http://www.bls.gov/news.release/cfoi.nr0.htm> (last visited Oct. 24, 2009).

446. See Keating, *supra* note 217, at 1353.

447. Professor Keating states:

Tort law permits potential injurers to put others at risk, without their knowledge or consent, and for the private benefit of potential injurers. The power is of great value to potential injurers: They stand to reap rewards by imposing risks in par because they can choose to impose those risks in circumstances that maximize the benefit they gain from doing so.

Keating, *supra* note 233, at 220.

448. *Id.* at 221.

449. See generally Chediak, *supra* note 21 (reporting deals that lure crowds).

450. Hall v. E. I. Du Pont De Nemours & Co., 345 F. Supp. 353, 371 (E.D.N.Y. 1972) (defining four distinguishable situations where tortfeasors are jointly liable).

451. *Id.*

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative

And they fail to adhere to a duty owed for the safety of the invitee or a duty to control crowds.⁴⁵² Although they each participate in Black Friday sales as independent retailers, they combine to produce indivisible harmful consequences for consumers in various locations.⁴⁵³

The practical application of enterprise liability can be used broadly or narrowly to achieve the same deterrent purpose. Applying enterprise liability in a broad manner toward dangerous activities would ensure that wrongdoers pay the cost for the activities in which they choose to participate.⁴⁵⁴ This type of tort remedy could indirectly regulate the aggressive marketing schemes associated with Black Friday sales.⁴⁵⁵ Applying enterprise liability in a narrow application akin to a business premises enterprise liability concept provides a perimeter on the nature of joint retail industry-wide practices.⁴⁵⁶ The characteristic risk is narrow enough to allow businesses to continue some forms of individual aggressive marketing, but the application would limit or restrict the planned joint activity.⁴⁵⁷ Therefore, events such as the traditional Filene's Basement Bridal Event could continue as individual retailer limited-item sales.⁴⁵⁸

regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results.

RESTATEMENT (SECOND) OF TORTS § 286 (1965).

452. See RESTATEMENT (SECOND) OF TORTS § 343 (1965) (defining the special duties owed to an invitee).

453. See *id.* § 440 (discussing superseding intervening causes).

454. See Nolan & Ursin, *supra* note 123, at 484 (suggesting defining a business premises concept in a broad or narrow form).

455. See *id.* at 484–85.

456. See *id.* at 484.

457. See *id.*

458. Filene's website states:

Filene's Basement is known for its bargains on everything from fashions to home goods, but perhaps the store is most famous for its annual Bridal Gown Events when brides-to-be can save hundreds, even thousands of dollars on designer wedding gowns. The sale is held in selected Filene's Basement stores once a year (twice a year in Boston). News reports so often compare it to the Running of the Bulls in Pamplona, Spain that the event is now officially called the "Running of the Brides."

Filene's Basement, Our World Famous Bridal Event, <http://www.filenesbasement.com/bridal> (last visited Aug. 2, 2009).

The narrow application of business premises enterprise liability would also provide a definition of the characteristic risk that should be considered alongside factors such as non-fault, injury-causing, entrepreneurial activities and foreseeable harm, as practiced by businesses participating in the same level of monopoly.⁴⁵⁹

D. Fairness Associated with the Use of Enterprise Liability and Black Friday

Fairness to consumers requires more than three or four security guards who do not possess the ability to control a sudden rush of thousands of shoppers. Fairness requires that consumers not be crushed, pushed, assaulted, and trampled as stores across the country open to mobs of shoppers. Consumers have incurred physical, emotional, and economic harm as a result of the unfair, aggressive marketing practices.⁴⁶⁰ It is not fair that the duty, according to the relationship between the retailer and the consumer, may be breached when the retail enterprise fails to exercise reasonable care in maintaining safe premises for the benefit of the invitee.⁴⁶¹ The affirmative steps necessary to prevent hazardous results must not amount to avoidance by the retail enterprise.⁴⁶² The value that the retail enterprise must sacrifice is the mere cost of early morning security or the implementation of entry procedures.⁴⁶³ Such a deliberate activity of maintaining security adequate enough to handle the crowds provides the consumer equal freedom and security

459. Nolan & Ursin, *supra* note 123, at 484–87 (discussing a business premises concept that could limit liability for personal injuries that arise out of the use of businesses premises in a no-fault mold, thus doing away with the elements of negligence); see also Calabresi, *supra* note 129, at 513 (“[T]here are many situations where placing losses on the activity which causes them would serve to foster better resource allocation, despite varying degrees of monopoly power and where failure to do so would cause grave misallocations.”).

