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Linda Mogul Madway

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1980-81]

## Comment

### EMERGING THEORIES OF PROOF IN PRODUCTS LIABILITY: RESOLVING THE PROBLEM OF IDENTIFYING DES MANUFACTURERS

#### I. INTRODUCTION

In 1947, diethylstilbestrol (DES), a synthetic estrogen<sup>1</sup> was approved by the Food and Drug Administration (FDA)<sup>2</sup> for use as a miscarriage preventative to be marketed on an experimental basis.<sup>3</sup> By 1952, when the need for FDA approval was dropped because DES was no longer considered a new drug,<sup>4</sup> 123 drug companies had ob-

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1. Comment, *DES and a Proposed Theory of Enterprise Liability*, 46 *FORDHAM L. REV.* 963, 963 & n.1 (1978). Estrogen is a female sex hormone which was found to be useful in the treatment of menopausal and other female disorders. *Id.* at 963 nn.1 & 2. The development of synthetic estrogens was considered a major advance since, compared to their natural counterparts, they are less expensive and may be administered orally. *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 562, 420 A.2d 1305, 1310 (1980). Although courts commonly refer to both stilbestrol and dienestrol as DES, they are actually two different drugs, only the former of which is properly denominated diethylstilbestrol (DES). *Id.* at 561, 420 A.2d at 1310. DES was first sold in the United States in 1941, and was used at that time for the treatment of menopausal symptoms. See Comment, *supra*, at 963 n.2 & 976.

2. See Comment, *supra* note 1, at 976. Federal law allowed the marketing of a new drug only if a new drug application (N.D.A.) both had been filed with the FDA, and had become effective. Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, § 505(b), 52 Stat. 1052 (1938). See *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 603-04, 607 P.2d 924, 931-32, 163 Cal. Rptr. 132, 140, cert. denied, 101 S. Ct. 285 (1980). A new drug was defined as one not generally recognized as safe. 26 Cal. 3d at 603, 607 P.2d at 931-32, 163 Cal. Rptr. at 139-40. An N.D.A. became effective automatically if it was not disapproved within a specified period of time. *Id.* at 604, 607 P.2d at 932, 163 Cal. Rptr. at 140. In 1962, the law was changed to require affirmative approval of an application before a new drug could be marketed. *Id.* Although the drug laws in effect prior to 1962 did not require proof of effectiveness before a drug could be marketed, they did require proof of safety. Federal Food, Drug, and Cosmetic Act of 1938, ch. 675, § 505(b), 52 Stat. 1052 (1938).

3. See Comment, *supra* note 1, at 963. Early studies indicated that DES was potentially effective to reduce miscarriages; the validity of these studies was subsequently questioned because of inadequate controls and later studies failed to confirm the earlier results. *Id.* at 963 n.2. When the effectiveness of DES was again tested in the late 1960's, the drug was categorized as "possibly effective," which meant that "there [was] little evidence of effectiveness under any of the criteria stated . . ." *Id.*, quoting NATIONAL RESEARCH COUNCIL, NATIONAL ACADEMY OF SCIENCES, *DRUG EFFICACY STUDY 7 & 42* (1969).

4. See Comment, *supra* note 1, at 964 n.3.

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tained FDA approval.<sup>5</sup> The ultimate number of companies involved in the market, however, has been estimated to be as high as 300.<sup>6</sup> The FDA banned the use of DES as a miscarriage preventative in 1971 following a finding that the daughters of women who used DES during pregnancy were more likely to contract vaginal or uterine cancer than the daughters of non-users.<sup>7</sup>

Numerous suits have been filed against DES manufacturers by these women with cancerous and pre-cancerous conditions.<sup>8</sup> However, given the fact that the adverse effects of DES cannot be detected until after a latency period of ten to twelve years,<sup>9</sup> victims are often unable to identify the manufacturer whose product was sold to their mothers.<sup>10</sup> While this inability has caused the dismissal of many of the DES suits,<sup>11</sup> two recent cases have permitted the plaintiff to proceed to trial using novel liability theories.<sup>12</sup>

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5. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 604, 607 P.2d 924, 932, 163 Cal. Rptr. 132, 140, *cert. denied*, 101 S. Ct. 285 (1980).

6. *See* Comment, *supra* note 1, at 964 n.3.

7. *See id.* at 964 n.5 & 965. The incidence of adenocarcinoma in DES-daughters has been estimated at from one in 250 to one in 1,000 compared with an estimated overall incidence as low as one in 10,000. *Id.* at 965 n.7, *citing* B. SEAMAN, *WOMAN AND THE CRISIS IN SEX HORMONES* 29 (1977). The majority of these women have other abnormalities, most commonly adenositis, which may be a pre-cancerous condition. Comment, *supra* note 1, at 965 & n.10.

8. Comment, *supra* note 1, at 966-67. One source estimates the number of suits pending at 80 to 100. *Id.*

9. *See Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 594, 607 P.2d 924, 925, 163 Cal. Rptr. 132, 133, *cert. denied*, 101 S. Ct. 285 (1980).

10. *See* Comment, *supra* note 1, at 972 n.27. The time lapse has resulted in the destruction of medical records. *Id.* at 972 n.6. "Doctors have died, hospitals have gone out of business, records have been destroyed, mothers, if they ever knew, have forgotten they took the drug." Reply Brief for Appellant at 3, *Sindell v. Abbott Laboratories*, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138 (1978).

11. *See, e.g., Gray v. United States*, 445 F. Supp. 337 (S.D. Tex. 1978) (complaint against Eli Lilly dismissed because of lack of proof that it had manufactured the DES); *McCreery v. Eli Lilly & Co.*, 87 Cal. App. 3d 77, 150 Cal. Rptr. 730 (1978) (summary judgment for defendant affirmed where plaintiff was unable to offer evidence identifying manufacturer); *Fields v. Eli Lilly & Co.*, No. C 122248 (Cal. Super. Ct. Dec. 1977) (motions for summary judgment granted with respect to most defendants). In several instances, trial courts have refused to recognize a cause of action where the suit involves multiple defendants. *See, e.g., Rheingold v. E.R. Squibb & Sons, Inc.*, No. 74 Civil 3420 (CHT) (S.D.N.Y. Oct. 14, 1975); *Krieger v. Eli Lilly & Co.*, No. 21235/76 (N.Y. Sup. Ct., filed 1976); *Kaufman v. Eli Lilly & Co.*, No. 21234/76 (N.Y. Sup. Ct., filed 1976).

12. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 101 S. Ct. 285 (1980); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (1980). Both cases were before the court on procedural motions and neither has been tried on the merits. *See* notes 67-123 and accompanying text *infra*.

This comment will first review three rubrics which relieve negligence plaintiffs from identifying the specific tortfeasor — concert of action,<sup>13</sup> alternative liability<sup>14</sup> and enterprise liability.<sup>15</sup> Next, the comment will examine three recent cases in which courts applied these rubrics to DES actions.<sup>16</sup> Finally, the comment will analyze the relative merits of the approaches taken by the three courts.<sup>17</sup>

## II. THREE THEORIES USED TO EXCUSE PLAINTIFF FROM IDENTIFYING THE SPECIFIC TORTFEASOR

In a cause of action for negligence, the plaintiff must prove that the injury was caused by the defendant's breach of duty.<sup>18</sup> In a product-liability negligence action, this generally entails identifying an individual defendant as the manufacturer or seller of the injury-causing item.<sup>19</sup> However, three theories have been recognized for excepting the plaintiff from this general rule: concert of action,<sup>20</sup> alternative liability<sup>21</sup> and enterprise liability.<sup>22</sup>

### A. Concert of Action

The concert of action doctrine developed to deter hazardous group conduct,<sup>23</sup> and is based upon the premise that injury results from the dangerous situation created by the negligent conduct of all the defendants.<sup>24</sup> Once concert has been established, each defendant is held jointly and severally liable for the entire harm.<sup>25</sup> Most commonly, the theory is applied to cases involving racing on public highways to hold all participants jointly and severally liable when a third party is struck by

13. See notes 23-31 and accompanying text *infra*.

14. See notes 32-51 and accompanying text *infra*.

15. See notes 52-66 and accompanying text *infra*.

16. See notes 67-132 and accompanying text *infra*.

17. See notes 133-55 and accompanying text *infra*.

18. W. PROSSER, LAW OF TORTS 236, 241 (4th ed. 1971).

19. Annot., 51 A.L.R.3d 1344, 1349, 1351-53 (1973). See also, 1 R. HURSH & H. BAILEY, AMERICAN LAW OF PRODUCTS LIABILITY § 1.41, at 125 (2d ed. 1974).

20. See notes 23-31 and accompanying text *infra*.

21. See notes 32-51 and accompanying text *infra*.

22. See notes 52-66 and accompanying text *infra*.

23. See Comment, *supra* note 1, at 979.

24. *Id.*

25. W. PROSSER, *supra* note 18, at 291-92.

one of the racers.<sup>26</sup> However, it has also been applied to cases involving pollution<sup>27</sup> and shooting accidents.<sup>28</sup>

The Restatement of Torts has defined concert as follows:

§ 876. Persons Acting in Concert

For harm resulting to a third party from the tortious conduct of another, one is subject to liability if he

(a) does a tortious act in concert with the other or pursuant to a common design with him, or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.<sup>29</sup>

26. *See, e.g.*, *Bierczynski v. Rogers*, 239 A.2d 218 (Del. 1968) (defendant's action held to be a proximate cause of the plaintiff's injury, although his car did not make contact with that of the plaintiff, because he induced and encouraged the tort); *Lemons v. Kelly*, 239 Ore. 354, 397 P.2d 784 (1964) (appellant liable, although his car did not collide with the plaintiff's, because the race was cause of accident); *Brown v. Thayer*, 212 Mass. 392, 99 N.E. 237 (1912) (defendants liable for the death of pedestrian struck by one of them although the plaintiff, because of a death statute, had to sue separately); *Hanrahan v. Cochran*, 12 App. Div. 91, 42 N.Y. Supp. 1031 (1896) (defendants liable because race created conditions that resulted in the accident). *See generally*, Annot., 13 A.L.R.3d 1431 (1967). It is important to note that these cases, unlike the present one, do not involve a problem of identification.