460. See Barnard, *supra* note 97 (reporting that the consumer probably spent \$100,000 in medical bills, suffers constant pain, and now walks with a cane).

461. See Keating, *supra* note 435.

462. See Keating, *supra* note 217, at 1354 (discussing how enterprises are “able to anticipate those accidents that issue from their characteristic risks minimize their incidence in advance, and disperse their costs after the fact”).

463. Judge Learned Hand’s famous negligence formula states: Defendant is negligent if “the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B less than PL.” *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

in making choice as to whether to participate in the activity.⁴⁶⁴

Economic fairness requires that compensation laws be designed for the protection of consumers who are injured in Black Friday sales.⁴⁶⁵ Consumer protection laws, found at the federal, state, and local levels, indicate that the harm incurred by consumers is what matters.⁴⁶⁶ However, laws relating to marketing practices and restrictions are only designed to persuade consumers to make a purchase from the retailer through fair means.⁴⁶⁷ There are also laws intended to govern consumer health and safety, but such laws are not responsive to issues regarding direct compensation schemes.⁴⁶⁸ Reasonableness requires the fair distribution of the financial cost of harm between the retail enterprise and the consumer.

Consumers do not enjoy a reciprocal relationship with the retail enterprise in sharing the benefits of the activity that endangers them.⁴⁶⁹ Consumers do not enjoy freedom from

464. "When reasonable risks are reciprocal, each member of the community that imposes and is exposed to these risks (1) relinquishes an equal amount of freedom; (2) gains an equal amount of security; and (3) gains more in the way of freedom than they lose in the way of security." Keating, *supra* note 233, at 203.

465. *Id.* at 196–97 ("We all have a fundamental interest in security because without a substantial measure of freedom from accidental injury and death, our chances of pursuing [the ends and aspirations that give our lives meaning] over the course of a complete and normal life span are in jeopardy.").

466. For more information, see the federal trade regulations, federal and local unfair trade practices acts, and rules relating to owners of land maintaining the duty of care for invitees.

467. *See generally* 15 U.S.C. § 45(n) (2006).

468. Only the FTC may sue to enforce Section 5; private individuals have no cause of action under the statute. The FTC also has authority, concurrent with the Department of Justice and private parties. 15 U.S.C. § 45(m)(1)(A) (2006).

The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this chapter respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1) of this section) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

Id.

469. "The basic idea of the reciprocity-of-risk criterion is that negligence liability fairly apportions the burdens and benefits of risky activities within a community of reasonable risk imposition A 'community of risk,' in its

harm; in essence, concentrated harm is shifted toward them.⁴⁷⁰ This shift comes about as a result of the regular, routine, and systematic marketing practices employed by the retail enterprise.⁴⁷¹ The manner in which the doors are opened in the stores, as well as the disorderly configuration of the crowds and a lack of a procedure for entry, all contribute to the harm to consumers that is more than likely to occur.⁴⁷² The principle of fairness would dictate that burden-benefit proportionality is justified.⁴⁷³

Black Friday activities are ones of deliberate systematic actions and foreseeable consequences which implicate the fairness concerns addressed by application of enterprise liability for compensation.⁴⁷⁴ While the foreseeability of accidental harms is un-contradicted, the type of marketing activity associated with Black Friday is not accompanied by the reasonable precautions that would allow for the traditional residual level of risk allowed in a negligence cause of action.⁴⁷⁵ "The more the law of large numbers is met, the more risks are certain not only to [result] in harm, but also to [result] in harm with predictable regularity."⁴⁷⁶ As it relates to Black Friday, this includes the numbers of major and minor retail participants, the numbers of consumers, the numbers of years that the practice has been in existence, and the numbers of typical injuries that arise out of the activities

strongest form, is one whose members impose identical risk of harm on another." Keating, *supra* note 233, at 202.

470. "When risks are not reciprocal, losses of security and increases in liberty are not equally distributed, so a regime of reasonable, but nonreciprocal risk impositions is not a regime of equal freedom." *Id.* at 205.

471. *Contra id.* at 203 (supporting the theory that "[t]he imposition of nonreciprocal risks is reasonable when those risks are to the long-run advantage of the prospective victims that they imperil").

472. "[T]he actual victims of nonreciprocal risk fare so badly that, were they to realize their fate at the time the right to impose the risks was being debated, they might well reject their imposition." *Id.* at 205.

473. "The damages paid under strict liability are, [for those exposed to nonreciprocal risk] . . . , but a condition for the legitimate conduct of activities whose risks are not mutually beneficial even when due care is exercised." Keating, *supra* note 217, at 1311.

474. *See generally id.* at 1309-12 (discussing the four aspects of the concept of fairness and enterprise liability).

475. "Negligence law explicitly contemplates the existence of a *residual level of risk* once all reasonable precautions have been taken and insists that it is more reasonable for victims to bear this level of risk than to try to reduce it further." *Id.* at 1341 (emphasis added).

476. *Id.* at 1333.

of the retail enterprise. Given the multitude of retailers who benefit from the risks that derive from Black Friday activities, and are therefore in a position to spread the cost of non-negligence accidents across the enterprise, fairness requires contribution from the entire retail enterprise.

Even the Federal Trade Commission ("FTC") relies on a fairness doctrine when the activities of retailers fall outside of a standard of conduct meant to safeguard consumers. The FTC specifically imposes liability for consumer harm caused by "[r]etailers of consumer products who knowingly join[] in the performance of unfair sales act[s] or practices in or affecting commerce and [they] know[] substantial injury would occur to the consumer as a result of the act."⁴⁷⁷ More explicitly, the FTC was charged with identifying unfair trade practices that "would cause or are likely to cause reasonably foreseeable injury within the United States, or involve material conduct occurring within the United States."⁴⁷⁸ Although the FTC has a strong bite, there are customer suffers from a lack of teeth. The FTC was simply not designed to facilitate personal recovery for injuries resulting in deceptive or unfair claims.⁴⁷⁹ Only the FTC may sue to enforce the regulations; private individuals have no cause of action under the statute.⁴⁸⁰ Whereas the legislation cannot provide direct compensation to the consumer, enterprise liability imposes activity liability where fairness dictates that enterprises that benefit from the imposition of particular risks in certain activities pay the cost associated with the risk.⁴⁸¹ This must also be applicable where the intentional and aggressive marketing scheme of Black Friday sales by the retail enterprise contains a known dangerous component that affects consumers.

477. 15 U.S.C. § 41 (2006). The FTC is responsible for the enforcement of the Act which is designed to promote competition and to protect the public from unfair and deceptive acts and practices in the advertising and marketing of goods and services.

478. See 15 U.S.C. § 45 (a)(4)(A)(i)–(ii) (2006); see also H.R. REP. NO. 1142, at 19 (1914) ("If Congress were to adopt the method of definition, it would undertake an endless task.").

479. See 15 U.S.C. § 45(m)(1)(A).

480. See *id.*

481. See Keating, *supra* note 217, at 1269 (stating that "the justification for activity liability insists that considerations of fairness—not efficiency—call for making activities that *benefit from the imposition of particular risks* bear the costs of accidental injuries issuing out of those risks").

V. CONCLUSION

Individual stakeholders are powerless to achieve a considerable impact on the aggressive marketing scheme of the retail enterprise. A single fatality, resulting from the marketing ploy, will not produce a significant impact.⁴⁸² Although local officials talk about legislation, their focus is limited.⁴⁸³ Furthermore, individual retailers, opting out of the marketing practice, cannot impact the marketing practice alone.⁴⁸⁴ The retailer will only lose out on profits because the competition will draw on their consumers.⁴⁸⁵ New retailers, who want to realize an end-of-the-quarter profit, may be prohibited from joining into the practice because of marketing cost and a fear of litigation.⁴⁸⁶ Other retailers are constantly hit hard with litigation, as a result of injuries stemming from participating in Black Friday, and have no other choice but to continue the practice.⁴⁸⁷ The cost associated with the loss of customers cannot be recaptured; only litigation including the enterprise liability concept would help impact the marketing practice and provide a deterrent on the practice.⁴⁸⁸ The deterrent nature of enterprise liability will have a significant effect and cause the retail enterprise to rethink the

482. See, e.g., Calabresi, *supra* note 137, at 717 ("A manufacturer is free to employ a process even if it occasionally kills or maims if he is able to show that consumers want a product badly enough to enable him to compensate those he injures and still make a profit.").

483. See generally Whittle, *supra* note 118 (proposing legislation only for crowd control without consideration of aggressive marketing).

484. See generally Black Friday.com, *supra* note 340 (representing over sixty retail chains participating in the risk creating activity).

485. Chediak, *supra* note 21 (reporting that "[s]tores . . . slashed prices, boosted their promotions, and in some cases, opened earlier to lure reluctant consumers").