27. *See, e.g.*, *Landers v. East Texas Salt Water Disposal Co.*, 151 Tex. 251, 248 S.W.2d 731 (1952) (defendants who polluted the plaintiff's lake held jointly and severally liable although they acted independently); *Moses v. Town of Morganton*, 192 N.C. 102, 133 S.E. 421 (1926) (although defendants acted independently, knowledge of what result their independent acts would have upon the plaintiff's creek created a concert of action).

28. *See, e.g.*, *Moore v. Foster*, 182 Miss. 15, 18 So. 73 (1938) (where two constables wrongfully fired their guns at the plaintiff, it was not necessary for the plaintiff to prove which defendant inflicted the wound); *Reyher v. Mayne*, 90 Colo. 586, 10 P.2d 1109 (1932) (both defendants liable where each fired negligently at the plaintiff's decoy geese and one defendant injured the plaintiff); *Oliver v. Miles*, 144 Miss. 852, 110 So. 666 (1926) (hunters who each did an unlawful act in pursuance of a common purpose were each liable for the injury caused although it was not known whose shot injured the plaintiff); *Mangino v. Todd*, 19 Ala. App. 486, 98 So. 323 (1923) (sheriff and his sureties were each liable for an injury caused by one during an unlawful assault because all were engaged in a common enterprise and aided, abetted and encouraged each other); *Benson v. Ross*, 143 Mich. 452, 106 N.W. 1120 (1906) (the plaintiff did not have to show which defendant fired the shot which caused injury since the defendants acted in concert in engaging in shooting practice in violation of a city ordinance). Presumably, all the defendants in each of these cases would have been liable, even if it was known who fired the shot causing injury, since concert did exist.

29. RESTATEMENT (SECOND) OF TORTS § 876 (1977). The California courts have based their test of concert on the First Restatement. In *Orser v. George*, the defendant was held liable for the death of the plaintiff's decedent, even though it had been established that the defendant's rifle could not have been the cause of the fatal injury. 252 Cal. App. 2d 660, 668, 60 Cal. Rptr. 708,

Mere knowledge of what another party is doing will not create concert since there is no affirmative duty to interfere with another person's activities.<sup>30</sup> Furthermore, a defendant must be proceeding tortiously or negligently to be held liable under concert.<sup>31</sup>

### B. *Alternative Liability*

The alternative liability theory developed to relieve the plaintiff of the burden of establishing which of several defendants caused an injury.<sup>32</sup> The basis for the theory was developed in *Ybarra v. Spangard*,<sup>33</sup> where the plaintiff awoke after an appendectomy partially paralyzed.<sup>34</sup> Not knowing the person or the instrumentality which had caused his injury, the plaintiff sued six doctors and nurses, each of whom had been responsible for him at some point during his unconsciousness.<sup>35</sup> Although the defendants claimed that *res ipsa loquitur* was inapplicable because of the number of defendants,<sup>36</sup> the court applied the doctrine, stating: "Plaintiff was rendered unconscious for the purpose of undergoing surgical treatment by the defendants: it is manifestly unreasonable for them to insist that he identify any one of them as the person who did the alleged negligent act."<sup>37</sup>

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714 (1967). The court held that liability may be established on a concert theory when it is shown that the defendant knew that his companions' conduct constituted a breach of duty owed the decedent, that the defendant gave substantial assistance or encouragement to his companions, and that his conduct itself was a breach of duty owed the decedent. *Id.* The California courts have applied concert to a variety of factual situations. See, e.g., *Loeb v. Kimberle*, 215 Cal. 143, 9 P.2d 199 (1932) (action for assault and battery to hold liable a defendant who did not physically participate); *Weinberg Co. v. Bixby*, 185 Cal. 87, 196 P. 25 (1921) (construction of embankments on both sides of a river was a joint enterprise making both owners liable for wrongful diversion of flood waters); *Meyer v. Thomas*, 18 Cal. App. 2d 299, 63 P.2d 1176 (1937) (action for conversion of a promissory note).

30. W. PROSSER, *supra* note 18, at 292.

31. *Id.* "One who innocently, . . . does an act which furthers the tortious purpose of another is not acting in concert with him." *Id.* at 292. (footnote omitted).

32. *Id.* at 243.

33. 25 Cal. 2d 486, 154 P.2d 687 (1944).

34. *Id.* at 487, 154 P.2d at 688.

35. *Id.* at 487-88, 154 P.2d at 688.

36. *Id.* at 492, 154 P.2d at 690. The doctrine of *res ipsa loquitur* relieves the plaintiff from the burden of proving negligence. See W. PROSSER, *supra* note 18, at 214. There are three pre-conditions to use of the *res ipsa* doctrine: 1) the accident must be one which does not ordinarily occur in the absence of negligence; 2) the injury must have been caused by an instrumentality within the defendant's exclusive control; and 3) the injury must not have been due to any action of the plaintiff. *Id.* The defendants claimed that the second requirement had not been met, because where multiple defendants were present, no one of them had exclusive control over the instrumentality. 25 Cal. 2d at 489, 154 P.2d at 688-89. *Ybarra* was the first of a new line of cases which relaxed this requirement and applied the doctrine in cases involving multiple defendants. See Annot., 38 A.L.R.2d 905 (1954).

37. 25 Cal. 2d at 492, 154 P.2d at 690. Nor was the plaintiff required to make an identification of the instrumentality causing injury, but had only to

The requirements of the alternative liability theory were set forth in *Summers v. Tice*.<sup>38</sup> The plaintiff in *Summers* was injured when the two defendants independently fired in plaintiff's direction while all three were hunting.<sup>39</sup> Since the evidence adduced at trial was insufficient to determine which shot had actually caused the injury,<sup>40</sup> the California Supreme Court held that, whereas the negligence of one of them had injured the plaintiff, "a requirement that the burden of proof on [causation] be shifted to defendants becomes manifest."<sup>41</sup>

Under the *Summers* approach, the plaintiff must establish an injury, a breach of duty (negligence) on the part of *each* defendant, and that one of the defendants caused the injury; which amounts to a prima

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show that he received an injury from an external force applied while he was unconscious in the hospital. *Id.* at 492-93, 154 P.2d at 690. The court relied on the fact of the defendants' superior knowledge and the special relationship between the plaintiff and each defendant, in reaching its decision. *Id.* at 492-93, 154 P.2d at 690-91. *Ybarra* was later cited by the California Supreme Court as precedent for its decision in *Summers v. Tice*, 33 Cal. 2d 80, 86-87, 199 P.2d 1, 4 (1948). For a discussion of *Summers*, see notes 38-44 and accompanying text *infra*.

38. 33 Cal. 2d 80, 199 P.2d 1 (1948).

39. *Id.* at 82-83, 199 P.2d at 2.

40. *Id.* at 84, 199 P.2d at 2. The plaintiff was actually struck by two bullets, only one of which caused substantial injury. *Id.* at 84, 199 P.2d at 3.

41. *Id.* at 86, 199 P.2d at 4. The court based its decision on policy considerations, stating that it was unfair to leave the plaintiff remediless where both defendants were negligent and had brought about the situation in which the plaintiff was unable to identify the cause of the injury. *Id.* The California courts have applied the *Summers* rationale to a variety of factual situations. For instance, in *Haft v. Lone Palm Hotel*, a father and son drowned in defendant's motel swimming pool. 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970). The court found that, having been required by statute to provide a lifeguard or to place a warning at the pool, the defendants were negligent in not doing either. *Id.* at 763, 478 P.2d at 467-68, 91 Cal. Rptr. at 748. According to the court, this finding presented an even stronger case than *Summers* for shifting the burden of proof of causation to defendants. *Id.* at 773, 478 P.2d at 476, 91 Cal. Rptr. at 756. The *Haft* court reasoned that, in *Summers*, the uncertainty of proof, "while emanating from the defendants' conduct, was not a foreseeable consequence of defendants' negligence. In the instant case, . . . [however,] the absence of definite evidence on causation is a direct and foreseeable result of the defendants' negligent failure to provide a lifeguard." *Id.* at 773, 478 P.2d at 476, 91 Cal. Rptr. at 756.

California courts have also applied alternative liability to automobile accidents involving several vehicles where the plaintiff is unable to apportion the damages caused by each tortfeasor; the result has been to shift the burden of proof to any defendant who might have contributed to the injury to prove that his negligence was not a cause of the harm. See, e.g., *Eramdjan v. Interstate Bakery Corp.*, 153 Cal. App. 2d 590, 315 P.2d 19 (1957) (the plaintiff was thrown from a motorcycle and then run over by a truck); *Copley v. Putter*, 93 Cal. App. 2d 453, 207 P.2d 876 (1949) (defendants' cars collided almost simultaneously with the plaintiff's); *Cummings v. Kendall*, 41 Cal. App. 2d 549, 107 P.2d 282 (1940) (defendants negligently engaged in auto race). However, these cases differ from *Summers* in that each negligent driver may have made some contribution to the injury, while, in *Summers*, only one defendant was responsible for the damage. See *Lareau v. Southern Pacific Transp. Co.*, 44 Cal. App. 3d 783, 790-92, 118 Cal. Rptr. 837, 841-42 (1975).

facie case of negligence against the defendants as a group.<sup>42</sup> Following this showing by the plaintiff, the burden of proof shifts to the defendants, all of whom are held liable if they cannot prove which one of them was responsible for causing the injury.<sup>43</sup> Any particular defendant is released from liability upon a showing that it could not have been the cause of plaintiffs' injury.<sup>44</sup>

Many courts in other jurisdictions have adopted the *Summers* rationale;<sup>45</sup> it has even been extended to situations where not all defendants were proved negligent.<sup>46</sup> In a New Jersey case, *Anderson v. Somberg*,<sup>47</sup> alternative liability was applied against a physician, a hospital, a medical supply distributor, and a manufacturer of surgical instruments, after the plaintiff was injured when an instrument broke in his spinal canal during an operation.<sup>48</sup> The *Anderson* court, relying upon *Summers*,<sup>49</sup> not only shifted the burden of proof on the causation issue to the defendants,<sup>50</sup> but also stated that the jury *must* find at least one defendant liable.<sup>51</sup>

### C. Enterprise Liability

Enterprise liability provides a third theory of recovery for a plaintiff who is unable to identify the defendant responsible for her in-

42. 1 F. HARPER & F. JAMES, *THE LAW OF TORTS* 703-04 (1956). *Summers* holds liable a defendant for whom the probability of being the cause-in-fact of injury is no greater than 50%. See Comment, *supra* note 1, at 986. The presumption is justified, however, because with all tortfeasors joined there is a 100% probability of causation collectively. *Id.*

43. 1 F. HARPER & F. JAMES, *supra* note 42, at 703-04.

44. *Id.*

45. See, e.g., *Bowman v. Redding & Co.*, 449 F.2d 956 (D.C. Cir. 1971) (burden of proof of causation shifted to the defendants if the plaintiff could establish that both defendants were wrongdoers and one or the other had caused the death of the plaintiff's decedent); *Abel v. Eli Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979) (alternative liability applied in a DES case); *Thrower v. Smith*, 62 A.D.2d 907, 406 N.Y.S.2d 513, *aff'd*, 46 N.Y.2d 835, 386 N.E.2d 1091, 414 N.Y.S.2d 124 (1978) (multiple car collision case); *Hood v. Hagler*, 606 P.2d 548 (Okla. 1979) (plaintiff bitten by one of two roaming dogs; burden shifted to dogs' owners to exonerate themselves); *Snoparsky v. Baer*, 439 Pa. 140, 266 A.2d 707 (1970) (plaintiff injured by a stone thrown by one of the defendants; if all defendants were proved negligent, the plaintiff is entitled to a shift in the burden of proof as to causation); *Sommers v. Hessler*, 227 Pa. Super. Ct. 41, 323 A.2d 17 (1974) (plaintiff injured in a spitball fight on a school bus; burden of proof on causation shifted to defendants). For a discussion of *Abel v. Eli Lilly & Co.*, see notes 124-32 and accompanying text *infra*.

46. *Anderson v. Somberg*, 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975); see notes 47-51 and accompanying text *infra*.

47. 67 N.J. 291, 338 A.2d 1, *cert. denied*, 423 U.S. 929 (1975).

48. 67 N.J. at 294, 338 A.2d at 3. As in *Ybarra*, while at least one of the defendants was responsible for the injury, the plaintiff was unable to make the necessary identification. *Id.* at 296-97, 338 A.2d at 4.

49. *Id.* at 302, 338 A.2d at 6.

50. *Id.* at 302, 338 A.2d at 7.

51. *Id.* at 303, 338 A.2d at 7. This was a remarkable result, because the court decided that no matter what the evidence, the jury could not find that every defendant had exonerated itself.



juries. The purpose of the theory is to alleviate the necessity of proving which of many defendants was the cause of injury,<sup>52</sup> and the effect is to hold all defendants jointly liable.<sup>53</sup> The theory originated in *Hall v. E.I. DuPont de Nemours & Co.*,<sup>54</sup> where several children were injured by blasting caps in a series of separate accidents.<sup>55</sup> In separate actions which were consolidated for trial,<sup>56</sup> representatives of the injured children brought suit against six blasting cap manufacturers<sup>57</sup> who comprised virtually the entire blasting cap industry of the United States.<sup>58</sup> The plaintiffs' contended that the defendants had created an unreasonable risk of injury by failing to place warnings on the caps and by failing to take other safety precautions.<sup>59</sup> The plaintiffs' maintained that the industry practice of delegating safety functions to a trade association, which collected statistics on accidents and had considered and rejected the idea of labelling individual caps, demonstrated conscious agreement among the defendants sufficient to impose joint liability.<sup>60</sup>

The *Hall* court, citing as precedent the principles inherent in workmen's compensation statutes and the doctrine of respondeat superior,<sup>61</sup> where employers are held vicariously liable because they are "the most strategically placed participants in a risk-creating process, . . ." <sup>62</sup> held that the entire blasting cap industry could be held jointly liable.<sup>63</sup> Under this novel enterprise liability theory, plaintiffs would have to prove defendants' joint awareness of the risks and their joint capacity

52. See Comment, *supra* note 1, at 995.

53. *Id.* See also *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. 353, 378 (E.D.N.Y. 1972).

54. 345 F. Supp. 353 (E.D.N.Y. 1972).

55. *Id.* at 359.

56. *Id.* at 358. The cases were consolidated because they were closely linked in litigation history and underlying legal theory. *Id.*

57. *Id.* at 359. In *Hall v. E.I. DuPont de Nemours & Co.*, the plaintiffs claimed that they could identify the manufacturer of the injury-producing cap, while the manufacturer could not be identified in *Chance v. E.I. DuPont de Nemours & Co.* *Id.* at 358. It is the *Chance* portion of the opinion which is discussed herein.

58. *Id.* at 358.

59. *Id.* at 359.

60. *Id.*

61. *Id.* at 376.

62. *Id.*

63. *Id.* at 376-78. The court reasoned that while in some instances precautions could best be taken by the individual manufacturer or supplier, in other situations adequate safety measures could only be undertaken at the industry level. *Id.* at 377. Thus, the entire blasting cap industry would be held jointly liable because it could better bear the costs and eliminate the risks than the individual manufacturers. *Id.* at 378.

to reduce or affect those risks,<sup>64</sup> and the plaintiffs would then be relieved of the burden of identifying the manufacturer of each individual blasting cap.<sup>65</sup> The entire industry would thus be held liable for harm caused by its operations.<sup>66</sup>

64. *Id.* at 378. The court gave no indication as to what types of factors would enter into this determination, except to note that the theory is particularly applicable to industries with a small number of producers. *Id.* This observation intimates an intent that the individuals be involved in the process to such an extent as to make it fair to hold them each liable. See Note, *Joint Liability May Be Imposed Upon All Members of an Industry and Their Trade Association for Injury Caused by Defective Product Design if the Entire Industry Cooperated in Creating the Design and the Specific Manufacturer of the Injury-Causing Product Cannot Be Identified*, 42 U. CIN. L. REV. 341, 345 (1973) [hereinafter cited as *Joint Liability Note*].

The *Hall* opinion may also be read as having developed a separate theory, which combined elements of the concert of action and alternative liability theories. See Note, *Enterprise Liability — Entire Industry May Be Liable If Impossible to Identify Actual Manufacturer of Defective Product*, 19 WAYNE L. REV. 1299, 1304 (1973). Under this hybrid approach, the plaintiffs' would show that the defendants adhered to an industry-wide standard, and the burden of proof as to causation would then shift to the defendants. 345 F. Supp. at 373-74. The theory is similar to concert of action because it requires the plaintiff to show a joint or common activity on the part of the defendants. However, because the burden of proof as to causation is shifted to the defendants, it also resembles the alternative liability theory. See *id.* See also Note, *Child Injured by Exploding Blasting Cap of Unknown Manufacturer May Sue Entire Blasting Cap Industry Which Adheres to Common Safety Program*, 61 GEO. L.J. 1340 (1973).

Under this hybrid theory, several factors would be significant in demonstrating joint control of the risk: the size and composition of the trade association's membership, its objectives in the field of safety, its internal decision-making procedures, its information-gathering system, the safety program and its implementation, and other activities with regard to safety. *Hall v. E.I. DuPont de Nemours & Co.*, 345 F. Supp. at 376. By studying these factors, the district court evidently wished to determine whether the group was responsible for the decision regarding non-labeling, and whether individual members participated in the decision in a meaningful way. *Joint Liability Note, supra* at 345. These factors would also seem to be relevant to the issue of joint capacity to reduce or affect risks under the enterprise liability theory. *Id.* at 344 n.17. "[R]egardless of which theoretical label is employed, the *Hall* court would impose joint liability in the present case only upon a showing of concerted activity in the face of known risks." *Id.* While the existence of a trade association was important in establishing joint control in *Hall*, the court stressed that this factor was not essential in its finding. 345 F. Supp. at 374.