486. See Mark Geistfeld, *Should Enterprise Liability Replace The Rule of Strict Liability for Abnormally Dangerous Activities?*, 45 UCLA L. REV. 611, 618–20 (1998) (discussing the social cost of adopting a tort system based on negligence that burdens an individual with the risk of incurring liability for injuries suffered by others, or the burden of taking precautions that would avoid such liability).

487. Wal-Mart leads with the most news coverage regarding injuries on Black Friday. See Roeper, *supra* note 12; see also Chediak *supra* note 21; Lystra, *supra* note 85; *Black Friday Injury*, *supra* note 90; Theboxtank, *supra* note 93; WEBnME.com, *Black Eye Friday*, *supra* note 82.

488. See Geistfeld, *supra* note 486, at 621 (indicating that "[e]nterprise liability . . . burdens the economic liberty interest of those who participate in the enterprise").

aggressive nature of its sales tactics.⁴⁸⁹

Public policy considerations demand that consumers are not to become sacrificial lambs for the financial benefit of the retail enterprise. Aggressive marketing schemes are problematic for society and the solution is to deter those practices which compromise the safety and health of consumers. The Federal Trade Commission Act was only designed to prevent the retail enterprise from causing harm to persons engaging in commerce with merchants, by restricting unfair methods of competition and deceptive practices.⁴⁹⁰ However, aggressive marketing schemes do not fall within the definition of deceptive practices geared at consumers, in the context of Black Friday sales.⁴⁹¹ The common law application of the duty of care for merchants regulated industries within the free enterprise system after the *laissez-faire* era of the late 1800s.⁴⁹² Yet, over a century later, the retail enterprise found a way to convince society that the benefits of its activities outweighed the probability of harm.⁴⁹³

The principles associated with enterprise liability, from the common law system to legislative enactment and

489. *Id.* at 624 (stating that “enterprise liability [should] be analyzed under conditions of the ‘perfect deterrence’” with the assumption relaxing over time); *see also* Calabresi, *supra* note 137, at 720 (“[T]he job of accident deterrence can be done more efficiently through . . . nonfault enterprise liability[] than under a fault liability system.”).

490. *See generally* 15 U.S.C. § 45(a)(1) (2006).

491. *See* Letter from the Fed. Trade Comm. to Senators Wendell H. Ford and John C. Danforth, Consumer Subcomm. (Dec. 17, 1980), <http://www.ftc.gov/bcp/policystmt/ad-unfair.htm> (“[E]nough cases had been decided to enable the Commission to identify three factors that it considered when applying the prohibition against consumer unfairness [including]: (1) whether the practice injures consumers, (2) whether it violates established public policy, (3) whether it is unethical or unscrupulous.”).

492. The Constitutional Rights Foundation states:

The idea of passing more law to correct society’s ills had replaced the . . . [laissez-faire] view that civilizations best advanced when the “fittest” had their way while the “unfit” were allowed to die out. Americans had increasingly come to believe that society could choose its future, which might require government regulations on private enterprise.

Social Darwinism and American Laissez-faire Capitalism, CONST. RTS. FOUND. (2003), <http://www.crf-usa.org/bill-of-rights-in-action/bria-19-2-b.html>.

493. *See* Keating, *supra* note 233, at 202–03 (discussing a community of risk, where a reasonable risk is one where “members impose only risks that confer more in the way of benefits on those who impose them than they inflict in the way of burdens”).

administrative usage, have proven that there is a place for its utility with Black Friday litigation.⁴⁹⁴ Contemporary scholars have moved from the abstract theory of enterprise liability to the practical application of the concept. Considerations of fairness and distributive justice are also of great import in discussions of the compensation agenda of enterprise liability. Ever since the release of Reporters' Study, there has been wide recognition of the utility of enterprise liability, as well as administrative alternatives to the law of torts.⁴⁹⁵ These include the imposition of industry and society-wide liability for accident costs arising from the type of activity conducted by a particular industry to the industry as a whole.⁴⁹⁶ Here, the description does not depart from Ehrenzweig's and Calabresi's contentions that activities should bear the cost they engender.⁴⁹⁷ This formulation also clearly relates to the industry-wide aggressive marketing scheme even to the point that criminal law introduced a concept of enterprise liability

494. Proponents of enterprise liability cite to benefits such as risk distribution, allocation of resources, deterrence, judicial application, fairness, and administrative ease. See generally *Hall v. E. I. Du Pont De Nemours & Co.*, 345 F. Supp. 353 (E.D.N.Y. 1972) (providing the judicial application of enterprise liability); Calabresi, *supra* note 129 (advocating risk distribution); Carlstrom, *supra* note 276 (discussing the use of enterprise liability with health care reform).