65. 345 F. Supp. at 379. The court acknowledged the possibility, raised by the defendants, that the manufacturer of the injury-producing caps had not been joined. *Id.* However, the court stated that this possibility did not affect the plaintiffs' burden of proof. *Id.* So long as the plaintiffs proved that it was more probable than not that the injury was caused by a cap made by one of the named defendants, the possibility of additional, unnamed defendants would not prevent a judgment for the plaintiffs. *Id.*

66. *Id.* at 358. Because the court later severed and transferred the cases after consideration of the choice of law issues, the theory of enterprise liability was never applied to these facts. *Chance v. E.I. DuPont de Nemours & Co.*, 371 F. Supp. 439 (E.D.N.Y. 1974).

Under still another articulation of enterprise liability, a plaintiff would be required to prove seven elements: 1) the plaintiff is not at fault for the inability to identify the causative agent, rather, this is due to the nature of the

### III. THREE APPROACHES TO RESOLVING THE DES IDENTIFICATION DILEMMA

Recent cases have suggested three approaches to resolving the identification problem, drawn from the three theories previously discussed.

#### A. *Sindell v. Abbott Laboratories*

Plaintiff Judith Sindell brought a class action<sup>67</sup> against ten drug manufacturers, alleging that the manufacturers were jointly liable for her injuries which resulted from her mother's ingestion of DES.<sup>68</sup> While Sindell was unable to identify the manufacturer of the drug taken by her mother and thus responsible for her injuries,<sup>69</sup> she alleged that the defendants were jointly liable because of their express and implied agreements to collaborate in, rely upon, and adopt each other's testing and marketing methods.<sup>70</sup>

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defendant's conduct; 2) a generically similar defective product was manufactured by all the defendants; 3) the plaintiff's injury was caused by this defect; 4) the defendants owed a duty to the plaintiff's class; 5) there is clear and convincing evidence that the plaintiff's injury was caused by the product of some one of the defendants; (for example, the joined defendants accounted for a high percentage of such defective products on the market at the time of plaintiff's injury); 6) there existed an insufficient, industry-wide standard of safety as to the manufacture of the product; and 7) all defendants were tortfeasors. Comment, *supra* note 1, at 995. Although this theory combines aspects of both alternative liability and concert of action, it is derived mainly from alternative liability in that the basic premise is that one of the defendants probably caused the plaintiff's injury. *Id.* at 996. While in the classic alternative liability case all defendants are joined, this theory suggests that in a DES case, the joined manufacturers account for 75-80% of the market. *Id.* at 996. This departure from the usual requirement of joinder of all defendants is justified by the addition of an element of proof to the plaintiff's case that derives from the concert theory: the plaintiff must prove the existence of an insufficient industry-wide safety standard. *Id.* at 996-97. Whereas parallel behavior among the defendants would be sufficient to meet this standard, without evidence of tacit agreement or understanding, imitative drug research, joint submission of clinical data, and parallel marketing practices would demonstrate an industry-wide safety standard. *Id.* at 996. In terms of causation, "the industry-wide standard becomes itself the cause of plaintiff's injury . . . . Therefore, each industry member has contributed to plaintiff's injury." *Id.* at 997.

67. This was a consolidation of two class action suits. *Sindell v. Abbott Laboratories* and *Rogers v. Rexall Drug Co.* *Sindell v. Abbott Laboratories*, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138, 141 (1978) (Opinion omitted in 85 Cal. App. 3d, further references will be only to 149 Cal. Rptr.). The class consisted of female residents of California who had been exposed to DES before birth, and who may or may not have known of the dangers of DES. *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132 (1980), *cert. denied*, 101 S. Ct. 285 (1980).

68. The plaintiff alleged that she developed precancerous lesions or tumors of the vagina, cervix and breast and a cancerous bladder tumor as a result of her mother's ingestion of DES. 149 Cal. Rptr. at 141.

69. 149 Cal. Rptr. at 142.

70. *Id.* at 141. The plaintiff alleged that the defendants knew or should have known that DES was neither safe for use by pregnant women nor effec-

The trial court dismissed the action<sup>71</sup> on the ground that no cause of action was stated since there was no identification of the defendant whose DES had harmed the plaintiff.<sup>72</sup> The California Court of Appeals reinstated the action,<sup>73</sup> finding that the complaint stated a cause of action under the concert of action and alternative liability theories.<sup>74</sup> On review, the Supreme Court of California disagreed with the lower court's determination regarding the applicability of the concert of action and alternative liability theories, and also concluded that the enterprise liability theory was inapplicable.<sup>75</sup> Nevertheless, the court held that the plaintiff's right of action was not precluded by her inability to identify the specific manufacturer of the DES which her mother had ingested.<sup>76</sup> Rather, the court found that she had stated a cause of action under a new theory — market-share liability.<sup>77</sup>

The *Sindell* court, in considering the *alternative liability theory*, accepted the defendants' argument that, since only five of the two hundred companies which manufactured DES had been joined as defendants, there was no rational basis on which to infer that any named defendant had caused the plaintiff's injuries.<sup>78</sup> The court, noting that in *Summers* all responsible parties had been joined, concluded that the *Summers* rule of alternative liability was not applicable to a situation where there was a possibility that none of the joined defendants had caused the injury.<sup>79</sup>

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tive to prevent miscarriages. 26 Cal. 3d at 594, 607 P.2d at 925-26, 163 Cal. Rptr. at 133-34. The plaintiff also alleged that the defendants did not adequately test DES for safety and effectiveness. *Id.* The plaintiff further alleged that the defendants knew or should have known that DES is carcinogenic, and that the defendants individually and in concert promoted, approved, authorized, acquiesced in and reaped profits from the sale of DES to pregnant women. Appellant's Opening Brief in the Court of Appeal of the State of California at 6-10, *Sindell v. Abbott Laboratories*, 85 Cal. App. 3d 1, 149 Cal. Rptr. 138 (1978); Additional Brief of Appellant, *Judith Sindell*, in the Supreme Court of the State of California at 4-5, 8-11, *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, *cert. denied*, 101 S. Ct. 285 (1980).

71. 149 Cal. Rptr. at 141.

72. *Id.*

73. *Id.*

74. *Id.* at 143.

75. 26 Cal. 3d at 598, 607 P.2d at 928, 163 Cal. Rptr. at 136.

76. *Id.* at 610-13, 607 P.2d at 936-38, 163 Cal. Rptr. at 144-46.

77. *Id.*

78. *Id.* at 602-03, 607 P.2d at 930-31, 163 Cal. Rptr. at 138-39.

79. *Id.* The plaintiff relied on three cases cited in *Summers* as supporting the application of alternative liability to a situation involving fewer than all possible tortfeasors. *Id.* at 602 n.15, 607 P.2d at 930 n.15, 163 Cal. Rptr. at 138 n.15. The *Sindell* court stated, however, that these cases were decided on a concert of action theory. See *Benson v. Ross*, 143 Mich. 452, 106 N.W. 1120 (1960); *Moore v. Foster*, 182 Miss. 15, 180 So. 73 (1938); *Oliver v. Miles*, 144 Miss. 852, 110 So. 666 (1927). The court noted that comment (h) to § 433B of the Restatement of Torts states that, while the rule of alternative liability has only been applied where all tortfeasors are joined as defendants, modifica-

The California court next considered and rejected use of the *concert of action theory*,<sup>80</sup> stating that the defendants' alleged failure to test the drug adequately or to give sufficient warning of its dangers did not constitute concert of action.<sup>81</sup> Moreover, the court rejected the plaintiff's assertion that, since the defendants had engaged in parallel or imitative practices and had relied on each others' promotional and marketing techniques, the defendants had acted in concert.<sup>82</sup> Instead, the court described these actions as a common industry practice and stated that to apply the concert of action theory to the case at bar would so expand the doctrine as to "render virtually any manufacturer liable for the defective products of an entire industry."<sup>83</sup>

tion of the rule could be allowed where the situation calls for it. 26 Cal. 3d at 602 n.16, 607 P.2d 931 n.16, 163 Cal. Rptr. 139 n.16. The California court relied on comment (h) in developing the theory of market-share liability.

An argument made by the defendants, was that a predicate to shifting the burden of proof under the alternative liability theory is that the defendants have greater access to information regarding the identity of the manufacturer of the injury-producing product. *Id.* at 600, 607 P.2d at 929, 163 Cal. Rptr. at 137. The court rejected the defendant's contention that the plaintiff was in a better position to make the identification, and stated that for the purposes of the appeal it would be assumed that the plaintiff could not identify the manufacturer whose drug caused her injuries. *Id.* at 600-01 & n.12, 607 P.2d at 929-30 & n.12, 163 Cal. Rptr. at 137-38 & n.12. The supreme court recognized that the defendants also lacked information on this point and that the circumstances appeared to render identification by either party impossible. *Id.* at 600-01, 607 P.2d at 929-30, 163 Cal. Rptr. at 137-38. The plaintiff's analogy to *Haft v. Lone Palm Hotel*, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970), where the lack of evidence of causation was a direct result of defendants' negligence, and the burden of proof was therefore shifted to the defendants, was also rejected. 26 Cal. 3d at 601 & n.14, 607 P.2d 930 & n.14, 163 Cal. Rptr. at 138 & n.14. *See* note 41 *supra*. The *Sindell* court labelled it merely speculative whether plaintiff's mother would have recorded the name of the manufacturer if the DES she took had been labelled as experimental. 26 Cal. 3d at 601 n.14, 607 P.2d at 930 n.14, 163 Cal. Rptr. at 138 n.14. While the defendants did not have greater access to information regarding identification of the manufacturer, the California court stated that this factor was not present in *Summers* and thus was never required in order for alternative liability to apply. *Id.* at 600, 607 P.2d at 929, 163 Cal. Rptr. at 137.

80. 26 Cal. 3d at 603-06, 607 P.2d at 931-33, 163 Cal. Rptr. at 139-41.

81. *Id.* at 605, 607 P.2d at 932, 163 Cal. Rptr. at 140.

82. *Id.* According to the court's interpretation of the concert of action theory, the plaintiff must prove a tacit understanding or a common plan among the defendants to fail to conduct adequate tests or to give sufficient warnings, and also that the defendants had aided and encouraged each other in these omissions. *Id.* The *Sindell* court rejected the plaintiff's allegation that a charge of concert could be based on the production of DES from a common and mutually agreed upon formula, stating that the formula is a scientific constant which all manufacturers must follow. *Id.* at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141.

83. *Id.* at 605, 607 P.2d at 933, 163 Cal. Rptr. at 141. Distinguishing the concert of action cases cited by the plaintiff from the present case, the *Sindell* court stated that these cases had involved a smaller number of defendants, whose actions resulted in a tort against a single plaintiff, usually over a shorter span of time, and that the defendant was either a direct participant in the act or encouraged or assisted the person who caused the injury. *Id.* The court also distinguished *Orser v. George*, 252 Cal. App. 2d 660, 60 Cal. Rptr. 708

The *Sindell* court declined to apply the *enterprise liability theory* for three reasons.<sup>84</sup> First, there were at least two hundred manufacturers of DES, and the *Hall* court had cautioned against use of the theory in a case involving a large number of producers.<sup>85</sup> Second, the plaintiff could not show that the defendants had jointly controlled the risk.<sup>86</sup> In *Hall*, joint control of the risk had been based upon the fact that responsibility for the formulation of safety standards had been delegated to a trade association; here, no such trade association of the DES manufacturers existed.<sup>87</sup> Moreover, the plaintiff had failed to meet the standard for joint control of the risk under a concert of action theory.<sup>88</sup> Finally, the court acknowledged the federal government's role in setting standards for the testing and manufacture of drugs, and stated that it would be unfair to impose liability simply for following government-imposed standards.<sup>89</sup>

Having discarded all of the extant theories which would have allowed the plaintiff to recover,<sup>90</sup> but persuaded by strong policy arguments that the plaintiff ought to be compensated,<sup>91</sup> the *Sindell* court developed the theory of market-share liability. The supreme court

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(1967), because the defendant there may have known that the other defendants' conduct was tortious towards the plaintiff, may have given them substantial assistance and encouragement, and may have separately been a breach of duty towards the plaintiff. 26 Cal. 3d at 606, 607 P.2d at 933, 163 Cal. Rptr. at 141. See notes 25-29 and accompanying text *supra*. Furthermore, the supreme court declined to apply the concert theory because of its doubt as to whether a tacit understanding to fail to perform an act could be the basis of a charge of concert. 26 Cal. 3d at 606, 607 P.2d at 933, 163 Cal. Rptr. at 141.

84. 26 Cal. 3d at 609-10, 607 P.2d at 935, 163 Cal. Rptr. at 143. The court explained the theories of enterprise liability developed in *Hall* and in Comment, *supra* note 1. See notes 52-66 and accompanying text *supra*.

85. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

86. *Id.*

87. See note 60 and accompanying text *supra*.

88. 26 Cal. 3d at 609, 607 P.2d at 935, 163 Cal. Rptr. at 143.

89. *Id.* at 609-10, 607 P.2d at 935, 163 Cal. Rptr. at 143. The court stated that federal regulations may specify the type of tests to be performed, the type of packaging to be used, and the standards to be followed in the manufacture of the drug. *Id.* n.26.

90. See notes 78-89 and accompanying text *supra*.

91. *Id.* at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. The court attached great importance to the *Summers'* reasoning that, as between an innocent plaintiff and negligent defendants, the defendants should bear the cost of injury. *Id.* at 610-11, 607 P.2d at 936, 163 Cal. Rptr. at 144. In reasoning closely parallel to *Summers*, the court also noted that, while neither party was at fault in failing to prove causation, the defendants' conduct in marketing a drug with delayed effects was a significant factor in creating the problem. *Id.* Other policy considerations taken into account were that the defendants were better able to bear the costs of injuries, and that holding the defendants liable would provide an incentive to product safety. *Id.*

shifted the burden of proof of causation to the defendants, upon the plaintiff's showing that those manufacturers whose sales of DES accounted for a "substantial share" of the market were joined as defendants.<sup>92</sup> Failing to prove that its drug was not the one which had injured each individual plaintiff, each defendant manufacturer would be held liable for the proportion of the judgment represented by its share of the DES market.<sup>93</sup> Anticipating that some discrepancy between market share and liability will occur under the new doctrine, the California court reasoned that the theory would treat each defendant fairly because "each manufacturer's liability would approximate its responsibility for the injuries caused by its own products."<sup>94</sup> Thus, the court stated that the difficulty in apportioning damages and in defining the relevant market should not militate against adoption of the market-share liability theory.<sup>95</sup>

In a dissenting opinion, Justice Richardson opined that the majority's holding allowed the plaintiff to recover damages without proof that any defendant had either in fact caused or probably caused the plaintiff's injuries.<sup>96</sup> Moreover, Justice Richardson observed that market-share liability would fall disproportionately on those manufacturers amenable to suit in California,<sup>97</sup> would treat DES-plaintiffs more

92. 26 Cal. 3d at 612, 607 P.2d at 937, 163 Cal. Rptr. at 145. The court did not state what would constitute a substantial percentage of the market.

93. *Id.* Defendants can bring in other manufacturers through cross-complaints. *Id.*

94. *Id.* The court acknowledged that minor discrepancy is inevitable and that a defendant's liability may differ from what its share of the market would justify. *Id.* at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145.

95. *Id.* at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46. The court likened the problem of apportionment of damages to the problems confronted by a jury in applying comparative negligence, noting that in neither case could mathematical precision be expected. *Id.* at 612-13, 607 P.2d at 937, 163 Cal. Rptr. at 145. While also noting that there were practical problems to be worked out, such as a time-frame and area for market share, as well as the difficulty in ascertaining what proportion of the drug was used as a miscarriage preventative, the court indicated that these problems would be worked out at trial. *Id.* at 613, 607 P.2d at 937-38, 163 Cal. Rptr. at 145-46.

96. *Id.* at 614, 607 P.2d at 938, 163 Cal. Rptr. at 146 (Richardson, J., dissenting). Under the majority's approach, Justice Richardson objected that "a particular defendant may be held proportionately liable *even though mathematically it is much more likely than not that it played no role whatever in causing plaintiffs' injuries.*" *Id.* at 616, 607 P.2d at 939, 163 Cal. Rptr. at 147 (Richardson, J., dissenting) (emphasis in original). Justice Richardson considered such a result to be contrary to established tort principles which require more than a mere possibility of causation. *Id.* at 616, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting).

97. *Id.* at 617, 607 P.2d at 940, 163 Cal. Rptr. at 148 (Richardson, J., dissenting). Justice Richardson contended that assuming no other state would adopt such a rule, those defendants brought to trial in California would bear joint responsibility for 100% of the plaintiffs' injuries although their market-share was considerably less. *Id.*

favorably than other tort plaintiffs,<sup>98</sup> and would be harmful from a social policy viewpoint.<sup>99</sup>

### B. *Ferrigno v. Eli Lilly and Co.*

In an action by eight daughters of DES users against twenty-two drug manufacturers,<sup>100</sup> the New Jersey Superior Court stated that the identification problem posed two separate issues:<sup>101</sup> first, the inability to identify the precise causative agent,<sup>102</sup> and second, the possibility

98. *Id.* at 618, 607 P.2d at 941, 163 Cal. Rptr. at 149 (Richardson, J., dissenting). Justice Richardson explained that plaintiffs in ordinary tort cases take a chance on whether the defendant is amenable to process and financially solvent, whereas these plaintiffs are given a wide selection of defendants from which to choose. *Id.* Moreover, according to Justice Richardson, the theory bases liability upon the defendant's wealth. Calling this a "deep pocket" theory of liability, he stated that it "fasten[s] liability on defendants" because they are better able to bear the cost of injuries than the plaintiffs. Justice Richardson continued, stating that "a defendant's wealth is an unreliable indicator of fault, and should play no part, at least consciously, in the legal analysis of the problem." *Id.*

99. *Id.* at 620, 607 P.2d at 942, 163 Cal. Rptr. at 150 (Richardson, J., dissenting). Justice Richardson feared that the decision will discourage pharmaceutical research and development and the dissemination of new drugs. *Id.* Justice Richardson questioned whether liability would be imposed in this manner if the injury was to surface in two or three generations instead of one, and also raised the point that the theory could be applied to other industries with adverse economic consequences. *Id.* at 620, 607 P.2d at 942, 163 Cal. Rptr. at 150 (Richardson, J., dissenting).

100. *Ferrigno v. Eli Lilly and Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (1980). Linda Ferrigno and her mother instituted a class action suit in 1976. *Id.* at 558, 420 A.2d at 1308. The Ferrignos sought to amend the complaint to add additional plaintiffs. *Id.* at 559, 420 A.2d at 1309. Shortly afterwards, a second suit was instituted by the plaintiffs named in the amended complaint; this suit sought to certify a defendant class. *Id.* The court permitted the amended complaint in the first action and consolidated the two actions. *Id.* Certification as to both plaintiff and defendant classes was later denied. *Id.* Five of the eight plaintiffs were unable to identify the defendant whose drug had caused the injury. *Id.* at 561 & n.1, 420 A.2d at 1310 & n.1. The claims of Linda Ferrigno and her mother were settled. *Id.* at 559, 420 A.2d at 1309. All other claims remained. *Id.*

101. *Id.* at 565, 420 A.2d at 1312.