495. During the editing of this article in May 2009, principles of enterprise liability were embedded in a retail criminal law settlement agreement in exchange for an agreement not to prosecute Wal-Mart retail store in Valley Stream, New York, following the death of the employee that was during the 2008 Black Friday sale. See *Eyewitness News: Settlement in Fatal Wal-Mart Stampede* (WABC-TV N.Y. broadcast May 6, 2009), available at <http://abclocal.go.com/wabc/story?section=news/local&id=6798753>; see also *Wal-Mart Reaches Settlement on Black Friday Death*, PHIL. DAILY NEWS, May 7, 2009, http://www.philly.com/dailynews/national/20090507_Wal-Mart_reaches_settlement_on_Black_Friday_death.html; *Wal-Mart Settles Black Friday Stampede Death Case*, REUTERS, May 6, 2009, <http://money.cnn.com/2009/05/06/news/companies/walmart-crowds.reut/index.htm>.

While critics said applying enterprise liability to any cause of action could not be done, the condition precedent of the District Attorney's settlement agreement went far beyond the industry-wide impact this paper is suggesting and creates a stronger impact on the aggressive marketing schemes of retailers and on crowd control. Nassau County District Attorney desires that the safety plan implemented will become the nationally recognized model for crowd-management among all retailers and become an industry-wide best practice. *Id.*

496. Keating, *supra* note 242, at 1903.

497. See Nolan & Ursin, *supra* note 151 (referring to EHRENZWEIG, *supra* note 124, at 1423); see also Calabresi, *supra* note 129.

for settlement in 2009.⁴⁹⁸

It is true that enterprise liability has been distorted from its original purpose,⁴⁹⁹ but the concept has come full circle and has its place in tort law. Courts must begin to recognize the full use and benefits of applying enterprise liability as a means of preventing more injuries and deaths associated with aggressive marketing practices. Whether a new doctrine, calling for the imposition of strict enterprise liability, is established, or whether the concepts of risk distribution, deterrence or allocation of resources are the motivating forces behind its application, enterprise liability still remains a viable tort concept. Consumers must be afforded the opportunity to benefit from the concept such that their bodies, limbs, and health are not sacrificed for the benefit of retailers who seek to profit from the aggressive Black Friday marketing scheme. The application of enterprise liability must also relieve individual retailers from the litigation fatigue they suffer in defending a multitude of lawsuits in various jurisdictions.⁵⁰⁰

498. Ending the cycle of assessing criminal fines and allowing retailers to walk-away silently, enterprise liability concepts were implemented to bring a new dimension to alternative criminal sanctions. As a condition of the agreement, the Nassau County District Attorney's Office agreed to suspend its ongoing criminal investigation of Wal-Mart's 2008 Black Friday sales event. Along with paying \$1.9 million for victims' compensation, and implementing improved safety measures, Wal-Mart agreed to terms of settlement that would include a safety plan for Black Friday events at its ninety-two New York stores. According to the agreement, safety experts must evaluate and approve the crowd management plans of each store while Wal-Mart will be responsible for complying with the recommendations of the experts. See *Eyewitness News: Settlement in Fatal Wal-Mart Stampede*, *supra* note 495.

499. Nolan & Ursin, *supra* note 123, at 468.

500. Al Norman, *Wal-Mart Suffers Litigation Fatigue*, HUFFINGTONPOST.COM, June 1, 2007, http://www.huffingtonpost.com/al-norman/walmart-suffers-litigat_b_50289.html (relating to employment practices). "The 2007 Annual Report, Wal-Mart devotes two entire pages of [ten]-point type to the subject of 'Litigation.' The giant retailer has become a target for legal actions. 'The company is a defendant in numerous cases containing class action allegations,' the company admits" *Id.*; see also Robin Sindel, *Retailers Whose Slips Show too Much Attract Lawsuits*, WALL STREET J., Apr. 28, 2007, at B1 (reporting nation's retailers are coming under legal assault for printing too much payment-card information on customer credit card receipts). "So far this year, plaintiffs' lawyers have filed more than 100 federal lawsuits seeking class-action status against big merchants. . . . A slew of suits brought on behalf of consumers have been filed in U.S. district courts in California, Pennsylvania, and Kansas." *Id.*