102. *Id.* The plaintiffs asserted that their inability to identify the manufacturer of the DES taken should not bar recovery; rather, liability should be borne by each manufacturer in proportion to the defendant's market share. *Id.* at 561, 420 A.2d at 1310. The court chose, on its own motion, to consider this and other legal issues raised in advance of trial. *Id.* at 558, 420 A.2d at 1308.

In one previous DES case which had been reviewed by the New Jersey Superior Court, *Lyons v. Premo Pharmaceutical Labs, Inc.*, the plaintiff had identified the manufacturer whose pills her mother took and reached a settlement both with Premo, the manufacturer, and Chemetron, which had acquired the firm which sold DES to Premo. 170 N.J. Super. 183, 188-89, 406 A.2d 185, 188 (1979). Motions for summary judgment by the other defendant drug companies were granted, and were affirmed on appeal. *Id.* at 189, 197, 406



that the causative agent was not among the defendants before the court.<sup>103</sup> While it has been subsequently overruled,<sup>104</sup> the *Ferrigno* decision shows an interesting approach taken by one court to resolving the DES identification dilemma. The court viewed *Anderson v. Somberg*,<sup>105</sup> as resolving the first issue. The court read that case as holding that, where a plaintiff, through no fault of her own, is unable to identify which of several defendants harmed her, it becomes the defendants' burden for each to establish that it was not the cause of harm.<sup>106</sup>

In addressing what it considered the more difficult second issue,<sup>107</sup> the *Ferrigno* court, again relying upon *Anderson*,<sup>108</sup> decided that the burden of proof could be shifted to the defendants,<sup>109</sup> even in the absence of joinder of all potential defendants.<sup>110</sup> While the court interpreted the plurality opinion in the *Anderson* case as assuming that all potential defendants were before the court, the *Ferrigno* court con-

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A.2d at 188, 192. The *Lyons* court would not allow the plaintiff to apply the alternative liability or the enterprise liability theories where the source of the injury was known. *Id.* at 192-93, 406 A.2d at 190. Moreover, the *Lyons* court also rejected the plaintiff's reliance on the concert of action theory. *Id.* at 193, 406 A.2d at 190-91.

103. 175 N.J. Super. at 565, 420 A.2d at 1312.

104. *Namm v. Charles E. Frosst & Co.*, 178 N.J. Super 19, 427 A.2d 1121 (1981). The court declined to apply the alternative liability theory, based in part on the fact that not all those who could have been responsible for plaintiffs' injury were before the court. *Id.* at 28-32, 427 A.2d 1125-28. The court stated that application of the theory here "would result in the taking of the property of all the named defendants in order to pay for harm which may have been caused by only one of the defendants, or even by one who is not a party to the lawsuit. . . ." *Id.* at 33, 427 A.2d at 1128. Another policy consideration present in other alternative liability cases but lacking here was any suggestion that the defendant was better able to make the identification of the responsible manufacturer. *Id.* at 32, 427 A.2d at 1127. The enterprise liability theory was also rejected by the court, on the grounds that it would violate the well-settled principle of tort law that manufacturers are liable only upon proof that the product was defective and that the defect arose while the product was in the defendant's control. *Id.* at 35, 427 A.2d at 1129. Any such drastic change in the law, according to the *Namm* court, would have to be accomplished by the supreme court or the legislature. *Id.*

105. For a discussion of *Anderson v. Somberg*, see notes 47-51 and accompanying text *supra*. The *Anderson* court stated that its decision was based on the facts that the plaintiff was unconscious when the injury occurred, the defendants all owed a duty to the plaintiff, all possible defendants were before the court, and that it was clear that one defendant was liable. 67 N.J. at 302-03, 338 A.2d at 7. The dissent was concerned that the responsible party may not have been before the court, and therefore did not believe that the jury should be required to find at least one defendant liable. *Id.* at 306, 310-11, 338 A.2d at 9, 11 (Mountain, J., dissenting).

106. 175 N.J. Super. at 566, 420 A.2d at 1312.

107. *Id.* at 565, 420 A.2d at 1312.

108. *Id.* at 567, 420 A.2d at 1313.

109. *Id.*

110. *Id.* at 567, 420 A.2d at 1313.

cluded that even the dissenters in the *Anderson* case would uphold the shifting of the burden of proof.<sup>111</sup>

The *Ferrigno* court further concluded that the *Anderson* rationale of alternative liability should be extended beyond the particular facts of that case and applied to the case at bar.<sup>112</sup> The court reasoned that, in both *Ferrigno* and *Anderson*, the plaintiffs had been innocent victims of an unforeseeable injury.<sup>113</sup> Also, in both cases, all of the defendants were potentially at fault<sup>114</sup> and all of the defendants owed a special duty to the plaintiff.<sup>115</sup> The court considered the *Ferrigno* defendants to be more culpable than those in *Anderson*, however, in that they caused the identification problem by making a fungible good with long-delayed effects.<sup>116</sup> And finally, since all of the defendants in

111. *Id.* at 566, 420 A.2d at 1313. The *Anderson* court had stated:

Identifying the responsible party is merely a matter of elimination. To instruct the jury that it must return a verdict against one or more of the defendants is simply requiring it to determine upon the evidence which defendants, if any, have exculpated themselves. For the jury under these circumstances to conclude that no defendant is liable would be a contradiction in logic.

67 N.J. at 304, 338 A.2d at 8. The *Ferrigno* court stated that, while the dissenters in *Anderson* would not make this presumption, and therefore did not agree that the jury should be mandated to find liability, the *Anderson* dissenters did agree that the burden of proof should be shifted to the defendants. 175 N.J. Super. at 566-67, 420 A.2d at 1313. Therefore, according to the *Ferrigno* court, the *Anderson* dissent recognized that the case should not be dismissed merely because of the possibility that the causative agent was not before the court. Furthermore, the *Ferrigno* court reasoned that "the plurality which went well beyond this position would agree." *Id.* at 567, 420 A.2d at 1313. *Anderson* thereby provided the court with precedent for the application of alternative liability to a setting where less than all potential defendants had been joined. *Id.*

112. 175 N.J. Super. at 567, 420 A.2d at 1313. The court noted that *Anderson* was decided in the context of a hospital operating room, and that the *Anderson* court attempted to restrict its language to "the type of case we consider here." 67 N.J. at 298, 338 A.2d at 5.

113. 175 N.J. Super. at 568, 420 A.2d at 1313. The plaintiff in *Anderson* was unconscious on the hospital operating table at the time of injury, whereas the plaintiffs in *Ferrigno* had not yet been born when the injury occurred. *Id.*

114. 175 N.J. Super. at 567-68, 420 A.2d at 1313. The court stated that all of the defendants in *Ferrigno* were associated with "the manufacture, marketing or distribution of DES at a time and place when and where their product possibly could be the one ingested by plaintiff's mother." *Id.*

115. *Id.* at 568, 420 A.2d at 1313. In *Anderson*, the defendants were "those who had custody of the patient, and who owed him a duty of care as to medical treatment, or not to furnish a defective instrument." 67 N.J. at 298, 338 A.2d at 5. The court stated that the defendants in *Ferrigno* had a special responsibility, even if DES was deemed unavoidably unsafe, to see that the drugs were properly prepared and marketed and that proper warnings were given. 175 N.J. Super. at 568, 420 A.2d at 1313.

116. 175 N.J. Super. at 568, 420 A.2d at 1313-14. The court noted that in these circumstances it was reasonable for the consumer to have discarded any records. *Id.* at 568, 420 A.2d at 1314.

*Ferrigno* were alleged tortfeasors, whereas it was presumed in *Anderson* that only one defendant was at fault, the shift in the burden of proof was thought to be more compelling.<sup>117</sup>

Acknowledging the *Sindell* court's rejection of the alternative liability theory,<sup>118</sup> the *Ferrigno* court nevertheless was satisfied that, under New Jersey law, the theory could and should be applied.<sup>119</sup> Having found the alternative liability theory a satisfactory method for providing recovery to the plaintiff, the New Jersey court declined to consider either the enterprise liability or the market-share liability theories<sup>120</sup> and also rejected the concert of action theory on these facts.<sup>121</sup> The court stated that any defendant could exculpate itself by identifying the actual manufacturer, by showing that it did not manufacture DES until after plaintiff was born, by showing that its drug could not have reached the location where the plaintiff-mother purchased it, or by

117. *Id.* at 568-69, 420 A.2d at 1314. Two theories were suggested in *Anderson* as the cause of the instrument's breaking; that it was negligently used, or that the instrument itself was defective. 67 N.J. at 296, 338 A.2d at 4. There was no indication that both these factors were present. In *Ferrigno*, as in all DES cases, it was alleged that all defendants acted tortiously in producing, marketing and selling the drug. 175 N.J. Super. at 560-61, 420 A.2d at 1309-10.

118. 175 N.J. Super at 569-70, 420 A.2d at 1314.

119. *Id.* The court noted the strong policy in favor of allowing innocently injured plaintiffs to recover. Noting that the *Sindell* court's rejection was premised on the finding that not all responsible parties were joined as defendants, the *Ferrigno* court observed that this had not deterred the New Jersey Supreme Court in *Anderson*. *Id.* at 569-70, 420 A.2d at 1314.

The court also analogized the situation of defendants here to that faced by defendants in multiple car collision cases, where one tortfeasor might escape liability and another be required to pay more than his share of the damages. *Id.* at 570, 420 A.2d at 1315. The car collision situation does not provide a perfect analogy to the case at bar. In the chain collision case, each defendant may have contributed to the injury, and the problem is merely that of apportionment. Since all defendants who may have contributed to the injury are identifiable, a defendant can only escape liability if he meets the requisite burden of proof. In DES cases, however, it is not readily apparent which manufacturers are potential defendants.

120. *Id.* at 570, 420 A.2d at 1315.

121. *Id.* at 570, 420 A.2d at 1315-16. The *Ferrigno* court stated that the *Lyons* court had disposed of the concert of action theory. The *Lyons* court rejected the concert of action theory after distinguishing defendants' 1940 and 1947 applications to market DES. *Lyons v. Premo Pharmaceuticals Labs, Inc.*, 170 N.J. Super. 183, 406 A.2d 185 (1979). For a discussion of *Lyons*, see note 102 *supra*. While the 1940 applications of the defendants might have supported a charge of concert, these applications did not seek to market DES for use as a miscarriage preventative. 170 N.J. Super. at 193-94, 406 A.2d at 190-91. The court pointed out that, since DES is safe for many purposes and is still in use, the drug companies' conduct in 1940 could certainly not be considered tortious. *Id.* It was the 1947 applications which sought to market DES for use during pregnancy which were allegedly tortious, and no concert was alleged as to these applications. *Id.* The *Ferrigno* court also quoted *Sindell*. See notes 80-83 and accompanying text *supra*.

showing that its drug was not the same shape, size, or color as that ingested by the mother.<sup>122</sup>

However, the court decided that, for the purposes of allocating damages among the defendants, it would adopt the *Sindell* rationale and hold each defendant liable for the proportion of the judgment represented by its share of the market.<sup>123</sup>

### C. *Abel v. Eli Lilly & Co.*

Reviewing the grant of summary judgments in favor of defendants,<sup>124</sup> the Michigan Court of Appeals, having noted that the concert of action theory was "well-established,"<sup>125</sup> found that the plaintiff had stated a cause of action under that theory<sup>126</sup> and held that the summary judgments which had been granted by the trial court were improper.<sup>127</sup>

Moreover, in discussing the theory of alternative liability, the *Abel* court noted that, although there were no Michigan cases directly on

122. 175 N.J. Super. at 571-72, 420 A.2d at 1316. Those defendants unable to exculpate themselves would be held jointly and severally liable. *Id.* at 572, 420 A.2d at 1316.

123. *Id.* at 572-73, 420 A.2d at 1316.

124. *Abel v. Lilly & Co.*, 94 Mich. App. 59, 289 N.W.2d 20 (1979). The plaintiffs alleged that defendants' were liable under concert of action, alternative liability, and enterprise liability theories for injuries caused by their mothers' ingestion of DES. *Id.* at 66-67, 71, 289 N.W.2d at 22, 24. The plaintiffs charged the defendants with negligence, breach of express and implied warranties, fraud and conspiracy; and that the named defendants constituted all of the known manufacturers of DES whose products were distributed in Michigan during the relevant time period. *Id.* at 66-67, 289 N.W.2d at 22. The plaintiffs further claimed that they were unable to determine which particular defendant had caused their harm but that this should not bar recovery because the defendants were jointly and severally liable and only the named defendants could have caused the harm. *Id.*

The trial court granted summary judgment for all of the defendants against those plaintiffs unable to determine which defendant's product had harmed them, and for all of the defendants, except the one named, against those plaintiffs who alleged that a particular defendant caused their harm. *Id.* at 68, 289 N.W.2d at 23. Summary judgment was also granted as to the claims of enterprise liability. *Id.*

125. *Id.* at 72, 289 N.W.2d at 24. For a discussion of the concert of action theory, see notes 23-31 and accompanying text *supra*. Justice Souris' opinion in *McCoy v. DeLiefde* was cited by the court as precedent for the concert of action theory. See *McCoy v. DeLiefde*, 376 Mich. 198, 135 N.W.2d 916 (1965) (three defendants negligently shot in plaintiff's direction, all would be held liable if plaintiff could show that defendants acted in concert).

126. 94 Mich. App. at 72, 289 N.W.2d at 25. The plaintiffs' concert claim was based on the allegation that all the defendants caused the marketing of DES, and that this activity caused the plaintiffs' injuries. *Id.* at 71-72, 289 N.W.2d at 24-25. The court emphasized that, on appeal from an order granting summary judgment, only the sufficiency of the pleadings was at issue and that the plaintiffs would have to adduce evidence to support the allegation of concert at trial. *Id.* at 72, 289 N.W.2d at 25.

127. *Id.* at 72, 289 N.W.2d at 25.

point,<sup>128</sup> the burden of proof on causation had been shifted to the defendants in other contexts under Michigan law.<sup>129</sup> In adopting the alternative liability theory,<sup>130</sup> the Michigan court cautioned that each plaintiff must prove by a preponderance of the evidence that each defendant had breached its duty of care, and that the harm which she suffered had been caused by her mother's ingestion of DES which had been manufactured by one of the named defendants.<sup>131</sup> According to the *Abel* court, the defendants would then be required to apportion the damages among themselves.<sup>132</sup>

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128. *Id.* at 74, 289 N.W.2d at 25.

129. *See Snider v. Bob Thibodeau Ford, Inc.*, 42 Mich. App. 708, 202 N.W.2d 727 (1972) (burden of proof shifted to car manufacturer and car dealer in suit for injuries caused by brake failure); *Holloway v. General Motors Corp.*, 403 Mich. 614, 271 N.W.2d 777 (1978) (citing *Summers*, court declared that the plaintiff, whose husband was killed and daughter injured in a car collision, did not have to show the precise nature of the defect in defendant's ball joint assembly); *Maddux v. Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961) (multiple car collision; burden of proof as to apportionment of damages shifted to defendants).

The *Abel* court found unpersuasive defendants' argument that in prior alternative liability cases the tortious acts had occurred within a brief time span. 94 Mich. App. at 76 n.5, 289 N.W.2d at 26 n.5. The court stated: "It hardly comports with the notions of fairness which underlies the adoption of [alternative liability] to hold that a tortfeasor who continues his wrongful conduct over a period of years will be absolved of responsibility for his acts as a reward for his persistence in wrongdoing." *Id.*

130. 94 Mich. App. at 76, 289 N.W.2d at 26-27. The plaintiffs alleged alternative liability in that all defendants acted wrongfully but only one defendant caused harm to each individual plaintiff. *Id.* at 71-72, 289 N.W.2d at 24.

131. *Id.* at 76, 289 N.W.2d at 26-27. The court's language, in stating that a plaintiff must show that a named defendant manufactured the DES, indicates that alternative liability cannot be applied where fewer than all potential defendants have been joined. *Id.* Thus the decision is contrary to the result reached in *Ferrigno*, where the action was allowed to proceed without joinder of all manufacturers of DES. 175 N.J. Super. at 570, 420 A.2d at 1315.

132. 94 Mich. App. at 76, 289 N.W.2d at 26. The court stated that the problem was essentially one of apportionment of damages, as in *Maddux v. Donaldson*, 362 Mich. 425, 108 N.W.2d 33 (1961). 94 Mich. App. at 76, 289 N.W.2d at 26. This is a misunderstanding because in *Maddux* each defendant contributed to the injury, whereas only one defendant caused the injury to any DES plaintiff. What the court seems to be saying is that after alternative liability has been proved, defendants will have to apportion the damages. The court declined, without discussion, to adopt the enterprise liability theory. 94 Mich. App. at 77, 289 N.W.2d at 27.

A dissenting judge charged that the plaintiffs were calling for strict liability in a product liability action which was not Michigan law. *Id.* at 84, 289 N.W.2d at 30 (Moore, J., dissenting). Justice Moore stated that the plaintiff could only recover on a negligence or a warranty theory, both of which require proof that the defendant supplied the defective product. *Id.* at 85, 289 N.W.2d at 30 (Moore, J., dissenting). A shift in the burden of proof, according to the dissent, was only relevant when liability had been established and only the question of the apportionment of damages remained. *Id.* at 87, 289 N.W.2d at 31 (Moore, J., dissenting).

What Justice Moore seems to have misunderstood is that the plaintiffs will have to prove a breach of defendant's duty before alternative liability will

## IV. THE THREE APPROACHES ANALYZED

The reasoning of the *Abel* court is well-supported by precedent.<sup>133</sup> By slightly extending Michigan law with the adoption of the alternative liability theory,<sup>134</sup> the *Abel* decision merely brings Michigan law into line with the law of many other jurisdictions.<sup>135</sup> In contrast, the *Ferrigno* court based its decision to expand the scope of the alternative liability theory upon the New Jersey Supreme Court's decision in *Anderson*.<sup>136</sup> In particular, the *Ferrigno* court relied upon the *Anderson* court's assumption that all of the defendants were before the court.<sup>137</sup> However, where the *Anderson* court made this assumption because of the particular factual situation of the case, one in which the existence of other defendants was merely speculative,<sup>138</sup> in DES cases it is more than likely that not all of the defendants can be joined.<sup>139</sup> Moreover, it is doubtful whether the *Anderson* court in-

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apply to shift the burden of proof on the causation issue. See text accompanying note 37 *supra*. Thus the "wrongful act" of the defendants will be established before alternative liability is applied. Justice Moore stated that a shift in the burden of proof can only occur after the liability of at least one defendant acting in concert has been proven. 94 Mich. App. at 89, 289 N.W.2d at 32 (Moore, J., dissenting). A shift in the burden of proof is relevant only to the alternative liability theory, and not to the concert theory. For a discussion of these theories, see notes 23-51 and accompanying text *supra*. In addition, one defendant can never act in concert, since there must be at least two defendants before there can be a common plan. See notes 23-31 and accompanying text *supra*.

Enterprise liability was rejected by the dissent as a ground for recovery. 94 Mich. App. at 92, 289 N.W.2d at 33 (Moore, J., dissenting). Justice Moore stated that at least one defendant must be found liable before others can be drawn in for, "if none is identified, why should we not conclude none are liable? . . . We cannot promiscuously make an entire industry liable without some liability being first established against someone." *Id.* at 90, 289 N.W.2d at 32 (Moore, J., dissenting). The point was also made that the lack of information as to identification was not the fault of the defendants but was due to the passage of time. *Id.* at 90, 289 N.W.2d at 33 (Moore, J., dissenting). Finally, Justice Moore expressed the opinion that collective liability would violate constitutional guarantees of due process and equal protection. *Id.* at 91-92, 289 N.W.2d at 33 (Moore, J., dissenting). This was based on the belief that enterprise liability would result in the taking of property to pay for harm caused by the conduct of another defendant or by one not a party to the suit, over whom the defendants had no control. *Id.*

133. For a discussion of the concert of action and alternative liability theories relied on in *Abel*, see notes 23-51 and accompanying text *supra*.

134. 94 Mich. App. at 76, 289 N.W.2d at 26-27.

135. See note 45 *supra*.

136. See notes 105-17 and accompanying text *supra*.

137. See notes 105 & 111 *supra*.

138. The *Anderson* court stated that "involvement by any person other than the defendants actually before the court below has never been asserted as anything other than pure and undisguised speculation." 67 N.J. at 305, 338 A.2d at 8.

139. *Sindell v. Abbott Laboratories*, 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144.

tended to allow a presumption of joinder of all defendants in any case where alternative liability is applied.<sup>140</sup>

Unlike the New Jersey court, which molded the *Anderson* rationale to fit the facts of a DES case, the California Supreme Court in *Sindell* clearly acknowledged that it was taking a novel step beyond the *Summers* holding by extending alternative liability to a situation where not all of the defendants were joined, and in using market-share data to apportion damages.<sup>141</sup> This step was justified by strong public policy considerations which support the recovery of an innocent plaintiff over the protection of allegedly negligent defendants.<sup>142</sup>

Although the alternative liability theory was the common device used by the *Sindell* court<sup>143</sup> as well as the *Abel*<sup>144</sup> and *Ferrigno*<sup>145</sup> courts to provide the plaintiff with a cause of action, the courts differed in their resolution of the problem caused by the inability to join all of the potential defendants. These contrasts among the courts can be seen, for example, in the language used by the *Abel* court indicating that it would require joinder of all of the potential defendants.<sup>146</sup> The *Sindell* and *Ferrigno* courts recognized that this was a virtual impossibility.<sup>147</sup> However, the *Sindell* court required that those manufacturers whose sales of DES accounted for a "substantial share" of the market be joined,<sup>148</sup> while the *Ferrigno* court imposed no floor on the number of manufacturers who must be joined.<sup>149</sup>

While the requirements regarding the joinder of defendants imposed by the *Sindell* and *Ferrigno* courts go far toward resolving the DES plaintiff's dilemma of being unable to identify the manufacturer of the drug ingested by her mother,<sup>150</sup> it is submitted that the *Ferrigno*

140. The *Anderson* court never stated that it would presume joinder of all defendants in alternative liability cases, and, to the contrary, took time to point out that the existence of other defendants was merely speculative. See note 138 and accompanying text *supra*.

141. 26 Cal. 3d at 611-12, 607 P.2d at 936-37, 163 Cal. Rptr. at 144-45

142. See note 91 *supra*.

143. 26 Cal. 3d at 611, 607 P.2d at 936, 163 Cal. Rptr. at 144.

144. 94 Mich. App. at 76, 289 N.W.2d at 26-27.

145. 175 N.J. Super. at 571, 420 A.2d at 1316.

146. 94 Mich. App. at 76, 289 N.W.2d at 26-27.

147. 26 Cal. 3d at 610, 607 P.2d at 936, 163 Cal. Rptr. at 144. This assumption was explicit in *Ferrigno's* discussion of the use of alternative liability in the absence of joinder of all defendants. See notes 107 & 111 and accompanying text *supra*.

148. See note 92 and accompanying text *supra*. This requirement was also imposed in *Erlich v. Abbott Laboratories*, No. 76-4331, Slip Op. at 18-19. (Ct. C.P., Phila. Cty., Pa., Feb. 2, 1981).

149. This issue was never raised in the *Ferrigno* decision.

150. Many problems remain for the DES plaintiff. First, because the cases came before the courts on procedural motions, the plaintiffs have not yet proven the allegations of negligence which are a prerequisite to shifting the burden of proof to the defendants. See notes 67-74 & 100 and accompanying text *supra*. Each individual plaintiff must also establish that DES

result is inferior to the result reached in *Sindell*. This is because the joinder of only a small number of manufacturers would destroy the underlying presumption of the alternative liability theory, *i.e.*, that with all manufacturers joined there is a high probability of causation collectively.<sup>151</sup> In the interests of fairness to the defendants and the preservation of traditional tort principles, the courts should encourage joinder of the maximum number of defendants.

Addressing the issue of the apportionment of damages among defendants, the *Abel* court stated only that the defendants would be required to apportion damages among themselves,<sup>152</sup> while the *Sindell* and *Ferrigno* courts stated that they would hold each defendant liable for damages in proportion to its market share.<sup>153</sup> However, an unresolved issue in both *Sindell* and *Ferrigno* is whether the damages awarded by the jury will be paid in full by the defendants joined, or whether only that proportion of the damages will be paid which corresponds to those defendants' percentage-share of the market. It is suggested that the latter result would better achieve the courts' policy of balancing the interests of plaintiffs and defendants and achieving a result which is fair to each.<sup>154</sup> This method of allocation would allow the *Sindell* court more flexibility in defining what constitutes a "substantial share" of the market, since the court would not have to be concerned that by setting too low a figure it would put an undue burden on the joined defendants. Moreover, this would protect the *Ferrigno* defendants against the imposition of an unfair burden which would result from the joinder of only a small number of manufacturers.

A question left unanswered in each of these three cases is whether a time-lag between the injury and its manifestation is necessary for the application of the doctrines developed by each court. It is submitted that the answer to this should be in the negative since, where the responsible manufacturer cannot be identified, the presence or absence of

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was the cause of her cancer. This will presumably be done on the basis of patterns shown by statistical data *supra* which may or may not be sufficient to prove cause-in-fact. See Comment, *supra* note 1, at 964-65 n.5. In *Sindell*, there is the additional problems of whether a sufficient number of DES manufacturers are amenable to suit in California to constitute a "substantial share" of the market. See note 92 and accompanying text *supra*. This will depend largely on how the court defines "substantial," and on whether the relevant market is the national market, the California market, or that of some smaller sub-region.

151. See Comment, *supra* note 1, at 986.

152. 94 Mich. App. at 76, 289 N.W.2d at 26.

153. See notes 93-95 & 122-23 and accompanying text *supra*.

154. This was the interpretation of *Sindell* and *Ferrigno* adopted by the Pennsylvania Court of Common Pleas in *Erllich v. Abbott Laboratories*, No. 76-4331, Slip Op. at 22 n.10. (Ct. C.P., Phila. Cty., Pa., Feb. 2, 1981). Finding the issue premature, the *Erllich* court did not decide whether to adopt a market-share approach for the apportionment of damages.



lapsed time in a case in no way changes the equities between the parties.<sup>155</sup>

#### V. CONCLUSION

Unlike the *Sindell* and *Ferrigno* courts, the *Abel* court did not break new ground;<sup>156</sup> and while the court in *Abel* did express concern for fairness to the plaintiffs, the decision provides little hope for future DES plaintiffs in light of the fact that the standards of proof set by the court are, it is submitted, simply too stringent for plaintiffs to meet.<sup>157</sup>

In contrast, the *Sindell* and *Ferrigno* decisions provide great hope for recovery by DES plaintiffs. Moreover, the same policy considerations which led the California and New Jersey courts to their respective holdings should also extend the opportunity for recovery to plaintiffs injured in other circumstances, such as by pollution or industrial waste, where particular tortfeasors are seemingly untraceable.<sup>158</sup> Finally, it is hoped that the *Sindell* and *Ferrigno* decisions will force manufacturers to show more concern for product safety, or, at the very least, provide drug manufacturers with an incentive to differentiate their products and, thus, eliminate the identification dilemma faced by DES plaintiffs.

*Linda Mogul Madway*

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155. Since *Sindell* and *Ferrigno* are derived from *Summers* and *Anderson* respectively, in neither of which was there a time-lag between the injury and its manifestation, there would be no point in adding additional requirements before application of the doctrines developed in the DES cases.

156. See note 133 and accompanying text *supra*.

157. This is based on the belief that the *Abel* court required joinder of all potential defendants, a requirement that is a virtual impossibility. See notes 131 & 146-47 and accompanying text *supra*.

158. See Comment, Industry-Wide Liability, 13 SUFFOLK L. REV. 980, 1001-02 (1979).